



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

CIVIL APPEAL NO. E117 OF 2021

IN THE MATTER OF PF (suing through father and next friend)

NKD.....APPELLANT/APPLICANT

VERSUS

WC.....RESPONDENT

(Being an appeal from the Judgement of Hon. B. K. Kiptoo SRM in Eldoret Children No.E028 of 2020)

RULING

INTRODUCTION

1. Before me for determination is the Applicant's Notice of Motion application dated 29th September 2021. The application primarily seeks an order for stay of execution of the judgment dated 22nd September, 2021 made in CMCC No. E028 of 2020.
2. The application is premised on the grounds on the face thereof and the Supporting Affidavit of NKD sworn on 29th September, 2021 in which he deposed that judgment in Eldoret Children Cause Number E028 OF 2020 was delivered on 22nd September, 2021 in favour of the Respondent. The Applicant being aggrieved and dissatisfied by the said judgment, lodged an appeal, being Eldoret Civil Appeal No. 117 of 2021.
3. The Applicant's Advocate on record has requested for certified copies of judgment and typed proceedings for purposes of preparing the record of appeal. According to the Applicant the appeal herein raises triable issues of law and facts with overwhelming chances of success.
4. The Applicant is apprehensive that the Respondent may execute the judgment any time thus rendering the appeal nugatory. The Applicant further contends that if stay of execution is not granted substantial loss will be occasioned to the minor herein.
5. The Applicant contends that it is in the best of the minor that the application be allowed pending the hearing and determination of the appeal as the minor is at the risk of being removed from the custody of the Applicant and be taken into the custody of the Respondent where she was defiled severally.
6. It the Applicant's contention that the minor is at risk of further harm as the perpetrator who committed the heinous act against her is at large and her security is not guaranteed while in the custody of the Respondent.

7. The Applicant prayed that this application be allowed as prayed as no prejudice will be occasioned upon the Respondent if the orders sought herein are granted.

8. The application was however opposed by the Respondent who vide her Replying Affidavit sworn on 18th October, 2021 averred that the Appellant in total disregard of the orders of court, escaped with the minor on 22nd September, 2021 immediately after the judgment was read.

9. The Respondent contends that the Applicant herein does not have the best interests of the minor as he has removed her from school even before she did her end term exam. The Respondent contends that the Applicant has been denying her access to the minor since 5th August, 2020 when he took the minor from her.

10. The Respondent denies the averments by the Applicant that the minor was ever defiled while in her custody. The Respondent contends that the minor is of tender age and therefore should be in her custody.

11. The Respondent urged this court to dismiss the application with costs.

DETERMINATION

12. I have carefully considered the application, the affidavits and the submissions filed as well as the authorities relied upon, and find that the only issue for determination is whether the Applicant has met the conditions for grant of stay of execution pending appeal.

13. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(1) and (2) of the Civil Procedure Rules which provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless –

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

14. Beyond the requirements of **Order 42**, this being a matter concerning children, the Court is enjoined by the Constitution of Kenya 2010 and of the Children Act, to consider the best interests of the Children. The Constitution of Kenya 2010 provides at **Article 53(2)** that:

“A child’s best interests are of paramount importance in every matter concerning the child.

The Children Act elaborates further at **Section 4(3)** that:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

15. On the issue of substantial loss, the Appellant/Applicant, asserted that this being a matter concerning a child, the guiding principle is the best interests of the child. He argued that the minor is at the risk of being removed from his custody and taken into the custody of the Respondent herein where she was defiled severally. He further argued that the minor is at risk of further harm as the perpetrator who committed the heinous act is still at large and her security is therefore not guaranteed while in the custody of the Respondent. On her part, the Respondent denied that the minor has been defiled while in her custody.

16. The case before Court involves the custody of a minor rather than a money decree. Reference to substantial loss must be quantified from the point of view of the affected child, who is subject of the subject of the orders being appealed against and is the one likely to suffer.

17. It is trite law that he who alleges must prove. The Applicant has relied on a copy of a medical report as evidence that the minor has been defiled severally while in the custody of her mother. I cannot substantiate the contents of the said report neither can I authenticate its origin without having its author cross-examined on the same. Allegations of defilement are very serious nature and should be strictly proven. From the foregoing the medical report annexed as Applicant's annexure "NKD-4" loses its evidentiary value.

18. On whether Application for stay was sought without considerable delay. The Order appealed against was delivered on 22nd September, 2021. Both the Memorandum of Appeal and the Application herein were filed on 29th September, 2021. I am therefore satisfied that the application has been made timeously and without unreasonable delay.

19. From the foregoing, I find that the Applicant has failed to demonstrate the substantial loss the minor will suffer if a stay order is not granted. The only thing this court adds is that the Respondent shall be personally held for any injury or harm the minor may suffer while under her custody, and the Respondent is directed to take care of the minor and avoid any harm attending the minor.

20. In the premise Notice of Motion application dated 29th September, 2021 is hereby dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY OF DECEMBER 2021

E. O. OGOLA

JUDGE



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