



REPUBLIC OF KENYA



DKK v JJK (Civil Appeal E006 of 2023) [2023] KEHC 1342 (KLR) (28 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1342 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E006 OF 2023
PM MULWA, J
FEBRUARY 28, 2023**

BETWEEN

DKK APPELLANT

AND

JJK RESPONDENT

RULING

1. The applicant's Notice of Motion dated January 7, 2023 is brought pursuant to Article 50 of the Constitution, Section 1A and 3A Civil Procedure Act and Order 51 Rules 1 and 15 of the Civil Procedure Rules, 2010. It seeks the following orders:
 - i). Spent
 - ii). That pending the hearing and determination of this application, the Honourable Court be please to grant a stay of the orders of December 19, 2022 and order of August 25, 2022 in Kikuyu Children's case no 17 of 2022.
 - iii). That pending the hearing and determination of the intended appeal, the Honourable Court be pleased to grant a stay of the orders of December 19, 2022 and order of August 25, 2022 in Kikuyu Children's Case No 17 of 2022.
 - iv). That the court grant such other orders as it deems fit
 - v). costs of this application be provided for
2. The application is premised on the grounds on the face of it and more particularly in the supporting affidavit of the Applicant. He has averred that he was unable to comply with the orders issued by the lower court as to the maintenance of the minors due to financial constraints.



3. The background of the case was that on August 25, 2022, the trial court ordered the Applicant to pay a monthly sum of Ksh 72,801 being his share of contribution together with school fees and related expenses. The said orders were reiterated by the trial court in its ruling of December 19, 2022.
4. Aggrieved, the applicant filed a Memorandum of Appeal contending that the learned trial Magistrate erred in both law and fact when she disregarded his response that the expenses awarded before her were exaggerated and also disregarded his demonstrated financial obligations.
5. Consequently, pending the hearing and determination of this application and the intended appeal and for fear that he may be cited for contempt of court orders, the Applicant prays that this court stay the lower court orders of December 19, 2022 and August 25, 2022 respectively.
6. Ms Cuna for the Applicant argued that the stay orders sought were necessitated by the fact that the applicant was condemned to pay an exorbitant amount for the maintenance of the child when he actually was also catering for school fees and related expenses. That the trial court ignored the fact that he had his personal obligations which included servicing a loan and paying for alternative accommodation due to the existing bad blood between him and the Respondent. She further submitted that the applicant had come to court with clean hands as he was duly paying the school fees and related expenses.
7. The application was opposed by the Respondent who contended that the same was vexatious, an afterthought, inaccurate, farfetched and premature. That the Applicant, despite acknowledging the lawful orders of the court, had refused to comply with the same.
8. Mr Mulama for the Respondent submitted to the court that the Applicant having been ordered to pay school fees and 50% of other upkeep expenses had resulted to choose which orders to comply with and which ones to disregard. That he had defaulted in payment since August 25, 2022 and did not deserve the orders he was seeking. The court was urged to dismiss the application dated January 7, 2023.

Analysis and Determination

9. I have considered the application, the averments in the filed affidavits as well as the oral presentations by both learned counsel for parties.
10. The main issue for determination is whether the applicant has demonstrated that he merits stay of the orders made on December 19, 2002 and on August 25, 2022.
11. Though this application was brought under Order 51 Rules 1 and 15, the principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides:

“No order for stay of execution shall be made under subrule (1) unless—

 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made
 - (b) the application has been made without unreasonable delay; and
 - (c) 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.”
12. Further to the above, stay may only be granted for sufficient cause and that the court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the court is no longer limited to the foregoing provisions. The courts



are now enjoined to give effect to the overriding objective in the exercise of its powers under the Civil Procedure Act or in the interpretation of any of its provisions.

13. The Applicant stated that he stood to suffer irreparable harm in the event he was to be cited for contempt whose ramifications would be adverse. That he is ready and willing to continue paying for school fees, school related expenses, medical expenses as well as servicing the loan for accommodation where the minors are currently staying.
14. The Respondent stated that the Applicant had refused and/or neglected to comply with clear orders and that nothing had stopped him from promptly and without delay filing the application for review of the trial court orders as soon as they were issued. And further that ninety (90) days were inordinately long a time given the needs of the minors.
15. The orders being sought to be stayed were granted on 25/8/2022 and December 19, 2022.
16. On August 25, 2022 the trial court gave orders, relevant to this application, as follows: -
 - a) ...
 - b) ...
 - c) That the defendant shall continue to pay school fees and other related expenses directly to the school pending the hearing and determination of the main suit.
 - d) That all other upkeep and maintenance expenses shall be on equal shared responsibility of both the Plaintiff and Defendant.
17. It is worthy to note that the court did not compute what constituted “all other upkeep and maintenance expenses”. This remained the situation until December 19, 2022 when further orders were made, relevant to the present application being: -
 - (a) That the Defendant shall pay a monthly sum of Kshs 72,801/= being his monthly share of contribution towards the maintenance of the children herein as ordered pending the hearing and determination of the main suit.
18. The orders herein above ensued from the Plaintiff’s application dated November 16, 2022 which the court allowed. I have had the chance to look at the said application and supporting affidavit. At ground No 8 thereof it is stated that:

“.....the current monthly upkeep of the minors is in the total sum of Kshs 72,801/= and the applicant’s request to the respondent to cater for half of the monthly upkeep has (sic) ordered by the court fell on deaf ears”.
19. The same averment is re-iterated in paragraph 8 of the supporting affidavit by the Plaintiff/Applicant and again under paragraph 13 thereof where the average expenses per month is indicated as Kshs 78,801.
20. It is not clear how the quoted amount eventually changed from Kshs 78,801 to Kshs 72,801. Be that as it may this court is alive to the fact that the main suit is still pending in the lower court and will be hesitant to make orders which are likely to determine that suit and especially where children are involved.
21. The learned trial Magistrate has appreciated that parental responsibility is a shared responsibility where both parents are living. The trial court will have the opportunity to determine the full extent of the



needs of the children and the extent to which each of the parties before it will be able to meet. The determination for shared parental responsibility is not meant to favor or punish either of the parties. It should be made only with the best interest of the children.

22. I have noted that the Applicant in the instant application went to great lengths to demonstrate his capabilities as to satisfying the orders of the court below. The imposed monthly sum of Kshs 72,801/= is equally sharable between the parents, thus 50% nets to Kshs 36,400/=.

23. Final Orders: -

The application dated January 7, 2023 does not succeed but the case in the lower court being one involving children, this court issues the following orders: -

1. Pending the hearing and determination of Kikuyu Children Case No 17 of 2022, the Applicant shall comply with the orders of August 25, 2022 and December 19, 2022 save that his share of monthly expenses shall be Kshs 36,400/=.
2. The monthly sum of Kshs 36,400/= is payable with effect from the order of December 19, 2022.
3. The Applicant is at liberty to proceed with the intended appeal.
4. Costs of this application will abide the outcome of the appeal.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28TH DAY OF FEBRUARY, 2023

.....

P.M. MULWA

JUDGE

In the presence of:

Kinyua – Court Assistant

Ms. Cuna for Appellant

Mr. Mulama for Respondent

