



**In re BKR , BKR & BKR (Minor) (Civil Appeal E016 of 2023)
[2023] KEHC 17896 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17896 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E016 OF 2023
JK SERGON, J
MAY 30, 2023
IN THE MATTER OF THE CUSTODY AND
MAINTANANCE OF BKR , BKR & BKR (MINORS)**

BETWEEN

BKS APPELLANT

AND

PC RESPONDENT

*(Being an appeal from the decision (Judgement) and Orders of
Hon. F.M Nyakundi, P.M in Kericho Children’s Court, Children’s
case No. E002 of 2022 delivered virtually on 27th April, 2023)*

RULING

1. The Appellant/Applicant filed a Notice of Motion dated 4th May, 2022 under certificate supported by the grounds laid out on its face and the facts stated in the affidavit of BKS seeking for the following orders:
 1. Spent.
 2. Spent.
 3. Spent.
 4. That this Honourable Court be pleased to order stay of execution of the judgement delivered by Honourable F.M. Nyakundi SRM, at Kericho on the 27th of April, 2023 in Kericho Children’s Case Number E002 of 2022, pending the hearing and determination of the Applicant’s Appeal.
 5. That the cost of this application be provided for.



2. The Applicant in his Supporting Affidavit avers that on 27TH April, 2023, Honourable F.M Nyakundi delivered a judgement in Kericho Children’s case Number E002 of 2022 granting legal and actual custody of all minors to the respondent herein amongst other orders and that being dissatisfied with the orders granted by the learned Magistrate, he has instructed his advocate on record to file an appeal against the said Judgement as well as an application for interim relief as the said judgement does not advance the best interests of the two minors who has been under his custody.
3. He further avers that the Appeal raises substantial issues of law and has overwhelming chances of success.
4. It is his averment that before the said judgement was delivered, he has been having custody of the first born BKR and second born BKR aged 14 and 8 years respectively and being male children, they require his molding in their conceptualization and graduation into manhood, more so the first born, BKR, who was initiated in December 2022 and is still undergoing recovery and medication which under their Kipsigis culture, the father is the one to undertake his care.
5. He acknowledged that the respondent has custody of the last-born minor whom he has limited access to.
6. He is apprehensive that unless the orders sought are granted, the respondent may execute the orders granted in the judgement which shall occasion emotional and psychological trauma on the minors’ contrary to their best interest for the following reasons:
 - i. That the sudden change in custody that is not in line with their wishes will occasion extreme stress to the minors who have all along stayed with him.
 - ii. That the 2nd born, BKR, has been staying with him and going to [Particulars withheld] Primary School near his residence and a sudden removal from the school and change without justification and without his acceptance and wishes will cause emotional distress to him which may eventually cause permanent damage to his person.
 - iii. That schools are opening on 8th May 2023 and the Respondent has informed him that she wants to transfer BKR to another undisclosed school and the ramifications are huge as the minor will be distressed and emotionally disturbed as his wishes of staying with the Applicant and attending his current school, [Particulars withheld] Primary School will be frustrated.
 - iv. That he has paid full year school fees for BKR and it is only fair that he remains in his current school with minimal disturbance which the Respondent is predisposed of causing by pulling him out on the strength of the judgement which the Applicant wishes to appeal against.
 - v. That the decision to grant exclusive legal and actual custody to the Respondent and denying the Applicant custody causes an imbalance that is highly detrimental to their interests as the children because they are fond of the Applicant as their father.
7. He further avers that he has read the judgment and it is in his considered view that the said judgement is not serving the best interests of his children as there is no explanation as to what has changed, what considerations the court made to conclude that all over sudden, and quite a departure from the ruling by the same court earlier on, the applicant has turned from being a good father to a monster requiring immediate change in custody of the two minors from the Applicant’s custody to the Respondent’s custody.



8. He avers that he has a responsibility to hand over the minors to the Respondent and he is willing to do so but his difficulty is explaining to them, especially BKR, the terms of the judgement of the court which goes contrary to the proceedings and evidence tendered in court.
9. It is his averment that the stay of execution of the judgement pending appeal and grant of an order of status quo that existed before the said judgement serves the best interests of the children especially in terms of their education, food, clothing and shelter as well as their psychological and emotional wellbeing, and the consequences of the implementation of the orders contained in the judgement will be gravely adverse to their interests.
10. He avers that it is in the interest of justice that the stay of execution and maintenance of status quo be granted and that it is in conformity with the principles of the best interest of the minors that the orders sought be granted.
11. In retort the Respondent through her replying affidavit dated 8th May, 2023 avers that the Applicant's application is a waste of the courts precious judicial time and an abuse of the court process as the claims by the Applicant that the orders made will adversely affect the two minors is fallacious and misleading.
12. She further avers that being the biological mother of the minors, she would never act contrary to their best interests and that the trial court applied the correct principles and took notice of the applicable laws to grant her custody of the minors as the trial court correctly established that the Applicant is not a responsible parent to be awarded custody of the minors after it emerged that the Respondent almost caused the life of the first minor during circumcision by subjecting the said minor to go through initiation procedure that was conducted by a quack.
13. It is her averment that the trial court had the opportunity of examining the 1st and the 2nd minors whereby it made finding that the two (2) minors expressed their desire to stay with the Respondent as their biological mother as opposed to the Applicant and his newly married wife and that during the hearing of the suit it was further established that the Applicant was not found to be morally fit to be granted custody of the minors on account of his immoral conduct of inviting different women into his house exposing the minors into bad behavior.
14. She avers that the 2nd minor will not suffer any prejudice on account of being transferred to another school because he is suffering from asthma hence the need for the Respondent as the biological mother to stay close to him and monitor his health condition as it will not be fair to subject her children to be taken care of by their step-mother while she is capable of raising them.
15. She further avers that she has been playing a major role in meeting the basic needs of the 2 minors and that the Applicant is creating an impression that he was completely locked out from having access to the minors which is not the case as the court clearly stated that he can always access them on particular days of the week.
16. She avers that the application is fatally defective and does not meet the threshold for grant of Stay of Execution as the Applicant has not demonstrated to the Honourable Court how he would suffer irreparable loss or damage if the application is not allowed and that if the said application is not allowed, it will not in anyway affect the appeal filed by the Applicant and that the court should not allow the court battles to affect the livelihood of the minors.
17. She further avers that if the application is allowed, the Respondents and the minors would suffer great prejudice as it is in the minors' best interest that they settle and move on in life and that the instant application is only a delaying tactic to reduce the speed of the wheels of justice as the same has not been made in good faith hence the same should be dismissed.



18. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting the motion and the Respondent’s Replying Affidavit.
19. Order 42, rule 6 (1) and (2) of the Civil Procedure Rules sets out the conditions to be satisfied for the grant of stay of execution pending appeal as follows:
- 20.
- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) 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.
21. In the case of Consolidated *Marine v Nampijja & another*, Civil App. No.93 of 1989 (Nairobi), the Court held that:
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
22. Substantial loss is a factual issue, which must be raised and further supported by evidence. In dealing with the issue of substantial loss, I am alive to the fact that the applicants herein ought to establish that execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicants as successful parties in the appeal.
23. In the case of *Shell Ltd v Kibiru & Another*, Civil Appeal No. 97 of 1986, Nairobi it was stated that-
- “The application for stay made before the High Court failed because the 1st of the conditions was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made since the Respondents would be unable to pay the money.”
24. The Applicant in this matter contend that if the stay orders are not granted, they stand to suffer irreparable loss as the Applicant has paid all the fees for the year for the minor, BKR, in his current school, [Particulars withheld] Primary School and the Respondent being determined to transfer the said minor to undisclosed school, this will lead to wasted school fees and unnecessary expenses in school fees, uniforms and educational requirement in another school and that the minors being male children, requires the molding in their conceptualization and graduation to manhood, especially the 1st born, Brian Kiplangat Rotich, who was initiated in December, 2022 and is still undergoing recovery and



medication which under the Kipsigis culture, the Applicant herein, who is the father is the one to undertake the duties.

25. The Applicants further stated that if the orders granted in the judgement are executed, the minors shall be subjected to emotional and psychological trauma on the minors contrary to their interest because the 2nd born, BKR, has been staying with him and going to [Particulars withheld] Primary School near his residence and a sudden removal from the school and change without justification and without his acceptance and wishes will cause emotional distress to him which may eventually cause permanent damage to his person and that being that the schools are opening on 8th May 2023 and the Respondent has informed him that she wants to transfer BKR to another undisclosed school and the ramifications are huge as the minor will be distressed and emotionally disturbed as his wishes of staying with the Applicant and attending his current school, [Particulars Withheld] Primary School will be frustrated. He further stated that the decision to grant exclusive legal and actual custody to the Respondent and denying the Applicant custody causes an imbalance that is highly detrimental to their interests as the children because they are found of the Applicant as their father.
26. The Respondent on the other hand stated that the 2nd minor will not suffer any prejudice on account of being transferred to another school because he is suffering from asthma hence the need for the Respondent as the biological mother to stay close to him and monitor his health condition as it will not be fair to subject her children to be taken care of by their step-mother while she is capable of raising them and that the Applicant has not demonstrated to the Honourable Court how he would suffer irreparable loss or damage if the application is not allowed and that if the said application is not allowed, it will not in any way affect the appeal filed by the Applicant and that the court should not allow the court battles to affect the livelihood of the minors.
27. Upon my consideration of the averments by both the Applicant and the Respondent, I find that the Applicant has not discharged the burden of proving that the minors and the Applicant will suffer substantial or irreparable loss if the order of Stay of Execution is not granted.
28. In sum, the Applicant has not demonstrated to the Honourable Court how he would suffer irreparable loss or damage if the application is not allowed. The grounds advanced as substantial and or irreparable grounds in my view appear to be mere inconveniences. Those grounds have not shown any substantial loss that may arise if the order for stay is denied
29. The upshot therefore is that the Notice of Motion dated 4th Ma, 2023 is found to be without merit. It is dismissed with each party bearing their own costs.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 30TH DAY OF MAY, 2023.

.....

J.K. SERGON

JUDGE

In the presence of:

C/Assistant - Rutoh

Nyambegera holding brief for Musundi for the Respondent

Kirui for the Applicant

