



REPUBLIC OF KENYA



**KENYA LAW**  
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**CMM v ANM (Civil Appeal E039 of 2023)  
[2023] KEHC 26977 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26977 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E039 OF 2023  
FN MUCHEMI, J  
DECEMBER 20, 2023**

**BETWEEN**

**CMM ..... APPELLANT**

**AND**

**ANM ..... RESPONDENT**

**RULING**

1. The applicant filed this Notice of Motion dated 29<sup>th</sup> November, 2023 under certificate of urgency seeking the following orders:-
  - a. That the Honorable court do grant stay of the order of the Honorable C.K. Kisiangani Principal Magistrate in Ruiru Children’s case No. E022/2023 AM Vs. CMM dated 15<sup>th</sup> November, 2023 scheduling delivery of judgment on 21<sup>st</sup> December, 2023.
  - b. That the honorable court do vary and or reverse the order of Hon. C.K. Kisiangani Principal Magistrate in Ruiru Children’s case No. E022/2023 AM Vs. CMM which summarily declined to give directions on the Applicant application under Certificate of Urgency dated 22<sup>nd</sup> November, 2023 and direct that the same be heard on merit before 21<sup>st</sup> December, 2023.
2. The Application is premised on the grounds that the learned Magistrate Hon. Kisiangani Principal Magistrate erred in declining to give directions on the application dated 22<sup>nd</sup> November, 2023 in Ruiru Children’s case No. E022 of 2023 on grounds that the suit is pending delivery of judgment which denied the applicant the right to be heard and the right to a fair hearing, thus rendering the said application nugatory. It is further averred that no adequate reasons were given by the learned Magistrate for failing to admit for hearing the said application. The applicant avers that there was ample time to hear and determine the said application since none of the parties had filed submissions and that the said judgement was slated for delivery on 21<sup>st</sup> December, 2023.



3. The application was opposed by the respondent on grounds that the applicant had been given sufficient time to ventilate his case but he asked for adjournment on the date of hearing. It was averred that this being a Children's case, it requires to be heard as soon as possible for the best interests of the child. Further, that there was no order made by the Magistrate that is capable of being appealed against and that there is a pending application made by the applicant seeking to set aside the orders allowing the matter to proceed which is yet to be heard. It is the applicant's case that the appeal is incompetent since no appeal arises from the order made.
4. I have perused the attachments to the application. The respondent is the plaintiff in Ruiru Children case No. MCCHCC/E022/2023 as well as the mother of the child. The applicant on the other hand is the father of the minor and the defendant in the said case. His name appears on the birth certificate of the child and he is required to grant consents on various decisions concerning the child. The applicant is said to be working in Addis Ababa and has not been available to give required consents in respect of matters concerning the minor when called upon. Neither has he been contributing to the maintenance of the child. Among other prayers in the amended plaint, the respondent seeks for orders of maintenance for the child. Briefly, this is the case before the Children's court at Ruiru Principal Magistrates Court.
5. From the applicant's conduct and applications made in court the applicant was accused of reluctance to have the suit heard. Several dates were indicated in the Replying affidavit where the case has been mentioned four times and come for hearing on two occasions. During the first hearing date, the matter was adjourned on the applicant's request. The court declined to adjourn the case on the 2<sup>nd</sup> hearing date on the application by the applicant's advocate and directed that the case do proceed. The case was heard and set for judgment on 21<sup>st</sup> December 2023.
6. The applicant filed an application seeking to set aside the orders made on 15/11/2023 directing that the hearing shall proceed which application is still pending. The court put the motion on hold since the matter had already been fixed for judgment.
7. The issue in this application is whether orders to arrest the judgment and to stay the directions of the Magistrate to the effect that the applicant's notice of motion should not be heard ought to be granted. Having given the background facts leading to the filing of this application, I proceed to determine it based on the facts laid before me by the parties. The position in the court record is that no ruling was made by the Magistrate on any issues before court. It is clear that the Magistrate only declined to hear the applicant's application seeking to set aside the orders made by the court on 15/11/2023 for the reason that the matter had already been set for judgment. The applicant did not attach any such directions or order to this application. The failure to attach any ruling or any directions confirm the averments by the respondent that no order capable of being appealed against was made by the Magistrate.  
  
The applicant seeks for orders stay of the orders of the Magistrate pending appeal. Order 42 of the [Civil Procedure Rules](#) gives conditions that must be satisfied before the court before orders for stay pending appeal are granted. The applicant has not made any attempt to state any of those conditions let alone to establish any of them.
8. The other issue is whether the appeal is arguable or whether it has any chances of success. The answer is in the negative because there is no final order made by the Magistrate that has been annexed.
9. The arguments of the applicant are based on the claim that he was denied the right to be heard and the right of fair hearing. I am afraid that these two grounds have no bearing on the stay of the proceedings before the learned Magistrate. In the event that this court was to grant the orders sought, it would be



futile in that there is basically no appeal before this court in the absence of any order made by the lower court.

10. Consequently, I find no merit in the Notice of Motion dated 29/11/2023 and it is hereby dismissed with costs to the respondent.
11. The appeal is also struck out with costs to the respondent on the court's own motion for being incompetent.
12. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 20<sup>TH</sup> DAY OF DECEMBER, 2023.**

**F. MUCHEMI**

**JUDGE**

