

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

AT ARUSHA

MISC. CIVIL APPLICATION 111 OF 2021

(Original, Misc Civil Application No. 41 of 2020 at the Juvenile Court of Arusha and Misc. Civil application No. 20 of 2021 of the High Court of Tanzania, Arusha)

BEATRICE BALTAZARY PREMSINGH.....APPLICANT

VERSUS

PETER GABRIEL MSOFFE.....RESPONDENT

RULING

Date of last order: 14-2-2022

Date of ruling: 28-2-2022

B.K. PHILLIP, J

The applicant herein filed this application under the provisions of section 68 (e) and Order XXI Rule 24 (1) (27) of the Civil Procedure Code Cap. 33 , R. E 2019, praying for the following orders ;

- i) That this Honorable Court be pleased to stay the execution of the Ruling and Drawn Order in Misc. Civil Application No. 41 of 2020 dated 24/11/2020 by Hon R. A. Ngoka – SRM pending determination of Misc. Civil Application No. 20 of 2021 pending

before Hon. M. G. Mzuna , J of the High Court of Tanzania,
Arusha

- ii) Any other orders this Court may deem fit and just to grant.

The application is supported by an affidavit sworn by Mr. Frank Kilian, the learned Advocate for the applicant. The application is contested. The respondent filed a counter affidavit in opposition to the application. The respondent is represented by Mr. Alute S. L. Mughwai, learned Advocate.

A brief background to this application is that in the year 2020 the respondent herein filed an application against the applicant at the Juvenile Court of Arusha at Arusha (Henceforth "the Juvenile Court"), praying to be granted an order for custody of his son, namely Peter Gabriel Msoffe, Junior, vide Misc. Civil Application No.41 of 2020. The application was heard inter-parties. Upon analysis of the submissions made by the learned Advocates and the report submitted in Court by the social welfare officer, the Court (Hon. R.A.Ngoka, SRM) granted to the respondent an order for the custody of the child and ordered further that the applicant has legal rights to visit the child during weekend and holidays, provided that prior notice is given to the respondent.

The aforesaid ruling of the Juvenile Court was delivered on 24th November 2020, in the presence of the applicant and the respondent's advocate. However, the aforesaid Court order was not complied with. Consequently, the respondent applied for enforcement of the same vide Misc. Civil Application No.6 of 2021, which was determined in favour of the respondent herein. The Court ordered that the child should be brought back to Arusha and handed over to the respondent in the presence of social welfare officer. Before the determination of the aforesaid Misc. Civil application No. 6 of 2021, the applicant had filed an application at the Juvenile Court for stay of execution of the Court Order made in Misc. Civil Application No.41 of 2020 which was dismissed for want of prosecution. Following the aforesaid ruling in Misc. Civil Application No. 6 of 2021, the applicant lodged the instant application.

This application was heard viva voce. Submitting for the application, Mr. Kilian prayed to adopt the contents of the affidavit in support of this application to form part of his submission. He went on submitting as follows; That the applicant prays to be granted an order for stay of execution because she is still exercising her right to appeal against the decision of the Juvenile Court (Hon R. A. Ngoka SRM). The applicant filed

application for extension of time to file an appeal against the aforesaid Ruling of the Juvenile Court vide Application No. 20/2021 pending before this Court. The said application No. 20/2021 has overwhelming chances of success since the applicant was not supplied with the copy of the impugned Ruling timely despite the fact that she applied to be supplied with the same. In the impugned decision there are serious issues which need to be determined by this Court. If this application will not be granted the applicant will suffer irreparable losses because her right to appeal will be in jeopardy and her application for extension time to lodge her appeal which is pending in this Court will be useless. The child, the subject of this application is staying with the applicant who has already paid the school fees for the child. If this application will be denied the applicant will not be able to recover the school fees so far paid. The respondent has nothing to suffer if this application will not be granted. Mr. Kilian cited the case of **Attilio Vs Mbowe (1969) HCD 284**, to bolster his arguments.

Moreover, Mr. Kilian submitted that the applicant attempted to apply at the Juvenile Court for an order for stay of execution of the Court order made in Misc Application No 41 of 2020, but the application was

dismissed on 20th of September 2021 for want of prosecution. He insisted that unless this Court intervenes the applicant will suffer irreparable losses.

In rebuttal, Mr. Alute submitted that paragraphs 9 to 14 of the affidavit in support of this application show clearly that the applicant filed a similar application to this one at the Juvenile Court which was dismissed for want of prosecution. Thereafter, she filed an application to set aside the dismissal order vide Misc Application No.53 of 2021 which still is pending at the Juvenile Court. What the applicant is doing is conducting parallel proceedings before different Courts in respect of substantially the same subject matter. That is an abuse of the Court process, contended, Mr. Mughwai. He went on submitting that the applicant was supposed to exhaust the available remedies at the lower before coming to this Court.

Furthermore, Mr. Mughwai submitted as follows; That the application that is pending in this Court before Hon, Mzuna, J is a mere application for extension of time to file an appeal against the decision of the Juvenile Court. An application for stay of execution is governed by the provisions of Order XXXIX Rule 5(3) of the Civil Procedure Code ("CPC"). The conditions stipulated in Order XXXIX Rule 5 (3) (b) and (c) of the CPC have not been complied with since this application has been made

belatedly and the applicant has not given any security for the due performance of the Court Order. This Court is obliged to consider the best interest of the child not the conveniences of the parties in this application. The Juvenile Court was satisfied that the respondent is the appropriate parent to be granted the custody of the child after giving audience to both the applicant and the respondent, and considered the report submitted by the social welfare officer as well as the best interest of the child.

In conclusion of his submission, Mr. Mughwai distinguished the case of **Attilio** (supra) on the ground that the same was in respect of an application for temporary injunction whereas the application in hand is about an application for stay of execution. He was emphatic that this application has no merits.

In rejoinder, Mr. Kilian, argued that Mr. Mughwai did not file any notice of preliminary objection to challenge the competency or tenability of this application. Thus, he cannot challenge the competency of this application at this stage.

With regard to the said Misc. Application No. 53 of 2021, Mr. Kilian contended the same has been rendered redundant because on 13th

December, 2021 the Juvenile Court issued an order for execution of the Court order made in Misc Application No.41 of 2020. The juvenile Court ignored the applicant's right to be heard, contended, Mr. Kilian. He urged this Court to be mindful of the principle of overriding objective and deal with the substantive issue not technicalities.

Moreover, Mr. Kilian submitted that in deciding who is in a better position to have the custody of the child as between the applicant and the respondent, this Court should not rely on the findings of the Juvenile Court since the same are the subject of the intended appeal.

With regard to the issue of security for costs, Mr. Kilian argued that the nature of the execution sought to be stayed is not something to do with monetary values. He argued that the applicant has been staying with the child since 2020 up to date, paying school fees and providing the child with all other necessities. The applicant has not received any complaint from the respondent.

In conclusion of his submission, Mr. Kilian argued that there is no any undue delay in filing this application. The applicant spent some time trying to secure the order for stay of execution at the Juvenile Court. The

Juvenile. Court's Ruling in which execution was allowed to proceed was delivered on 13th December 2021 and this application was filed on 20th December 2021. He insisted that there is no inordinate delay in filing this application.

Having carefully analyzed the submissions made by the learned advocates and perused the court's records, I wish to start by pointing out that this application is quite different from other applications for stay of execution which involves disputes over properties which have monetary values like immovable and movable properties such as house, motor vehicles, machines etc. This application involves a dispute over the custody of a child, a human being who is invaluable/ priceless. I am in agreement with Mr. Kilian that the criteria for granting an order for stay of execution which requires the applicant to deposit security for due performance of the Court order cannot be applicable under the circumstances of the instant case.

On the hand, I agree with Mr. Mughwai that the case **Atilio** (Supra), relied upon by Mr. Kilian is distinguishable from the facts of this application because the same was concern with an application for temporary injunction. In this case, there is a Court order which was issued

after the hearing of the case inter-parties and thereafter, the Court ordered the execution of its order. Thus, Mr. Kilian's arguments that if this application will not be granted the applicant will be more inconvenienced than the respondent and will suffer irreparable losses in terms of the school fees allegedly paid for the child, in my opinion are not tenable under the circumstance of this case since there is already a decision made in favour of the respondent. In addition, there is no any receipt attached to this application at least to substantiate the alleged loss of the school fees. As correctly submitted by Mr. Mughwai, the circumstances of this case requires this Court to consider the best interests of the child not the convenience of the parties in this case.

Upon perusing the Ruling of the Juvenile Court which the applicant claims that she intends to challenge, I noted that there was a report from a social welfare officer which was filed in court and relied upon by the Court in its decision. This being an application for stay of execution I had neither an opportunity to hear the parties or the social welfare officer nor an opportunity to peruse the report submitted in Court by the social welfare officer. As I have alluded earlier in this Ruling, since this matter involves a child, a human being who is invaluable, in my considered

opinion , it is risky for this Court to grant the order for stay of execution sought by the applicant as doing so might not be in the best interests of the child. With due respect to Mr. Kilian I do not agree with his views that this Court should not to rely on the findings made by the trial Court, just because the same are subject of the intended appeal. In the absence of any substantiated explanations /arguments that the order for stay of execution shall be in the best interest of the child, this Court have no option except to rely on the findings made by Juvenile Court which had a better opportunity to assess the circumstances of the case and the report filed in Court by the social welfare officer. The Juvenile Court issued the order for custody of the child while well informed about the child and the parties. In short, in my considered view it is prudent that this Court should not issue the order sought in this application.

In addition to the above and without prejudice to my observations herein above, It is a common ground that the applicant lodged her first application for stay of execution at the Juvenile Court which was dismissed for want of prosecution. Thereafter, she lodged an application to set aside the dismissal order. Before the applicant's application for setting aside the dismissal order in respect of her application for stay of execution was


heard, the Juvenile Court proceeded with the hearing of the application for enforcement of its orders in Misc Application No. 41 of 2020 and granted it. Thereafter, the applicant filed the instant application. From foregoing narrations, it is obvious that this application is a second application for stay of execution made by the applicant in respect of the same subject matter. I am inclined to agree with Mr. Mughwai that the applicant is making two parallel application in different Courts which is not correct. I have considered Mr. Kilian's argument that the application for setting aside the dismissal order in respect of the applicant's application for stay of execution which is pending at the Juvenile Court, has been rendered nugatory after the grant of the application for enforcement of the Court order. With due respect to him, in my opinion the applicant was supposed to challenge the decision of the Juvenile Court in Misc application No.6 of 2021, instead of filing afresh application for stay of execution as if none had been filed earlier. I am in agreement with Mr. Mughwai that filing another application for stay of execution after the first one had been unsuccessful in a manner I have explained herein above is abuse of the Court process.

It has to be noted that it is trite law that a party to a case is entitled to enjoy the fruits of his/her decree or Court order, unless there are sufficient reasons to stay the execution of the Court order in question. In this case there no appeal has been filed to challenge the decision of the Juvenile Court. What is pending before Hon, Mzuna J, is just an application for extension of time to file an appeal against the decision of the Juvenile Court ,which according to the affidavit in support of this application was filed after the applicant was served with the application for enforcement of the orders of the Juvenile Court (Misc Application No.6 of 2021). In my opinion the pendency of the said application before Hon, Mzuna J, cannot be a good reason to move this Court to grant the order sought in this application.

In the upshot this application is dismissed. Since this application involves matters pertaining to family issues, each party will bear his own costs.

Dated this 28th day of February 2022




B.K.PHILLIP
JUDGE.