

IN THE FAMILY AND JUVENILE COURT 'C' AT THE FORMER COMMERCIAL COURT BUILDING, ACCRA, HELD ON WEDNESDAY THE 31ST DAY OF JULY 2023 BEFORE HER HONOUR HALIMAH EL-ALAWA ABDUL-BAASIT SITTING AS AN ADDITIONAL MAGISTRATE WITH MADAM FELICIA COFIE AND MR. WISDOM ATIASE AS PANEL MEMBERS.

SUIT NO. A6/199/23

EUGENIA WONGKYEZENG
KUMASI, ASHANTI REGION

APPLICANT/RESPONDENT

VS.

NANA KWAME OFOSUHENE
SPINTEX, ACCRA

RESPONDENT/APPLICANT

RULING
MOTION ON NOTICE FOR STAY OF EXECUTION

Background:

This is an Application by Respondent/Applicant (hereinafter referred to as the 'Respondent') praying that the execution of the Ruling of this Court dated 4th January 2023 to be stayed pending the determination of the Appeal filed at the High Court. The Application has been brought on the grounds that the Respondent who is dissatisfied with the Ruling of this Court has filed a Notice of Appeal and the Appeal raises substantial arguable points of law for the Court's consideration and thus has a very bright chance of success. The court on the 4th of January 2023 and in the best interest of the child, awarded custody of the child in issue to the Applicant/Respondent (hereinafter referred to as Applicant). The Respondent in his Affidavit in Support of the Application for Stay of Execution deposed that the special circumstance of the Application is that the child is

affected by the Ruling of the Court as his education will be greatly distorted. The Applicant in her Affidavit in Opposition also deposed among others that the child in issue is already with her custody and has successfully gained admission to a school and has started doing well.

Arguments of Counsel

Arguing in support of the Application, Counsel for the Respondent submitted that the crux of our Respondent's Application is that a Ruling was delivered in January 2023 and aggrieved by that decision they have filed a Notice of Appeal. Counsel for the Respondent argued that the Notice of Appeal filed constitutes exceptional circumstances to tilt the discretion of the court into granting this instant Application for the Stay of Execution. He argued further that they are minded by the best interest of the child as well as the position that the child should be with the mother but the court did not avail its mind to other conditions such as the change of the environment of the child in issue. He relied on the cases of Brown vs Mallet 1975 1 GLR 81 as well as Ofori vs Ofori 1981 1GLR 745. Based on the above, Counsel prayed for an order staying the execution of this court's ruling of 4th January, 2023.

Counsel for the Applicant in opposing the Application also submitted that their Affidavit in Opposition is essentially is to the fact that the Appeal filed is most likely not to succeed. He argued that the child in issue is already with the mother and is doing extremely well. He argued further that the instant Motion appears to be on the Respondent's ego but it is the child's interest that is paramount. Counsel submitted further that Ruling is clear and unambiguous and concluded that the instant Motion has no point of law to be argued and same should be

dismissed with punitive cost. He therefore prayed that the application should be dismissed.

Analysis

It is trite that there are acceptable and established principles that apply and guide the courts in an Application for Stay of Execution. The learned Justice Kweku T. Ackaah-Boafo in the case of Indepth Network vs. Daniel Kofi Baku & Nine Others [High Court (General Jurisdiction Division), Accra] Suit No. GJ/826/2018; 4th February, 2019 listed the established principles as follows;

- a) What the position of the Appellant/Applicant would be if the Judgment was enforced and he succeeded on the Appeal. See Joseph vs. Jebeille [1963] 1 GLR 387, S.C.
- b) that if the court is satisfied upon any affidavit or facts proved of the conduct of the defeated party that he is bringing the appeal not bona fide to test the rightness of the judgment but for some collateral purpose the application for stay ought to be refused;
- c) that a court should not stay execution unless there are exceptional circumstances warranting a stay because it is well established that a successful litigant should not be deprived of the fruits of his victory;
- d) that where the court is satisfied that the appeal is frivolous because the grounds of appeal contain no merit and therefore there is no chance of its succeeding it ought to refuse an application for a stay;
- e) Whether the grant or refusal of the application will work greater hardship on either party. See Twumasi J in Nana Kwasi Agyeman VII and Others vs Nana Hima Dekyi XIII and Others [1982-83] GLR 453-463.

- f) Whether or not the Applicant would be returned to the status quo ante should the appeal succeed. See NDK Financial Services Ltd. V Yiadom Construction And Electrical Works Ltd (2007-2008) SCGLR 39.
- g) Whether or not a successful appeal would be rendered nugatory should the Application be refused and the effect of the ruling on the Applicant. See Charles Osei Bonsu v. Dorothy Aboagye & Anor (2015) 81 GMJ 25 and Djokoto & Amissah vs. BBC Industrial Co (Ghana) Ltd. & City Express Bus Services Ltd [2011] 2 SCGLR 825.

In as much as these principles must be applied to the instant Application, the overriding consideration of the instant court is the best interest of the child. The instant Court is a Family and Juvenile Court and its decisions are made pursuant to the provisions of the Children's Act, 1998 (Act 560) as well as the Juvenile Justice Act, 2003 (Act 653), among others. Decisions on children are made based on the **Welfare Principle** and this 'Welfare Principle' has been codified in section 2 of the Juvenile Justice Act 2003, (Act 653) and in Section 2 of the Children's Act 1998 (Act 560) which provides as follows;

'2. Welfare Principle

- 1. *The best interest of the child shall be paramount in any matter concerning a child.*
- 2. *The best interest of the child shall be the primary consideration by any Court, Person, Institution or other body in any matter concerned with a child.'*

It is trite that the Welfare Principle or what constitutes the best interest of the child has really not been defined. In fact neither the Constitution 1992 nor the Act 560 or Act 653 has defined the Welfare Principle or what constitutes the best interest of the child and various courts have defined and/or explained the Welfare Principle. In the case Josephine Sokroe of Tarkwa (Suing As

Administrator Of the Estate of the Late Hayford Wogbe vs. Anthony Kofi Assmah [2013]DLHC2485, the learned Justice Robin B. Batu stated as follows; *'I will surmise that what constitutes the best interest of the child would comprise of everything that inures to the welfare of the child including the unhindered enjoyment of all the rights guaranteed to a child under Article 28 of the constitution and particularly the enjoyment of the rights which Section 6 (2) of Act 560 imposes on parents as a duty to provide for the child –the right to Life, Dignity, Respect, Leisure, Liberty, Health, Education and Shelter.'* Similarly, in the case of R v Gyngall [1893] 2 QB 232 at 243, CA the Court of Appeal per Lord Esher MR stated that: *"The Court has to consider, therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, . . . and the happiness of the child."* Thus, based on the above, the Welfare Principle implies that the Court determines what would be best for the child despite both parents' good intentions and competing wishes.

In the instant case, the child in issue had indeed been with the Respondent since he was Two (2) years old and the evidence on record shows that his academic progression stalled over the years as he stays with the Respondent who is his biological father. The court in the best interest of the child awarded custody to the Applicant who is the biological mother. The Applicant has since gone into execution and the child has been with her since January 2023. The evidence show further that the child in issue has since relocated to Kumasi and has been enrolled in a new school where he is catching up with academic work and adapting to his new environment. Refusing this instant Application will mean that the child will continue with his education in Kumasi as the status quo will remain. Granting the Application implies that the child will have to be brought back to the Respondent in Accra for him to continue his education from where he

left off. The learned Judge, Edmund Davies L.J. in Re C. (A) (an Infant); C. v. C. [1970] 1 All E.R. 309 at p. 313, C.A. said that *'in all cases the paramount consideration is the welfare of the infant and the court must look at the whole background of the infant's life and at all the circumstances of the case.*

Conclusion

It is the respectful opinion of this court that allowing the instant application would amount to another sudden change in the social, psychological and academic environment of the child again. This to a large extent will definitely affect the child's academic progression, his emotions and his process of assimilation into his new environment where he is beginning to establish a pattern of life. Additionally, with the Welfare Principle in mind, the facts of this case as well as upon scrutinizing all the Affidavit evidence, the Panel opines that the Respondent has not established any exceptional circumstance(s) to warrant a stay of execution. In the light of the above discourse, this instant Application for Stay of Execution is dismissed. Cost of Ghc2, 000.00 awarded in favour of the Respondent/Applicant.

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H/H HALIMAH EL-ALAWA ABDUL-BAASIT.
PRESIDING JUDGE

I AGREE

I AGREE

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MADAM FELICIA COFFIE
PANEL MEMBER

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MR. WISDOM ATIASE
PANEL MEMBER