



DNW v In the matter of QN and LW (Minor) suing through their mother and next friend BAS) (Civil Appeal E081 of 2024) [2024] KEHC 11435 (KLR) (30 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11435 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E081 OF 2024**

**DK KEMEL, J
SEPTEMBER 30, 2024**

BETWEEN

DNW APPELLANT

AND

**IN THE MATTER OF QN AND LW (MINOR) SUING THROUGH THEIR
MOTHER AND NEXT FRIEND BAS) RESPONDENT**

RULING

1. Vide a an application dated 19th June 2024, the Appellant herein sought orders of stay of further proceedings as well as stay of execution of orders and ruling in Bungoma CMCC Children Case E006 of 2023 pending the hearing and determination of this instant appeal.
2. The application is supported by the grounds on the face of it and the supporting affidavit sworn on 19th June 2024 by the Appellant herein. He essentially narrates that he is the father of the children herein and that the matter Bungoma in CMCC Children Case E006 of 2023 was referred to mediation where an agreement was reached as per annexure marked DNW-1. That on 18th January 2024, the Respondent filed an application seeking notice to show cause and an order for committal to civil jail as per annexure marked DNW-2 and that he opposed the said application vide a replying affidavit sworn on 24th April 2024 as per annexure marked DNW-3. That the trial Court proceeded to issue a ruling allowing the entire application necessitating this instant appeal. According to him, his appeal raises triable/arguable grounds that are meritorious with high chances of success.
3. The Respondent opposed the application vide her replying Affidavit sworn on 1st August 2024, wherein she contends that the application is frivolous and vexatious and is simply meant to frustrate her from executing the order of the Court delivered on 22nd May 2024 in CMCC Children’s Case No. E006 of 2023 at Bungoma as per annexure marked BAS-1. According to her, the ruling was entered into after the Appellant decided to abandon his parental responsibilities and failed to conform to



the conditions as set out in the contested mediation agreement dated 31st July 2023, which was later adopted as the trial Court judgement. She referred to annexure marked BAS-2.

4. The Respondent contends that in default of the Appellant's compliance with the said terms in the mediation agreement, she approached the Court via an application seeking an order for the Appellant to show cause why he should not be committed to civil jail for disobeying Court orders.
5. The Respondent contends that this application by the Appellant is brought forth with unclean hands and that he is undeserving of the orders sought. Further, this application is simply an afterthought as the same was only filed when the trial Court issued the notice to show cause why he should not be committed to civil jail.
6. The Respondents finally contends that the orders sought herein are not within the best interest of the minors who have greatly been prejudiced by the actions of the Appellant herein and should the stay of execution orders issue, the minors shall be greatly prejudiced.
7. Vide Court orders issued on 10th July 2024, the parties were directed to argue the application by way of written submissions. Both parties failed to comply with the directions.
8. I have given due consideration to the Application and the reply made in opposition thereto. I find the only issue for determination is whether the Appellant has met the conditions for stay of proceedings and stay of execution pending determination of the appeal.
9. The conditions for stay pending appeal are set out under Order 42 Rule 6 of the Civil Procedure Rules. Although sub-rule 1 mentions both the stay of execution and stay of proceedings, the conditions given under Sub-rule 2 apply solely to stay of execution pending appeal and not stay of proceedings.
10. In *William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others* [2019] eKLR, a five judge bench of the High Court, after looking at our jurisprudential scan on the question of stay of proceedings, authoritatively laid out the principles our Courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. See: *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] eKLR; *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)*; *David Morton Silverstein v Atsango Chesoni* [2002] eKLR: They laid down the following six principles:
 - a. First, there must be an appeal pending before the higher Court;
 - b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
 - b. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
 - c. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
 - d. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and



- e. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.
11. In short, a stay of proceedings is a radical remedy which is only granted in very exceptional circumstances. In the words of Ringera J. in *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)*:
- “As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”
12. As a general matter, an appellate court will only exercise its discretion to grant a stay of proceedings pending an appeal over an interlocutory matter before a magistrate’s Court or Tribunal only in exceptional circumstances. Hence, the propriety of granting a stay of proceedings pending an appeal over interlocutory matters is decided on the facts of each case and with “due regard to the salutary general rule that appeals are not entertained piecemeal.” (*Walhaus & Others v Additional Magistrate, Johannesburg & Another, 1959 (3) SA 113(A) at 120D; S. v Western Areas Ltd & Others 2005 (5) SA 214 (SCA) at 224D*).
13. In this instant application, i am not persuaded, however, that the appeal will be rendered nugatory by the mere fact that the trial may proceed to deliberate on any further proceedings. This Court remains alive to the fact that the orders which the Appellant has failed and or refused to comply with relate to maintenance of the children and that it would not be in the children’s best interest to grant an order of stay of further proceedings on this matter in the trial Court.
14. With regard to the issue of stay of execution pending appeal, the conditions an Applicant for stay of execution of decree or order needs to satisfy, as set out in Rule 6(2) of Order 42 aforementioned, are:
- a. that substantial loss may result to the applicant unless the order is made;
 - b. that the application has been made without unreasonable delay;
 - c. that such security as the Court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
15. The rationale for the conditions aforementioned was aptly given in *Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63*, thus:
- “The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court.”



16. The Court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

17. The mediation agreement dated 31st May 2023 was adopted in Court and that the same was never challenged on review or Appeal. The notice thus to show cause issued under the ruling delivered on 22nd May 2024 would constitute execution of the decree.

18. The Appellant has not demonstrated that substantial loss shall be occasioned should the stay orders not be granted.

19. The court notes that the mediation order had remained uncontested for over one (1) year from 31st July 2023. Accordingly, although, the application was filed without undue delay, i am far from convinced that substantial loss will be visited on the Appellant unless the orders sought are given.

20. This Court remains alive to the fact that the orders which the Appellant has failed and or refused to comply with relate to maintenance of children and that it would not be in the children’s best interest to grant a stay order pending an Appeal against the ruling of the trial court. It is further noted that the impugned ruling appealed against was a discretionary order and ruling made with very limited parameters on appeal.

21. In the result, i find no merit in the Appellant’s application dated 19th June 2024. The same is dismissed with no order as to costs. The Appellant is hereby ordered to set in the requisite motions with a view to fast tracking the disposal of the appeal. To this end, the Appellant is directed to file and serve the record of appeal within fourteen (14) days of the date of this ruling. Matter is fixed for mention on October 16, 2024 to confirm compliance and for further directions.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF SEPTEMBER 2024

D. KEMEI

JUDGE

In the presence of :

Shikhu for Wamalwa for Appellant/Applicant

Kizito Court Assistant

