



KM v IK (Suing as Mother and Next Friend of EM Minor) (Civil Appeal 150 of 2022) [2023] KEHC 2507 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2507 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 150 OF 2022
EM MURIITHI, J
MARCH 28, 2023**

BETWEEN

KM APPELLANT

AND

IK (SUING AS MOTHER AND NEXT FRIEND OF EM MINOR) RESPONDENT

RULING

1. Before this court is a Notice of Motion under certificate of urgency dated November 14, 2022 by the applicant/appellant, KM, brought under order 42 rule 6, order 51 rule 1 of the *Civil Procedure Rules* and Section 99 of the *Children Act, 2001* seeking stay of execution and variation of maintenance orders made in the judgment of Honorable R. Ongira, SRM in Tigania PM's Children Case No E013 of 2022 pending the hearing and determination of this application and ultimately the main appeal.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of KM, the applicant herein, sworn on even date. He avers he has appealed against part of the judgment of October 3, 2022, which appeal raises triable issues with high chances of success. He avers that he was ordered to pay Kshs 8,000 monthly in addition to other responsibilities, which amount is oppressive and is likely to affect his future, because his current net pay is less than Kshs 20,000. He avers that he has other people who depend on him especially his aging parents who are peasant farmers. He is ready to provide for and maintain his child within his financial capabilities, and he prays for his application to be allowed. He faults the trial court for failing to interrogate his net monthly pay, thus arriving at an unfair quantum of maintenance, and he undertakes to prosecute his appeal expeditiously because it touches on the welfare of his child.
3. On July 24, 2021, the court issued an order for the maintenance of the prevailing status quo and the response to the application to be filed.



4. The respondent has opposed the application vide her replying affidavit sworn on November 30, 2022. She avers she sued the applicant after he blatantly refused and ignored to take care of his biological child. She avers that the minor herein is entitled to parental care and to be provided with education, clothing, food, shelter among other things. After the judgment was delivered, the applicant was advanced a financial facility of Kshs 2.8 Million by Co-operative Bank. She accuses the applicant of being dishonest to the court when he says that he earns Kshs20,000 monthly. According to her, the applicant is a man of means, but he is not willing to comply with the judgment of the court. She has been solely providing for the minor which expenses have overwhelmed her. She urges the court to dismiss the application as the applicant will not be prejudiced.

Analysis and Determination

5. This court has considered the implication of granting stay as against the best interests of the minor herein, who is only 2 years at the time of the application and who needs provision in terms of education, medical care, clothing, shelter, food and so on. In this court's considered view, staying the lower court decision would be tantamount to denying the minor herein his aforementioned basic needs.
6. There are good reasons for withholding orders for the stay of execution of orders in children matters, based on the judicial acknowledgement that the welfare of the child is of paramount consideration and the daily needs for the livelihood and upkeep of the child cannot be stayed without detriment to the best interests of the child, which the court is enjoined to observe, promote and uphold under Article 53 of the *Constitution*.
7. The court respectfully note the decision in *ZM v EIM* [2013] eKLR (William Musyoka J.) that:-

“As a matter of principle, grant of stay of execution of maintenance orders in children's cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute. To my mind once a maintenance order is made where parentage is undisputed it should not be suspended pending appeal, where the appeal is on the quantum payable. The solution ideally lies in expediting the disposal of the appeal and staying the matter before the Children's Court to wait the outcome of the appeal. Tinkering with the quantum at this stage would amount to determining the appeal before arguments are heard from both sides on the merits of the same.”
8. The court wishes to remind the applicant that he must obey the maintenance orders of the trial court until further orders of the court. The Respondent is at liberty, as she may be advised by her legal advisors, to seek committal to jail for contempt of court for the enforcement of the orders of the trial court, in the event of breach thereof.

Orders

9. In the interests of justice, therefore, this court declines to issue the orders sought by the applicant in his application dated November 14, 2022.
10. This court, however, directs that the applicant's appeal shall be heard on priority basis, on a date within 60 days to be fixed in consultation with counsel.
11. Costs to abide the outcome of the appeal.



Order accordingly.

DATED AND DELIVERED ON THIS 28TH DAY OF MARCH, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Akwalu Advocate for the Applicant

Respondent in person.

