THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA-MAKINDYE
(FAMILY DIVISION)
MISC. APPLICATION NO. 524 of 2019
(Arising from Civil Appeal No. 10 of 2019)

STEVE SAHABO …….……. APPLICANT

VERSUS

LARISSA KANEZA ……...……...……. RESPONDENT

RULING

BEFORE: HON. LADY JUSTICE KETRAH KITARIISIBWA KATUNGUKA

Introduction

[1] This Application is brought by Steve Sahabo under **Section 33 of the Judicature Act Cap 13, Section 98 of the Civil Procedure Act and Order 52 rules 1 and 3 of the Civil Procedure**, by way of Notice of Motion, seeking orders for; a stay of execution of the orders in Civil Appeal No. 10 of 2019 pending the hearing and disposal of the appeal against the decision of the High Court in Civil Appeal No. 10 of 2019; costs of the application be provided for.

[2] The grounds for this application are set out in the affidavit of the Applicant, Steve Sahabo, and are briefly that; the applicant will suffer substantial loss if the application is not granted; the applicant is willing to furnish security for due performance of the decree as may ultimately be binding upon it; the applicant has made this application without unreasonable delay; the applicant has high chances of success on appeal; it is just, fair and equitable that the application is granted.

[3] The respondent disputed the above grounds in her affidavit in reply and averred that the applicant has not complied with the court orders in CA NO. 10 of 2019; that the applicant has not appealed against the court orders in CA No. 10 of 2019; that the applicant will not suffer substantial loss because court granted shared custody of the child to both parents.

Representation

The Applicant is represented by Counsel Sseninde Saad of M/S Oketcha Baranyanga & Co. Advocates; while the Respondent is represented by M/S Ligomarc Advocates.

Both counsel filed written submissions.

The case

[4] The gist of the application is that the applicant and respondent got married in June 2011 and have one child aged 7years, Stella Sahabo; that the parties developed misunderstandings and separated; that after the separation the applicant obtained a court order from the Magistrate's Court wherein he and the respondent were granted joint custody with the child staying with him during school term and in first term holiday and then spending two school holidays with the respondent; that the respondent appealed the decision to the High Court; that the High Court granted joint custody to both parties but altered the duration of physical custody of the child with the child spending school time and half of the school holidays with the respondent and the applicant spending half of the school holidays with the child; that the applicant will suffer substantial loss when the High Court order is implemented as he will be deprived of time to bond with his daughter; that it is in the best interests of the child that the application is granted.

[5] The issue for determination now is *whether the applicant satisfies the necessary grounds for grant of stay of execution*.

Position of the Law.

[6] Section 98 of the CPA gives the High Court inherent powers to take decisions which are pertinent to the ends of justice; and an order for stay of execution is such one (see the case of **Singh v Runda Coffee Estates Ltd [1966] EA).**

[7] An applicant seeking stay of execution must meet the conditions set out in O. 43 r.4 (3) of the Civil Procedure Rules and those espoused in the case of ***Lawrence***

Musiitwa Kyazze Vs Eunice Businge, Supreme Court Civil Application No 18 of 1990, but more pronounced in the Supreme Court Case of ***Hon Theodore Ssekikubo and Ors Vs The Attorney General and Ors Constitutional Application No 03 of 2014***. They include: The applicant must show that he lodged a notice of appeal; That substantial loss may result to the applicant unless the stay of execution is granted; That the application has been made without unreasonable delay; That the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.

It is now a settled principle of the law that when considering issues to deal with children, their welfare is paramount; (see **Article 34 of the Constitution of the Republic of Uganda, Section 3(1) of the Children Act and the First schedule to the Children Act, Article 3(1) of the United Nations Convention on the Rights of the child** (which Uganda ratified in 1990); **Article 4(1) of the African Charter on the Rights and the Welfare of the Child** (which Uganda ratified in 1992). The above principle has been fortified by courts (see the case of **Mark Siduda Trevor (an infant) Family Cause No. 213 of 2014, the case of Deborah Joyce Alitubeera Civil Appeal No. 70 of 2011 and In Re M an infant SCCA No. 22/2004**).

I shall therefore go ahead to consider if each of the requirements in O.43 r 3 have been complied with while keeping in mind the welfare of the child.

Whether the applicant has lodged a notice of appeal.

[8] The applicant's affidavit makes no mention of his intention to appeal Civil Appeal No. 10 of 2019 and there was no notice of appeal attached thereto to prove his case. Counsel for the applicant in his submissions in rejoinder, while submitting at the bar, stated that a notice of appeal was filed on court record on 8/10/2019. He alluded to a copy of the said notice as being attached to his submissions but none was found attached. I have searched the court record and found no such notice of

appeal. I agree with counsel for the respondent that there is no evidence that the applicant has or intends to appeal against the decision in CA No. 10/2019.

This ground has not been satisfied.

Whether the applicant will suffer substantial loss.

[9] In **Tropical Commodities Supplies Ltd & 2 others v International Credit Bank Ltd (In Liquidation) [2004] 2 EA 331,** Ogoola J held that the phrase substantial loss *doesn't represent any particular amount or size, it cannot be qualified by any particular mathematical formula. It refers to any loss great or small: of real worth or value as distinguished from a loss that is merely nominal.*

[10] Counsel for the applicant submitted that the applicant's time with the child reduced. The applicant stated that the duration of a month and 2 weeks is unfair to him and not in the child's best interests and that he has, by the court order, been deprived of time to bond with his child without any justification.

[11] Counsel for the respondent submitted that there will be no substantial loss on the part of the applicant since the court granted shared custody with visitation rights when the child is in custody of the other parent; that the applicant has made it difficult to try the custody arrangement without even demonstrating what loss he will suffer if the child spends time with her mother.

[12] In a correspondence from counsel of the applicant on court record, dated 21st October 2019, referenced OBM/SS/58/19, counsel in response to a request to prevail over his client so as to have him comply with the court order, replied and I quote;

"In case your client is not accessing their daughter, execution proceedings for the said court decision should commence at the High Court Execution and Bailiff Division."

In the correspondence above mentioned from counsel for the applicant, he stated that the child had not been in school due to illness but has since resumed school. The respondent attached a school letter dated 30/10/2019 wherein the school informed her that the child had not been in school since 7th October. It is clear that even by 21st October the child was not in school. Court delivered its judgment in the presence of both parties and their counsel on 4/10/2019.

The applicant has made no attempt to follow the court order. The respondent has clearly failed to access the child and all the while the child has been in the applicant's custody to the exclusion of the mother. This in itself is contrary to court's orders in CA 10/2019 or even in Application No. 40 of 2017 (Kira Chief Magistrate Court) which counsel for the applicant may seek to rely on as still in force since execution of CA 10/2019 was not commenced.

[13] The applicant and his counsel were aware of the existence of the court's orders on 4/10/2019 when judgment was delivered. Court record shows that counsel for the respondent extracted a court order for CA 10/2019 on 14/10/2019. In the case of **Hadkinson v Hadkinson [1952] All ER,** Romer L.J relied on the case of **Church v Cremer (1 Coop Temp Cott 342)** where it was held that "A party who knows of an order whether null or valid, regular or irregular, cannot be permitted to disobey it . . . as long as it existed". Additionally, in the case of **Hon. Sitenda Sebalu v Secretary General of the East African Community Ref No. 8/2012,** a judgment of the court if undischarged must be obeyed.

[14] The response of counsel for the applicant that execution proceedings should commence in order for the respondent to access her daughter are a clear sign of intention not to comply with court orders and which in my view contravene the welfare principle and therefore is not in the best interests of the child.

[15] As an officer of court, counsel is required to uphold the decisions of court and not respond to them impetuously. Counsel for the applicant and the applicant are required to obey court orders, whether or not they are in agreement with the court orders and follow the due process to have them set aside if they are dissatisfied with them. I find that their actions have instead caused the respondent substantial loss by her failure to access the child as per court orders.

The applicant has not demonstrated the substantial loss likely to be suffered. This ground accordingly fails.

Whether the application has been made without unreasonable delay.

[14] In **Sewankambo Dickson, supra** (also cited by applicants' counsel) court relied on *Ujagar Singh v Runda Coffee Estates Ltd [1966] EA 263* where Sir Clement De Lestang, Ag. V.P stated '. . . *It is only fair that an intended appellant who has filed a notice of appeal should be able to apply for a stay of execution . . . as soon as possible and not have to wait until he has lodged his appeal to do so. Owing to the long delay in obtaining the proceedings of the High Court it may be many months before he could lodge his appeal. In the meantime, the execution of the decision of the court below could cause him irreparable loss.'*

[15] The applicant in this matter has not filed any notice of appeal. The application was brought on 7/10/2019 and judgment in CA 10/2019 was delivered on 4/10/2019. The application was made without unreasonable delay but no notice of appeal was subsequently filed and yet all the while the applicant had no intention to obey the court orders that he was aware of. According to the evidence shown, the child at the heart of this application was removed from the school on 7/10/2019 when this matter was also filed. I find that all these incidences are not coincidental but designed to frustrate the respondent's efforts to enjoy the fruits of judgment.

[16] The requirement under O.43 is for the application for stay to be made within reasonable time and therefore to have at least lodged a notice of appeal. I have already found that no notice of appeal was filed in support of this application and there is no proof of any pending appeal.

The applicant has indeed brought the application for stay without inordinate delay but the application does not meet the crucial requirement for a pending appeal to warrant a stay of execution especially since an appeal does not operate as a stay. Court orders have to be obeyed and under order 43 can only be stayed where there is a pending appeal.

In light of the above, this ground has not been satisfied.

Whether there is a likelihood of success in the applicant's pending appeal.

[18] Likelihood or probability of success was found in **GAPCO Uganda Ltd v Kaweesa & Anor (MA No. 259 of 2013) [2013] UGHCLD 47** to be that 'the Court must be satisfied that the claim is not frivolous or vexatious and that there is a serious question to be tried. ***(See American Cyanamid versus Ethicon [1975] ALL ER 504).***

[19] In the applicant's affidavit he states that the decision of the court that varied the period of time for sharing custody was done without any given reason from court and that the court did not consider the opinion of the child before altering the duration of custody and this was done without considering whether the applicant was unfit as a parent.

[20] Counsel for the respondent submitted that since no evidence was given of a pending appeal, then there is no likelihood of success that can be shown on the part of the applicant.

I agree with counsel for the respondent. There is no notice of appeal on the court record as alleged by counsel for the applicant. If there is no appeal lodged, then there is no likelihood of success of the appeal that can be claimed.

This ground has therefore not been satisfied.

Whether security has been given by the applicant for the due performance of the decree

[21] The affidavit of the applicant states that he is willing to furnish security for due performance of the decree.

[22] Security must be given for the due performance of the decree. Courts have however held that each case must be looked at according to its merits. The requirement for payment of security for costs is to ensure that a losing party does not intentionally delay execution while hiding under unnecessary applications.

The applicant in this case has already failed to obey the court orders in CA 10/2019 and therefore cannot convince court that he is willing to perform the decree and furnish security to that effect.

[24] I would find in this instance that even though the applicant alleges to a readiness to satisfy this requirement, he has already failed to obey court orders which behaviour cannot be condoned. This requirement is not satisfied.

On the above premises, both parents are entitled to being with their children, and children are not chattels that can safely be moved from one place to another in a 'ping pong' way. Their emotional and psychological concerns cannot be sacrificed at the altar of the parents' rights and differences. (*See the case of* ***Rwabuhemba Tim Musinguzi vs. Harriet Kamakune (Civil Application No. 142 of 2009) [2009] UGCA 34).***

The applicant's conduct cannot be entertained and the respondent shall be granted access to her child which is also in the best interests of the child. By staying execution, moreover with no proof of a pending appeal, the applicant's contempt is being condoned, which this court shall not permit.

I agree with counsel for the respondent that the applicant has not come to court with clean hands. He has shown no willingness to comply with court orders and then seeks a stay of execution with no proof of a pending appeal or even any intentions to appeal CA 10/2019. This is detrimental to the child's best interests and the application cannot therefore be granted.

[25] In summary the application fails and is dismissed with costs.

Dated this 11th Day of March 2020.

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KETRAH KITARIISIBWA KATUNGUKA

JUDGE