



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. E154 OF 2021

GKM.....APPLICANT

VERSUS

VAO (Suing as mother and next friend).....RESPONDENT

(Being an Appeal from the Judgment of Hon. R. K. Onkoba, Resident Magistrate in

Chief Magistrate's Court, Eldoret Children No.22 of 2021 delivered on 9/11/2021)

RULING

1. By the Notice of Motion application dated 22nd November 2021 and filed herein on 26th November 2021.the Appellant/Applicant seeks to secure the following orders: -

a) That this matter be certified as urgent and heard ex parte in the first instance.

b) That this honourable court be pleased to order stay of execution of the judgement and decree rendered on the 9th day of November 2021 at Eldoret by Honourable Resident Magistrate R.K Onkoba pending the hearing inter partes of this application.

c) That this honourable court be pleased to order stay of execution of the judgement and decree rendered on the 9th day of November 2021 at Eldoret by Honourable Resident Magistrate R.K Onkoba pending the hearing and determination of the appeal.

d) That costs of this application be provided for.

2. The application is premised on the grounds set out therein and is supported by affidavit of Jeremiah Terresiah Collins Aludah sworn on 22nd November 2021 and a further supporting affidavit of the appellant filed on 14th December 2021.

3. The applicant's case is that he is yet to file the record of appeal in the High Court in view of the delay on the part of the registry in availing the certified copies of the judgement and proceedings. The respondent managed to take steps for purposes of executing the impugned judgment and decree and has commenced the process of execution; that the applicant was never served with the hearing notice.

4. The applicant avers that he is financially constrained with family responsibilities and provides for his mother who is 72 years old. He also takes care of his brother who is mentally challenged and his family. He will continue taking care of the minor making sure all his needs are taken care of. He proposes to provide kshs. 10,000/- per month and kshs. 62,000/- school fees together with all related expenses or requirements. He cannot afford to pay the respondent kshs. 50,000/- per month.

5. The applicant states that he has an arguable appeal and the respondent will not suffer any prejudice should the court grant the orders sought. The applicant on the other hand will suffer irreparable loss and damage if stay orders are not issued in view of the attachment of his salary and being committed to civil jail for failure to obey court orders. He is ready to abide by any such reasonable conditions as may be directed by the court.

Response

6. The application is opposed by the respondent vide a replying affidavit dated and filed on 3rd December 2021 and a supplementary affidavit dated 17th December 2021 and filed on 20th December 2021.

7. It is the respondent's case that she is unemployed and currently struggling to cater for the minor. Further, that the applicant deliberately omitted to attach his payslip and he is an expatriate employee with colossal benefits in monetary value. He used to provide for the minor and herself to the tune of kshs. 200,000/- per month. The applicant deliberately stopped providing for the minor after their relationship went sour and the kshs. 10,000/- he proposes is too little and cannot cater for the minor's needs. The respondent states that the applicant has not demonstrated sufficient cause to warrant the grant of stay of execution. She cited **Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Nbi. Civil Appeal No. 291 of 1997** and **The Hon. Attorney General vs The Law Society of Kenya & Another, Civil Appeal Application No. 133 of 2011** in support of her submissions.

8. The respondent submitted that the interest of the child is of paramount importance, and that suspension of the maintenance order is not in the best interests of the child. She cited **RWW vs EKW Civil Appeal No. 13 of 2013 (2019) eKLR**.

Submissions

9. Parties filed submissions which I have considered. The issue I raise for determination is whether the Applicant has satisfied the requirements set out in **Order 42 Rule 6** of the **Civil Procedure Rules**.

10. It is trite law that for application seeking stay pending appeal the Applicant must meet the statutory requirements set out in Order 42 Rule 6 which are: -

(2) No order for stay of execution shall be made under sub rule (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.

11. With regard to substantial loss, the applicant has provided an affidavit of means annexed to the further supporting affidavit, where he has stated that he has been paying medical expenses for the minor and that he is married with two children for whom he is the sole provider. He has also attached evidence of his provision for the school fees and extracurricular activities for the minor. Considering that he is the sole provider for his wife and children and that he is providing for his mother and his brother's family, I find that there will be substantial loss suffered by the applicant should execution issue. Further, we must consider that the loss will be to his other dependants as well.

12. The decision he seeks to appeal was delivered on 9th November 2021 and the application filed on 26th November 2021. Therefore, the application was filed without unreasonable delay.

13. The applicant has proposed that he continues to pay the minor's fees and provide kshs. 10,000/- towards maintenance of the child. He will also cater for school related expenses. However kshs.10,000/- is on the lower side while this court has not been satisfied that the applicant should pay kshs.50,000/- per month for the maintenance of the minor, kshs.10,000/- is little in the circumstance. I therefore assess the need at kshs.20,000/- per month pending the hearing and determination of the appeal. In addition the applicant shall fully pay school fees and all related expenses. I find that this is sufficient security for the appeal. Further, the respondent has not shown any proof that the applicant used to provide kshs. 200,000/ for her and the minor.

14. A discretion to grant or refuse stay must also take into account the competing rights of the parties as well as the circumstances of the case. The fundamental principle on the welfare and best interest of the child provided for under Article 53 of the Constitution and Section 4 of the children Act ought to naturally underscore the subject matter of the proceedings.

15. I hereby grant orders for stay of execution pending appeal on conditions that the applicant continues to pay school fees for the minor and cater for school related expenses. He shall also pay kshs. 20,000/- per month towards the maintenance of the minor.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 15TH OF MARCH 2022.

E. K. OGOLA

JUDGE



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