



REPUBLIC OF KENYA



TNM v BNM (Sued as Mother and Next Friend of the Minors) (Children's Appeal Case 5 of 2023) [2023] KEHC 23053 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23053 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CHILDREN'S APPEAL CASE 5 OF 2023
MW MUIGAI, J
SEPTEMBER 28, 2023**

BETWEEN

TNM APPELLANT

AND

BNM (SUED AS MOTHER AND NEXT FRIEND OF THE MINORS) RESPONDENT

(Being an Appeal against the orders dated 28th February, 2023 by Hon. Martha Opanga (SRM) in the Children's Court at Kangundo, Children's Case No. E19 of 2022)

RULING

PLEADINGS

1. By Notice of Motion dated 6th March, 2023 brought under Orders 42 Rule 6 (1&2), 43 and 51 Rule 1 of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act*, wherein the Appellant Applicant sought orders that:
 1. Pending the hearing and determination of this Application inter partes, this Honorable Court be pleased to grant a stay of execution of the ruling and Orders of the Magistrate's Court of Kangundo by Hon Martha Opanga delivered and/or made on the 28th February, 2023 in Magistrate Court Children Case No. E19 OF 2022- *BNM (Suing as the mother and next friend v TNM)*.
 2. Pending the hearing and determination of the Appeal herein, this this Honorable Court be pleased to grant a stay of execution of the ruling and Orders of the Magistrate's Court of Kangundo by Hon Martha Opanga delivered and/or made on the 28th February, 2023 in Magistrate Court Children Case No. E19 OF 2022- *BNM (Suing as the mother and next friend v TNM)*.



3. There be stay of proceedings of Kangundo, Children’s Case No. E19 of 2022-BNM (*Suing as the mother and next friend v TNM*) pending the hearing and determination of the appeal.
4. The costs of this application be provided for.
2. The application is premised on the grounds inter alia:
 - a. The applicant has been ordered to pay Kshs. 100,000 at an interlocutory stage without being accorded an opportunity to dispute the allegations made by the Respondent that the house is not furnished.
 - b. The Applicant’s right to access his children has been limited and the Applicant can only see his children on prior arrangements and supervision by the children’s officer yet the Applicant has no history of violence against his children and he has always taken care of his children
 - c. The Applicant has been ordered to take out a comprehensive medical cover yet he has shown that the children are covered under his medical cover plan both inpatient and outpatient and that their medical expenses have always been deducted from his medical cover
 - d. The ruling of the lower court overburdens the applicant beyond his financial means contrary to the best interest of the children
 - e. The ruling of the lower court negates the constitutional principle that parental responsibility is a shared responsibility.

Supporting Affidavit

3. The application was supported by Supporting Affidavit dated 12th January,2023 sworn by TNM who is the applicant, where he deposed that the court disregarded the averments in his replying affidavit and the evidence adduced hence condemning him unheard.
4. He deposed that he is advised by his advocate on record that the best interest of a child is of paramount consideration by dint of Article 53 (e) of *the constitution*.
5. He deposed that the Court barely took into account his side with the effect of burdening him and ultimately going against the best interest of the child principle.
6. It was deposed that the appeal was extraneous and meritorious with an overwhelming chances of success
7. The applicant deposed that if the orders of the lower court are effected as ordered then the appeal will be rendered nugatory since the Respondent will commence the process of execution of the aforementioned sum against him causing delays in the provision of the minors’ basic needs.
8. He deposed that in the interest of justice, fairness and the best interest of the children, both parties should equally contribute and he should be allowed equal visitation rights to his children.

Replying Affidavit

9. The Respondent BNM in her Replying Affidavit dated 17th April,2023, deposed that the appeal was made in bad faith, full of falsehoods, half-truths and was meant to mislead the Court into giving undeserved orders.
10. She deposed that her application before the Trial Magistrate Court was clear and precise in terms of the needs of the minors and what each of them as parents needed to contribute towards the best interest of the minors.



11. She deposed that the Appellant did not raise any counterclaim nor the issues he was raising in the appeal. He also did not dispute the fact that he was the father of the two minors nor adduce the evidence he was now trying to introduce in the appellate Court.
12. It was deposed that the appellant was attempting to retry the matter by introducing new materials which neither the Trial Court nor herself have an opportunity to respond to.
13. She deposed that the appellant has never had the best interest of the minors at heart and had always left her to do everything claiming that he had another family to take care of.
14. She deposed that both parents have equal responsibility over the welfare of their children and was perturbed that the appellant can lie that he has the best interest of the children when in reality he was working to their detriment.
15. It was deposed that the Appellant has always insisted on enrolling the two minors in a public school where no school fees is paid and kept on transferring them every time which was unhealthy to the minors.
16. She lamented that the appellant has never informed her or the minors that he had enrolled them to any health insurance scheme and the minors have always been treated on cash basis
17. She deposed that even after the ruling by the trial court her daughter fell ill and they begged the Appellant for assistance in treatment without much success and that they awaited at Kenyatta hospital the whole day and were only received by the doctor when he finally came. According to her if they had a medical cover as alleged by the Appellant they would have been treated in the medical facilities in their neighborhood and would not need to travel to Nairobi.
18. It was deposed that she does not have a stable job as she runs a small Mpesa shop at Tala market near Matatu stage and has to pay rent and use whatever little commission they get at the end of the month to cater for the needs of the minors. According to her she has no hardware or bank agency shop as alleged.
19. She deposed further that the Appellant has always had access to the minors as their doors have always been open for him but it is his failure to provide for them that makes him run away every time he sees them- as he is afraid of the minors questioning his failure to provide.
20. She deposed that she is advised by her Advocate on record that in an application for stay of execution involving monetary terms the Applicant should provide security for its due performance which in this case the Appellant has not provided as required.
21. The Court was urged to dismiss the Appellant's Application for the ends of justice to be met.

Further Affidavit

22. The Applicant TNM in his Further Affidavit dated 12th May,2023, deposed that he has been in his children's lives and has been providing for the minors including paying school fees and medical expenses without being authorized.
23. He deposed that he has another family which he is taking care of and the allegation that the other children have schooled in posh schools is false since they have studied in public schools and colleges.
24. He deposed that he has the best interest of the minors as their parent including having them acquire the best education. He claimed that the public schools proposed have a history of performing well and hence having them school in private schools does not mean they will have achieved a better education than the one offered in public schools.



25. He deponed the Respondent has denied him the access to the minors and has grown hostile when he asked to see his children instead demands for money. This can only mean that Respondent is unwilling to continue to discharge her parental obligations over the minor and to give them the best life.
26. He lamented that the Respondent unjustifiably wanted to enrich herself using the minors which was contrary to the best interest of the child and that he has over the years duly and promptly discharged his parental responsibilities towards the children by providing for their basic needs including food, shelter and medical access.
27. He further deposed that he had been advised by his advocate on record that the best interest of a child is paramount by dint of Article 53 (e) of *the Constitution*, a duty which he has fully discharged albeit constant frustrations and accusations from the Applicant herein.
28. He deposed that the entire response is misconceived and further that the Respondent has approached the Court with unclean hands by failing to disclose material facts that he bought the house they reside in with the aim of securing a better future for his children.
29. The Appeal was disposed by written submissions.

Submissions

Appellant/ Applicant's Submissions

30. The Appellant/ Applicant by his submissions dated 12th May,2023 and filed in court on 17th May,2023, in which counsel for the Applicant raised the issue of whether the Applicant has satisfied the conditions for an order of stay of execution pending Appeal, reliance was placed on Order 42 Rule 6 of the Civil Procedure Rules, which states as follows:

- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
- (3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”



31. It was submitted that the Respondent in her letter dated 5th April,2023 annexed to her Replying Affidavit threatened to proceed with execution of lower court ruling. It was contended that the Applicant stands to suffer difficulty in making the payments in light of the responsibilities he was ordered to shoulder in respect of the minor children and this will be detrimental to the Children to the minors if execution is levied against him as he will be unable to discharge his parental responsibilities toward the minors.
32. On the issue of the final orders at an interlocutory stage, it was submitted that the Applicant is aggrieved with the entire ruling, specifically the one that read: A Respondent to help furnish the house where the two children live by paying Kshs. 100,000/= towards the same. According to the applicant, the order was couched in the manner of a final prayer warranting a final order. That aspect needed investigation and production of proof through evidence at a hearing.
33. On the issue of the effect of the orders on the best interests of the child, reliance was placed on Article 53 (2) of *the Constitution* and Section 8 (1) of the *Children Act* No. 29 of 2022 and the cases L.A.O Vs O.K Arap M. [2019] eKLR, C.I.N V J.N.N [2014] eKLR and M.O.A Vs H.A.O [2021] EKLR to buttress his point on the best interest of the child.
34. It was submitted that the award issued in the ruling of the lower court was inordinately high, made of unreasonable amounts of money without any basis or evidential proof which will cripple the Applicant's finances emphasizing that the Applicant demonstrated to the court through his payslips, that he earns only a sum of Kshs. 45,000/= and it would be unreasonable and unfair to award an amount above what he earns yet he has another family to fend and carter for.
35. Reliance was placed on the case of P K M V R P M [2017] eKLR where guidance was given on the conclusion of amounts payable as maintenance.
36. It was further submitted that the Applicant proposed the following terms on the Application: payment of school fees in proposed schools by the Applicant i.e. Nguluni S.A or Tala Township; the Applicant provide medical expenditure; he be granted unlimited access to the minor every fortnight from Saturday 10.00 am to Sunday 5.00 when the children are not in school.
37. On the issue of law on visitation rights by the father, it was opined that it was wrong for the lower court to make a determination regarding supervised visitation rights about the Applicant contending that no evidence has been shown that the Applicant has been violent towards his children or caused any harm to require supervision of from the Children Officer considering that children offices are closed on weekends hence impossible to arrange for a visit on weekends given that the Applicant is at work on week days.
38. Reliance was placed on the case of S.B v A.L [2010] eKLR, it was submitted that the Applicant should also be allowed to be actively present in the children's life through unsupervised access to his children.
39. It was the counsel's submission that the Applicant will suffer irreparable loss and his appeal will be rendered nugatory, and the interest of minor issues adversely affected, if the ruling of the Trial Court delivered on 28th February,2023 and the proceedings are not stayed.
40. The Applicant prayed that the application dated 6th March,2023 be allowed.

Respondent's Submissions

41. The Respondent in her submissions dated and filed in court on 5th June,2023, Mr. Nzioka, counsel for Respondent raised the following issues for determination:



1. Whether the Appellant is prosecuting Review in the guise of an appeal?
 2. Whether this Honorable court should grant a stay of execution of the ruling and orders in the premises?
 3. Whether the orders sought by the Appellant will prejudice and/or occasion injustice to the Respondent?
42. On Whether the Appellant is prosecuting Review in the guise of an appeal, it was submitted that a crucial distinction must be drawn between an Appeal and Review. It was contended that all these recourses may sound the same, but certainly are unallied.
43. Reliance was made on Order 45 Rule 1 of the Civil Procedure Rules 2010 thus:
Application for review of decree or order.
- (1) Any person considering himself aggrieved—
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
44. It was contended that an appeal on the other hand is a legal proceeding instituted to contest the decision of a lower court by a party who is dissatisfied with the judgment or ruling. It was further contended that the Appellate Court is confined to only re-examine the lower court record and wont fetter its jurisdiction by re-trying the matter but rather order for a fresh trial by the court if it is satisfied with the reasons that have been proffered. Counsel relied on Order 42 Rule 27 (1) of the Civil Procedure Rules which provides as follows:
- “The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred”
45. It was opined that this statutory provision goes ahead to afford instance/exceptions where additional oral or documentary evidence in an appellate court may be admitted:
- a. the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
 - (b) the Court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.
46. It was submitted that the action by the Appellant not only proves that the Appellant is steering the course of this application on his own terms and rules but also abuses the forum of this Honorable court to cure his inactions.
47. On the issue of Whether this Honorable court should grant a stay of execution of the ruling and orders in the premises, reliance was placed on Order 42 Rule 6 [sub-rule 2] of the Civil Procedure Rules thus:



- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
48. It was contended that court in determining stay of execution in the children matters must arrive at a determination that compliments the best interest of the child as provided by Sections 4 of the *Children Act* Article 53 (2) Constitution.
49. It was averred that the Appellant has not demonstrated the loss he may suffer in the event the orders of stay of execution are not granted and neither has he provided security/ for the due performance of the decree and in the circumstances is undeserving of the orders sought.
50. On the issue of Whether the orders sought by the Appellant will prejudice and/or occasion injustice to the Respondent, it was submitted that the order of stay of execution operates as a bar to keep the decree from enjoying the fruits of their judgment and that at the time of filing this matter, the minors were opening school for the second term, the Appellant paid school fees of Kshs. 10,000 for the 2nd minor only and failed to pay school fees for the 1st minor as the only thing the Appellant did was to drive the 1st minor to school.
51. It was submitted that the Appellant has previously never demonstrated his willfulness in taking over parental responsibilities over the minors without being pushed, reminded or constantly being pestered. Article 159 (2) (d) of *the Constitution* was invoked and the court was invited to exercise its discretion in their favor and refuse to grant the draconian orders which may well work great injustice to the minors.
52. On the issue of whether the Appellant is deserving of such orders, it was submitted that the parental responsibility is an equal joint responsibility of the parents to a child and no parent shall be treated specifically as having a superior right over the child than the other. Credence was placed on the case PKM v ANM [SUPRA], and it was averred that the ruling and orders of the lower court overburdens him is just but a craft devised by him to capriciously evade his parental responsibilities over the minors and negate the same to the Respondent as he has always done.
53. It was the Respondent’s submission that parental responsibility is a joint and equal Responsibility thus both parties are equally aware that they have an equal task to support their children. It was further submitted that the lower court in its ruling distributed the parental responsibilities between the Appellant and the Respondent as follows:

Appellant’s Responsibilities:

- a. Legal custody



- b. Arranged visitation rights
- c. Payment of Kshs. 8,000/= for food
- d. Payment of school fees as per fee structure
- e. Kshs. 100,000/= to furnish dwelling house of the minors

Respondent's Responsibilities:

- a. Legal custody
- b. Actual custody
- c. Payment of Kshs. 37,000/= for food and utility bills.
- d. Provide entertainment and house help
- e. Provide clothing for the minors

54. It was submitted that should the court be inclined to grant the orders sought, the minors will suffer harm and loss more insurmountable than the minors have endured and it would be imperative to say that the Appellant is frustrating the Respondent from enjoying the fruit of her judgment which was made for the benefit of the minors and in the interest of justice. Reliance was placed on the case of *R Vs Sussex Justices, Ex parte Mc McCarthy* [1924] 1 KB 256, [1923] ALL ER, to buttress the point that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

55. Further, reliance was placed on Section 79B of the *Civil Procedure Act* which provides as follows:

“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.”

56. Respondent finally submitted that this Honorable Court do disallow the Application and dismiss the same with costs to the Respondent.

Determination

57. I have considered the application, affidavits in support and in opposition to, submissions and the authorities relied upon.

58. The application is premised on Order 42 rule 6(2) of the Civil Procedure Rules, 2010 provides that:-

“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.

59. It therefore follows that no appeal or second appeal will operate as a stay. A party must show sufficient reasons why stay orders should be granted. See *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nairobi 15 of 1990 [1990] KLR 365.

60. The Court, in *RWW vs. EKW* [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

61. The only issue necessary for determination would be whether the application seeking stay of execution is merited.

Substantial Loss

62. On the first condition, the court in *Tropical Commodities Suppliers Ltd and Others vs. International Credit Bank Limited (in liquidation)* (2004) E.A. LR 331, defined substantial loss in the sense of Order 42 rule 6 as follows:-

“...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

63. The Applicant contends that he stands to suffer difficulty in making the payments in light of the responsibilities he was ordered to shoulder in respect of the minor children and that this will be detrimental to the minors if execution is levied against him as he will be unable to discharge his parental responsibilities towards the minors. The court notes that the stay sought here can be categorized to be of special circumstances as it involves the interest of minors and as enumerated in *the Constitution*, the best interest of the child are paramount and therefore the applicant providing for them is a matter than cannot wait.

64. *Gichuhi, Ag.JA (as he then was) in Kenya Shell Limited vs. Kibiru* [1986] KLR 410, at 417 held:

“It is not sufficient by merely stating that the sum of Shs. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it



were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

65. It therefore follows that even if the Applicant has demonstrated the loss, he/she would suffer, he cannot completely fail to provide for the minors on any ground but should be able to chip in to the expenses and maintenance of the minors.
66. The Court is of the view the Applicant/Appellant has not demonstrated the substantial and/or irreparable damage and loss they will suffer. The ground fails.

Unreasonable Delay

67. On the second condition, The court observes that the Trial Court Ruling was delivered on 28th February 2023, and the appellant filed the application for stay on 22nd March 2023 less than a month later and is therefore is not unreasonable. .
68. The Court finds that there is no undue delay in filing the application herein

Arguable Appeal

69. As to what constitutes an arguable appeal, the Court of Appeal in Nairobi Women’s Hospital vs. Purity Kemunto [2018] eKLR:

“To say that an appeal is arguable is another way of saying that it is not frivolous and that it raises a bona fide issue deserving full consideration by the Court. Even one bona fide issue will satisfy the requirement, for the law does not look for a multiplicity of arguable issues.”
70. The Court notes that the grounds of appeal are that the orders for provision are inordinately high and the applicant is unable to meet them and feels it would financially burdening to him. In children cases, the best interest of the child is paramount however the court is aware that the issue of provision and maintenance is based on ability and the appellant cannot give what he does not have.
71. The Court’s view is that the issues are triable to be considered in the appeal.

Disposition

72. In the premises:-
 - a. Stay of execution not granted pending the said appeal
 - b. because this is a matter that involves the rights of minors and the best interest of the child takes precedence and their development upkeep and welfare is ongoing and paramount.
 - c. Therefore, the applicant must/shall provide for money for food and utility in the tune of Kshs 8,000, provide for medical cover and school fees expenses.
 - d. The payment of Ksh 100,000/- furnishing the house to be paid once is highly contested and is not specifically to cater for the children only. This specific payment is suspended pending hearing and determination of the Appeal.
 - e. The order to stay proceedings is not granted as no legal basis was/is laid or any prejudice shown to this Court to any party in ongoing proceedings. Moreso, proceedings regarding the welfare of the minor children are crucial to safeguard the children’s best interest.
 - f. The appeal to be prosecuted within 90 days hereof.



g. The costs of this application abide the outcome of the appeal

It so ordered.

RULING DATED SIGNED & DELIVERED IN OPEN COURT IN MACHAKOS ON 28TH SEPTEMBER, 2023 (VIRTUAL /PHYSICAL CONFERENCE).

M. W. MUIGAI

JUDGE

In the presence/absence of:

No Appearance - For The Appellant

No Appearance For The Respondent

Patrick/geoffrey- Court Assistant(s)

