



**Jamac v Osman (Miscellaneous Application 26 of 2022)  
[2023] KEHC 21157 (KLR) (Family) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21157 (KLR)

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

**FAMILY**

**MISCELLANEOUS APPLICATION 26 OF 2022**

**MA ODERO, J**

**JULY 28, 2023**

**IN THE MATTER OF THE ADVOCATES ACT (CAP 16) LAWS OF KENYA**

**BETWEEN**

**MOHAMMED SADE JAMAC ..... APPLICANT**

**AND**

**BARWAQO ISSAK OSMAN ..... RESPONDENT**

**RULING**

1. Before this court is the Notice of Motion Application dated September 9, 2012 by which the Applicant Mohammed Sade Jamac seeks the following orders:-

- “ 1. Spent.
2. Spent.
3. That pending the hearing and Determination of the intended appeal, there be an order for stay of execution in Civil Application No E103 of 2022 Nairobi between Barwago Issak Osman and Mohammed Sade Jamac.
4. That upon grant of prayer 1 and 2 above, the Memorandum of Appeal lodged herein be deemed as duly filed.
5. That costs of this Application be in the cause.

2. The Application was premised upon Sections 1A, 1B, 3A and 3B of the *Civil Procedure Act*, Order 22 Rule 222, Order 51 and Order 42 of the *Civil Procedure Rules 2010*, Articles 22(3) (d) and 159 (2) (d)



of *the Constitution of Kenya 2010*, and all other enabling provisions of the law and was supported by the Affidavit of even date sworn by the Applicant.

3. The Respondent Barwaqo Issak Osman did not file any reply to the Application. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated January 12, 2023 whilst the Respondent did not file any written submissions.

### **Background**

4. The Respondent Barwaqo Issak Osman filed in the Nairobi Kadhi Court Childrens Case No E013 of 2022. The Respondent filed in that suit an application dated July 15, 2022. Interim orders were issued on July 18, 2022 as follows:-

- “ 1) That this application is certified urgent and be dispensed with on priority basis.
- 2) That the Defendant/Respondent is restrained from traveling out of the jurisdiction of this court on his own nor with the minors herein; Salman and Aisha both children of Mohamed Sade.
- 3) That the Defendant/Respondent to provide for the minors a monthly upkeep of Kshs 30,000/= and Kshs 30,000 for house rent.
- 4) That the Defendant/Respondent to immediately take the minors to school and madarasa and cater for their educational and medical expenses.
- 5) That Legal and physical custody of the minors herein is granted to the Petitioner/Applicant while the Defendant/Respondent shall have right of visitation upon reasonable notice.
- 6) That the Defendant is restrained from harassing and or intimidating the Plaintiff/Applicant or forcefully taking the minors from the custody of the Plaintiff/Applicant.
- 7) That the Director of Immigration and OCS Pangani Police Station are directed to ensure compliance with these orders.
- 8) That this application and orders be served upon the Defendant/Respondent by today before the close of business.

5. When the application came up for inter parties hearing no reply had been filed by the Applicant. Counsel for the Applicant indicated to the court that he intended to file an application challenging the jurisdiction of the Hon. Kadhi to hear the matter.

6. The Hon. Kadhi proceeded to fault the Applicant for failing to comply with the orders given by the court on July 18, 2022 and for failing to indicate why he (the Applicant) had failed to file the intended application opposing the jurisdiction of the Hon. Kadhi then proceeded to hear the application Ex parte.

7. On September 5, 2022 the Hon. Kadhi delivered a ruling in which he made the following orders:-

- “ 1. The application dated July 15, 2022 is marked unopposed.
2. The interim orders dated July 18, 2022 are hereby confirmed.



3. Costs of this application is awarded to the Applicant.”
8. Being aggrieved by this ruling the Applicant filed a Memorandum of Appeal dated September 9, 2022. Contemporaneously with that Appeal the Applicant filed this application for stay of execution of the orders made on September 5, 2022 pending the hearing and determination of the appeal.
9. Order 42 Rule 6 (2) of the [Civil Procedures Rules](#) provides for guiding principles that one must satisfy before the court can grant a stay of execution, it provides as follows:-
- “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 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 orders as may ultimately be binding on him has been given by the applicant.”
10. The impugned orders were made on 5<sup>th</sup> September 2022. This application for stay of execution was filed on 9<sup>th</sup> September 2022 barely four (4) days after the ruling was delivered. I am satisfied that the application was filed in a timely manner.
11. [The Constitution of Kenya 2010](#) provides at Article 53 (2) that:-
- (2) A child’s best interest are of paramount importance in every matter concerning the child.”
12. Likewise [Children Act 2022](#) at Section 8(1) provides as follows:-
- “(8)
- (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies-
- (a) The best interests of the child shall be the primary consideration;” [own emphasis]
13. In the case of *Bhutt v Bhutt – Mombasa HCCC No8 of 2014*, the court held as follows:-
- “In Determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution Order 42 Rule 6 of the Civil Procedure Rules, must be complemented by overriding consideration of the best interest of the child in accordance with “Article 53 (2) of [the Constitution](#).” [own emphasis]
14. The Applicant contends that the Hon. Kadhi erred in making orders that he pays an amount of Kshs 30,000 per month towards the maintenance of the minors without taking into account the Applicant’s reply to the application. This is a matter which can only be determined at the hearing of the main appeal.
15. The ruling made by the Hon. Kadhi related to the welfare and maintenance of minors. The Applicant is seeking to stay those orders pending the hearing and determination of his appeal.



16. What is to be the fate of the minors if the orders are stayed? The Applicant has not made any proposals as to how he will cater for the minors in the interim.
17. Moreover, the Applicant has failed to demonstrate that he is likely to suffer substantial loss if the orders of stay are not granted.
18. It would not be in the best interests of the minors to stay orders relating to their maintenance. I find no merit in this application. Accordingly, the Notice of Motion dated September 9, 2022 is hereby dismissed in its entirety. This being a family matter I make no orders on costs.

**DATED IN NAIROBI THIS 28<sup>TH</sup> DAY OF JULY, 2023.**

.....

**MAUREEN A. ODERO**

**JUDGE**

