



**DWS v DWM (Appeal E086 of 2023)  
[2024] KEHC 13557 (KLR) (Family) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13557 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY  
APPEAL E086 OF 2023**

**H NAMISI, J  
OCTOBER 31, 2024**

**BETWEEN**

**DWS ..... APPELLANT**

**AND**

**DWM ..... RESPONDENT**

**RULING**

1. Before the Court is a Notice of Motion dated 28 September 2024 seeking the following orders, inter alia:
  - i. That pending the hearing and determination of the Application there be stay of execution of the Ruling of Honourable Learned Magistrate C.C Oluoch issued on 1st day of September 2024 in Milimani MCCHCCC E713 of 2023;
  - ii. That there be a stay of execution in this matter pending hearing and determination of the appeal in the Court of Appeal;
  - iii. That status quo in respect of the minor be maintained;
  - iv. That costs of the application be provided for.
2. The Application is supported by the Affidavit sworn by the Applicant and premised on the grounds on the face of it. In response, the Respondent filed a Replying Affidavit sworn on 11 October 2024.
3. The brief background of the matter is that the Appellant/Applicant lodged an appeal against the Ruling of the Children’s Court dated 1st September 2023, in which the court granted interim custody of the minor to the Respondent. On 1st September 2023, the Appellant/Applicant filed an application



herein seeking stay of execution of the orders of the Children’s Court. The same was granted, pending the hearing and determination of the appeal.

4. The Appeal was canvassed by way of written submissions. On 19 September 2024, this court rendered its judgement, dismissing the appeal.
5. Parties opted to canvass this application by way of written submissions. Despite requesting time to file their submissions, the Applicant did not file submissions within the time allowed. The Respondent filed submissions on 22 October 2024. I have read the application, Replying Affidavit and the submissions by the Respondent.
6. The conditions for stay pending appeal are set out in Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 as follows:

“No order for stay of execution shall be made under sub-rule (1) unless–

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

7. In the case of *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
8. The Court of Appeal case in *Kenya Hotel Properties Ltd V Willesden Investments Ltd* (2007) eKLR held that where undue hardship is occasioned on the applicant then the balance of convenience is in his favor. When the court has to determine an application for stay of execution, it is bound to consider whether the said application meets the threshold and requirements for granting the order as stipulated under Order 42 rule 6. In this case the application was made timeously without unreasonable delay. The grounds to consider, therefore, are sufficient cause, substantial loss and overriding objective of the best interest of the child as argued by the applicant.
9. The Appellant/Applicant has failed to attached the Memorandum of Appeal. The onus is on the Applicant to establish existence of a sufficient cause. There is no Memorandum of Appeal to demonstrate this.
10. On the issue of substantial loss, the same was discussed in the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto, Bungoma High Court Misc Application No 42 of 2011*, where the Court held that:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.”

11. The substantial loss argued by the Appellant/Applicant is as regards the change in environment for the minor following the interim custody orders. This cannot be regarded as substantial loss or as a set



of circumstances that could render the appeal as nugatory. Therefore, no substantial loss/ hardship has been proved by the Appellant/Applicant.

12. On the issue of the overriding objective of the best interest of the child, the Appellant/Applicant have not proved how an order for custody of the minor with her biological mother negates the best interest of the minor. This ground is without merits.
13. I find that the threshold for stay pending appeal has not been established. The application is without merits and the same is hereby dismissed.

**DATED AND DELIVERED AT NAIROBI THIS 31 DAY OF OCTOBER 2024**

**HELENE R. NAMISI**

**JUDGE**

Delivered on virtual platform in the presence of:

Mabeya for the Appellant/Applicant

Kisigwa for the Respondent

