



REPUBLIC OF KENYA



**KENYA LAW**  
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**HMI v KBH (Family Appeal E010 of 2022)  
[2023] KEHC 1194 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1194 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY APPEAL E010 OF 2022  
JN ONYIEGO, J  
FEBRUARY 17, 2023**

**BETWEEN**

**HMI ..... APPELLANT**

**AND**

**KBH ..... RESPONDENT**

**RULING**

1. Through a plaint dated December 30, 2019, HMI moved to the Tononoka children’s court vide children case No 435 of 2022 seeking orders as follows;
  - a. A declaration that both the plaintiff and the defendant have equal parental responsibility for the issue herein namely KBH .
  - b. A maintenance order requiring the defendant to make periodic financial payments of Kshs 180,000 to the plaintiff in respect of the subsistence, maintenance and utility needs of the child herein.
  - c. The defendant do pay school fees in respect of his child.
  - d. The defendant do take a medical cover for the child.
  - e. An execution order do issue against the defendant
  - f. The defendant do meet the additional educational and medical needs of the child herein as and when the same may arise.
  - g. Actual/physical custody of the child to vest in the plaintiff.
  - h. Costs of the suit and interest therein at court rates.
  - i. Any other relief that this honourable court may deem fit.



2. Upon considering the evidence tendered before court and the defendant's submissions, the court delivered its judgment on February 2, 2022 thus directing that;
  - a. This court is not bound by the doctrine of *res judicata* thus not barred to determine the issues on custody on merit.
  - b. Legal custody of the child to be joint between the plaintiff and the defendant
  - c. The defendant to have physical/actual custody of the child while the plaintiff to have physical supervised access to the child on alternate weekends at Mtwapa police station the gender desk from 11.00 am to 3.00 pm. During this period the plaintiff is warned against causing any kind of drama and commotion in the presence of the child. The plaintiff to access the child peacefully as a mother without abusing and talking to the defendant in any manner.
  - d. The plaintiff is also allowed to continue with virtual access to the child on the days that she doesn't have physical access but is restrained from using abusive language to the defendant in the presence of the child while having the said access. The plaintiff to access the child in a peaceful manner and in the event that there is any damaging information being passed by the plaintiff to the child then the call to be disconnected.
  - e. The above access to go on for a period of one year from the date of this judgment and in the event that the plaintiff has been maintaining peace, order and decorum during these moments of access then either party can apply for review of access.
  - f. This court allows the defendant to provide for the child fully and the plaintiff be a liberty to chip in at any time
  - g. This court lacks jurisdiction to deal with the prayer by the defendant in respect of property named Mtwapa Title number Kilifi/Mtwapa/2895. The defendant to approach a court with proper jurisdiction to handle.
  - h. Prayers f,g,h and I of the defendant's counter claim are dismissed.
  - i. Neither the plaintiff nor the defendant is allowed to leave the jurisdiction of Kenya with the child without the consent of the other or order of the court until the child is 12 years old and able to understand better what is going on. Any party who wishes to leave the county with the child when he attains the age of twelve should also do so with the consent of the other party or by court's order
  - j. The defendant's passport deposited in court to be released to him.
  - k. This being a case brought on behalf of the child then costs to be borne by each party.
3. Dissatisfied with the judgment of the lower court, the appellant moved to this court vide a memorandum of appeal dated March 21, 2022 seeking to set aside the lower court decision with emphasis on the award of actual custody of the baby to her being a child of tender age. After canvassing the appeal, the court delivered its judgment on October 21, 2022 thus upholding the appeal and made the following orders;
  - a. The order of the trial court awarding Actual custody of the minor herein to the respondent be and is hereby substituted with the order that; actual custody of the minor herein be and is hereby awarded to the appellant with unlimited access to the respondent.



- b. That the respondent shall have the child during alternate weekends starting from 4.00pm on Friday and return the child on Sunday at 4.30 pm same weekend
- c. That the respondent shall pick and drop the child at a place to be agreed upon by parties as shall be convenient to them.
- d. The rest of the orders made by the lower court shall remain in force
- e. The respondent shall deliver the minor to the appellant on October 30, 2022 at 4.00pm at a place to be agreed by parties and thereafter to pick the baby the second Friday from that day.

Regarding costs each to bear his or her costs.

4. Immediately upon delivery of the judgment, the respondent/applicant sought leave to appeal and temporary stay of execution for 45 days to enable the child complete his December end of term exams. The court granted stay of execution as prayed and fixed the date for handing over the baby to the appellant/ respondent on December 5, 2022.
5. However, upon expiry of the said period, the respondent/ applicant did not hand over the baby to the mother/appellant as directed. Meanwhile, the respondent moved to this court vide an application dated December 1, 2022 seeking orders *inter alia*; stay of execution of this hon. court's orders made on October 21, 2022 pending the hearing and determination of the application and thereafter pending hearing and determination of the intended appeal and costs be provided for.
6. The application is anchored on the grounds set out on the face of it and averments contained in the affidavit in support sworn on December 1, 2022 by the applicant. Basically, the applicant averred that; the court relied on untrue allegations and misinformation that he was working in Iraq and Afghanistan as a ground to deny him actual custody of the minor herein; he was a holder of a Kenyan class K permit based on his retired status hence an ordinary citizen available for the minor while in Kenya; the minor is comfortable as he is being assisted by the maternal aunt one Fainace; the respondent is likely to take the child out of this court's jurisdiction as she has done before in total disregard of several court orders; there are exceptional circumstances to warrant the award of the minor to the father; It is not in the best interest of the child that actual custody be placed in the hands of the mother; if the orders sought are not granted, the child's studies will be disrupted mid-way and that the appeal will be rendered nugatory.
7. In response, the appellant/respondent, filed her replying affidavit on December 14, 2022, thus urging the court to dismiss the application on grounds that; the applicant did not challenge by way of evidence or submission during the appeal the allegation that the court was misinformed as to his place of work in the middle east hence cannot raise the issue at this stage; the applicant is on a tourist visit visa which expires after every three months hence the assertion by the applicant that he is a holder of class K permit is unsupported; being a visitor, the applicant does not have time for the minor and when out of the country the child is often left in the hands of strangers; the alleged minor's maternal aunt does not assist in looking after the child as she has not seen the baby since 2020; the applicant has cleverly been obtaining stay orders thus hiding the baby from her for the last one year; the applicant will not suffer any prejudice nor loss as a person if actual custody of the minor is passed to her and lastly, the appeal will not be rendered nugatory as the applicant will continue to enjoy unlimited access;
8. In his rejoinder, the applicant filed a supplementary affidavit sworn on December 22, 2022, giving a chronology of events since the case began before the lower court; He averred that; a tourist visa can be extended even for six months depending on the circumstances of each case; he has just finished building a house in Kenya where he intends to spend his retirement period; he is a holder of class k



- permit no138787; the applicant has full access to the child; the appellant if given custody, she will not allow him visit the child as she has sworn to kill and has previously attempted to kill him( applicant).
9. To further react to the supplementary affidavit, the respondent filed a further affidavit on January 25, 2023 without leave of the court a fact that was vehemently opposed by Mr Obonyo whose submission I do uphold and consequently order that the affidavit be expunged from the court record.
  10. When the matter came up for directions, parties agreed to dispose of the application by way of written submissions. Consequently, the applicant filed his submissions on February 1, 2023 through the firm of Obonyo legal advocates. Mr Obonyo literally restated the averments contained in the affidavit in support of the application. Basically, counsel submitted on the principles governing stay of execution and the relevant authorities thereof which I have taken into account *inter alia*; [James Wangalwa & another v Agnes Naliaka Cheseto](#)(2012) eKLR and [Nicholas Stephen Okaka & another v Alfred Waga Wesonga](#)(2022) eKLR.
  11. It was learned counsel's submission that; the applicant is likely to suffer substantial loss as the respondent is irresponsible hence cannot be trusted with the custody of the minor amid blatant disobedience of court orders. That the best interests of the minor will dictate that the minor's custody remains with the applicant. That the minor's welfare and more particularly his health is quite impressive whenever he is in the father's custody and vice versa.
  12. Regarding the aspect of filing the application within reasonable time, counsel opined that the same was timeously filed. Learned counsel went further to state that the appeal which has high chances of success is likely to be rendered nugatory if stay is not granted.
  13. On her part, the respondent filed her submissions in person on January 27, 2023 basically adopting the averments contained in her affidavit in reply to the application. Mr Were advocate who came in as appearing for the respondent during the hearing simply relied on the respondent's submissions thus contending that the applicant has come to court with dirty hands as he had ignored and refused to comply with this court's orders made on October 21, 2022.
  14. Counsel went on to submit that the application amounts to abuse of the court process hence should be dismissed. Mr Were asserted that the applicant ought to be cited for acting in contempt of the court order and should be ordered to surrender the child whom he has hidden from the mother for over one year now. That granting the order will be prejudicial and traumatizing to the respondent mentally as she has been kept away from her child thus denying her access.

### **Determination**

15. I have considered the application herein, response thereto and submissions by both parties. The only issue arising for determination is whether the applicant has met the threshold for stay of execution order.
16. Under order 42 rule 6 of the [Civil Procedure Rules](#), an applicant seeking stay orders is duty bound to prove the following elements; That he or she is likely to suffer substantial loss in the event a stay order is not granted; that the application has been filed within reasonable time; that security for due performance of the decree or order has been deposited or a proposal to do so has been made and or, whether after taking into consideration the circumstances of the case, there is any other sufficient cause to warrant the court to issue the order of stay.
17. It must however be borne in mind that to grant or not to grant a stay of execution order is a matter of discretion by the court seized of the matter. See [Butt v Rent Restrictions Tribunal](#) (1979) eKLR where the court held that the prayer to grant stay of execution is discretionary and should be exercised in



such away as not to prevent an appeal. In other words, the court must reasonably balance both the applicant's and respondent's interest and weigh on the merits and demerits in granting or not granting the order of stay.

18. However, it is settled law that proof of likelihood to suffer substantial loss is the cornerstone for granting stay of execution orders. In the case of *Kenya Shell Limited vs Benjamin Karuga Kabiru & another* (1986) eKLR Platt J had this to say:

“... it is usually a good rule to see if order XLI rule 4 of the Civil Procedure rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case unless an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without evidence it is difficult to see why the respondents should be kept out of their money.”

19. Similar position was held in the case of *Halai and another v Thornton and Turpin* (1963) Limited (1990) KLR 365 where the court expressed itself that:

“Thus, the Superior court's discretion is tethered by three conditions. firstly, the appellant must establish sufficient cause; secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay, and thirdly the applicant must furnish security”.

20. In the instant case, the applicant is seeking stay of execution on grounds that; the child is in school and therefore should not be interrupted; the respondent is not suitable to look after or take care of the baby; the respondent is likely to remove the child outside this court's jurisdiction; the appeal has high chances of success and that, if not allowed, it will be rendered nugatory.

21. There is no doubt that on October 21, 2022, this court delivered its judgment and made various orders. This application was filed on December 1, 2022 hence timeously filed. As to whether the applicant is likely to suffer any substantial loss, he did not state any specific loss he is likely to suffer as an individual save for the claim that the best interest of the child will not be served if custody of the minor is granted to the mother and that the child's studies will be disrupted.

22. When the court delivered its judgment on October 21, 2022, the applicant sought for a temporary stay of execution for 45 days to enable the child finish his December exams. Despite the spirited opposition from the respondent, the court graciously granted that prayer and directed the applicant to surrender the minor to the applicant by December 5, 2022. This order was not and has not been complied with to date. What substantial loss will the applicant suffer by complying with a lawful court order? I do not see any.

23. Concerning the best interests of the child, it is a constitutional and statutory obligation which is binding on all courts, institutions or bodies making decisions concerning the welfare of a child to uphold the same. In the circumstances of this case, I do not see strongly compelling reasons to suggest that a child of tender age will suffer prejudice by joining a mother. To ignore a court order that the child be handed over to the mother by December 5, 2022 after exams is not justifiable.

24. How could the applicant ignore the order until schools opened in January 2023 only to go back to the same excuse that the child's studies will be affected? Why did he wait until January? The court is alert of these simple tricks. In any event, the child will not be prejudiced by shifting school if necessary since schools have just opened. In my view, the excuse given for not handing over the minor is not tenable.



25. Regarding the likelihood of the appeal being rendered nugatory, the same is not true. If the appeal went through, the best the court of appeal will do in my view is to return the minor to the applicant as the actual custodian. Therefore, there is a remedy hence the outcome of the appeal will not be rendered useless nor nugatory as claimed.
26. As concerns the appeal having high chances of success, that is for the court of appeal to determine. I do not wish to delve into the merits of the appeal by re-evaluating evidence. As to whether there is any other sufficient ground to allow the application, I see none.
27. In a nut shell, I do agree with the respondent that the applicant has come to court with dirty hands and that he who seeks equity must approach the court with clean hands; See *JMR vs RNM* (2022) eKLR.
- “It is trite that he who comes to equity must come with clean hands. It is duplicitous of the Applicant to approach this court seeking to stay orders, which he has in any event disobeyed”
28. In view of the above holding, I am inclined to find that the application is not merited and the same is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17<sup>TH</sup> DAY OF FEBRUARY 2023.**

.....

**J N ONYIEGO**  
**JUDGE**

