



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 67 OF 2020 (E013/2020)

LNN.....APPELLANT/APPLICANT

VERSUS

MOO (Minor suing through his father and

the next friend of OI.....RESPONDENT

RULING

1. On the 27th August 2021 the appellant/applicant filed an application dated the 26th August 2021 seeking the following orders;

- i. That the court be pleased to stay execution of the Ruling and order of the Subordinate court given on the 13th October 2020 in Kisii CM Child Case No. 18 of 2020 between the parties pending hearing and determination of the application.
- ii. That the court be pleased to set aside the orders made on the 18th day of May 2020 dismissing the appellant's appeal and to reinstate the appeal for hearing and determination on merit
- iii. That the court be pleased to grant any other it deem fit and just to grant for the benefit of the minor child
- iv. That costs of the application be provided for.

2. The application is based on the supporting affidavit of LNN and the grounds on the face of the Motion. The application was opposed. The respondent filed a replying affidavit dated the 4th October 2021.

3. The appellant/ applicant depones that the court granted a stay of the proceedings in the Magistrate's court pending the hearing and determination of the appeal on the 7th April 2021. That on the 7th April 2021 the court made further orders that a supplementary record of appeal be filed to include the typed proceedings and ruling of the court. That the said typed proceedings and certified copies of the ruling have not been supplied to her and so they were unable to file the supplementary record of appeal. A request of the same was made vide their letter dated the 15th October 2020. That when the matter came up for mention to confirm filing of the supplementary record of appeal on the 18th May 2021 the appeal was dismissed for non-compliance with the court order and non-attendance of his advocates on record. That the failure of her advocate to attend court was not deliberate but due to inadvertent omission and/ or mistake as they failed to diarise the relevant page of the diary.

4. The respondent avers that the application is frivolous and vexatious. That the applicant's application seeking to have a say is res judicata as it was previously determined. That the applicant has not been interested in pursuing the appeal. That the applicant was given time to file the supplementary record of appeal and on the 18th May 2021 the court dismissed the appeal for failure to prosecute the said appeal. That the matter proceeded before the lower after the dismissal of the appeal in the month of July 2021 and it's only when he sought to enforce the lower court's orders that the appellant/applicant moved this court with the current application. That she is not entitled to the orders sought and her application should be dismissed.

5. Counsels canvassed the application by way of oral submissions. Both reiterated what is deponed by their clients in their affidavits in this matter. Mr. Bosire in addition to restating what is deponed by his client, urged this court not to punish his clients for acts committed by her counsel as the appellant had no knowledge of the mistake. That the court should look at the interest of the child and in the interest of justice not visit the sins of counsel upon the litigant. Mr. Kaba in addition to relying on the respondent's affidavit maintained that the appellant's counsel was aware of the matter and the application for a stay of execution is res judicata. In response Mr, Bosire stated that the issue of stay is pending determination.

ANAYLSIS AND DETERMINATION

6. I have considered the parties affidavits the oral submissions and the court proceedings. The facts that led to the dismissal has been cleared stated. The applicant did not file the supplementary record of appeal as ordered by the court. Counsel has urged this court not to punish his client for the sins of his counsel. Counsel has owned up to his mistake and has attached a copy of his diary page for the 18th May 2021 which is blank. He has also attached a letter seeking to be furnished with the typed proceedings and certified copies of the ruling for purposes of appeal. The letter is dated the 15th October 2020.

7. I do agree that a party should not be punished for the sins of his or her counsel, if the sin is an omission by the counsel and a reasonable explanation is given. A perusal of the proceedings attached shows that the appeal revolves around a minor. In my view to maintain the order of dismissal will not help the parties. It's important that the appeal be heard to determine the issues between the parties which concern the minor. The application was filed without delay. In the interest of justice I will not punish the appellant for an omission done by her counsel. I therefore reinstate the appeal for hearing and determination. The supplementary record of appeal shall be filed within 7 days from the date of this ruling.

8. On the issue of stay, though counsel for the respondent argues that the same is res judicata and that the same was determined by a consent. My understanding is that when the appeal was dismissed the orders pending in the matter were extinguished. The stay order could no longer stand with the dismissal of the appeal. It was therefore in order to seek a stay of execution order as it was likely that the respondent would move to execute the lower court orders. Parties had recorded a consent on the same. The respondent has not stated the prejudice he will face if the stay order is granted. It is therefore my view that an order of stay is merited. I therefore grant a stay of execution of the Ruling and order of the subordinate court granted on the 13th of October 2020 in Kisii CM Child Case No. 18 of 2020 pending the hearing and determination of the appeal.

9. Final orders, a stay of execution is granted pending the hearing and determination of the appeal. The appellant/ applicant to file her supplementary record of appeal with 7 days. The matter will be mentioned on the **11th November 2021** for directions on the hearing of the appeal. Costs shall abide the appeal.

DATED, SIGNED AND DELIVERED AT KISII ON THE 2ND DAY OF NOVEMBER 2021

R. E. OUGO

JUDGE

In the presence of:

Mr. Bosire For the Applicant

Mr. Kaba For the Respondent

Ms Rael C/A