



REPUBLIC OF KENYA



**KENYA LAW**  
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**KKW v SWM (Civil Appeal E002 of 2022)  
[2023] KEHC 21057 (KLR) (Family) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21057 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPEAL E002 OF 2022  
MA ODERO, J  
JULY 28, 2023**

**BETWEEN**

**KKW ..... APPELLANT**

**AND**

**SWM ..... RESPONDENT**

*(Being an Appeal from the Ruling and Order of the Hon. H.M. Mbaki  
delivered on 22nd of November, 2019 in the Children case No. 1006 of 2012)*

**RULING**

1. Before this court for determination is the summons dated January 3, 2022 filed by the applicant KKW seeking the following orders:-
  1. Spent.
  2. Spent.
  3. That this honourable court be pleased to stay the ruling of the lower court in Children’s Case Number 1006 of 2012 before Honorable Trial Magistrate delivered by Hon H.M. Mbati on December 16, 2021 pending the hearing and the determination of this appeal.
  4. That this honourable court do issue any further orders it deems fit in the interest of justice.
  5. That the costs be in the cause.”
2. The summons was premised upon Section 10 of the *Judicature Act* (Cap 8) Rules (3) (2) of the *High Court (Practice and Procedure) Rules* and all other enabling provisions of law and was supported by the Affidavit of even date sworn by the Applicant.



3. The Respondent SWM opposed the application through her Replying Affidavit dated March 29, 2022. The matter was canvassed by way of written submissions. As by July 22, 2022 no written submissions had been filed on the Court Tracking System (CTS) or supplied to the court by the Applicant. The Respondent filed the written submissions dated February 28, 2023.

### **Background**

4. Vide a ruling delivered on November 22, 2019 the Nairobi Children’s Court directed the Applicants to pay for the education related expenses for the two (2) minors at [Particulars Withheld] Academy from March 26, 2015. In addition, the Applicant was ordered to pay a sum of Kshs 15,000 per month towards the maintenance of the two (2) minors. The Applicant failed to comply with the said orders.
5. The Respondent then filed a Notice to Show Cause seeking to realize an amount of Kshs 2,600,000 being arrears back dated to the year 2015.
6. This application arises from the ruling delivered on December 16, 2021 by Hon H.M. Mbatia Senior Resident Magistrate in respect of a Notice to show Cause dated January 27, 2021.
7. In that ruling the learned trial Magistrate allowed the Notice To Show Cause in the amount of Kshs 2,382,088. The trial court proceeded to allow for the sale of the Property known as LR No xxxxx/xxx (LR/xxxxx) and directed that Applicants share of the proceeds be utilized in order to realise the amount owed.
8. Being aggrieved by the decision of the trial court the Applicant filed the Memorandum of Appeal dated January 3, 2022. Contemporaneously with that Appeal the Applicant filed this application seeking a stay of the orders made by the trial court pending the hearing and determination of the Appeal.

### **Analysis and Determination**

9. I have carefully considered the application before this court, the reply filed thereto, as well as the written submissions filed by both parties
10. 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.”

11. The impugned orders were made on November 18, 2022. This application for stay was filed on November 22, 2022 barely a week after the judgement was delivered. I am satisfied that the application for stay was filed in a timely manner.
12. The impugned orders were made in relation to the maintenance of the minors. It is trite law that in matters concerning the welfare of children courts are required to give priority to the best interest of the child.



13. The *Constitution of Kenya, 2010* provides at Article 53 (2) that:-
  - (2) 2) A child's best interest are of paramount importance in every matter concerning the child."
14. 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]
15. In the case of *Bhutt v Bhutt* – Mombasa HCCC No 8 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]
16. The court is mindful of the fact that it is not required at this point to determine the merit or otherwise of the intended appeal. I have perused the judgement of the lower court. I note that legal custody of the minors was vested in the mother (Respondent). The Applicant (Father) was awarded custody during the summer holidays as well as rights of access to the minor whilst she is in Australia.
17. The Applicant argued that he stood to suffer substantial loss if the orders of stay of execution were not granted as if the minor is taken out of the country then he may never see them again.
18. At this point the court is not required to delve into the merits or other wise of the intended appeal. The question of whether or not the learned trial magistrate erred in ordering the sale of property in question is a matter to be determined at the hearing of the Appeal.
19. The Applicant states that he likely to suffer substantial loss if the stay orders are not granted. He has conveniently failed to consider the loss being suffered by the minors due to his failure to obey court orders in respect to their maintenance. The needs of the Applicant cannot supersede the needs of the minors.
20. The Applicant has failed to obey the orders made by the Children's Court on November 22, 2022. It is indeed ironic that the Applicant has now rushed to the High Court to seek a stay of orders made as consequence of his own refusal to obey legitimate court orders.
21. It is trite law that courts do not make orders in vain. A person to whom a court order is directed is under an obligation to obey such orders. In the case of *Hadkinson- Vs -badkinson* [1952] All ER the Court stated as follows:-
  - "It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."
22. The Applicant had disobeyed the orders directing him to pay maintenance and was in arrears for several years. The Notice To Show Cause was decided against him and the Applicant was ordered to settle arrears of Kshs 2,382,088



23. He who comes to equity must come with clean hands. Having deliberately refused to obey valid court orders the Applicant cannot expect this court to exercise its discretion in his favour. I am in agreement with the sentiments of the my learned sister Hon Lady Justice Achode (as she then was) who in the case of *K -v- JW* [2017] eKLR, stated as follows:-

“ A litigant who refuses to obey court orders as shown that he will not submit himself to the jurisdiction of the court when it does not suit his purpose. To blatantly choose to disobey orders made by a court of competent jurisdiction is to abuse the dignity of the court and to have no regard whatsoever for the rule of law.”

24. Having deliberately disobeyed court orders made on November 22, 2022 the applicant cannot now seek that the court make orders of stay in his favour. He is a serial contemnor who deserves no audience before the court.

25. Finally, I find no merit in this application for stay. The same is dismissed in its entirety. Costs will be met by the applicant.

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

.....

**MAUREEN A. ODERO**

**JUDGE**

