



KB v RJ (Family Appeal 7 of 2022) [2022] KEHC 12287 (KLR) (22 April 2022) (Ruling)

Neutral citation: [2022] KEHC 12287 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL 7 OF 2022
JO NYARANGI, J
APRIL 22, 2022
IN THE MATTER OF SK - MINOR**

BETWEEN

KB APPELLANT

AND

RJ RESPONDENT

RULING

1. Before me is a notice of motion dated February 25, 2022 seeking a temporary stay of execution of the orders for attachment of 1/3 of the appellant's salary granted in Tononoka Children's Court Case No 3 26 of 2015 (RJ v KB) on the February 3, 2012 and scheduled to take place on March 5, 2012 and subsequent proceedings in the aforesaid suit be issued pending *inter partes* hearing of this application. That upon *inter partes* hearing stay to remain in force pending hearing and determination of the intended appeal.
2. The application is anchored on grounds enumerated on the face of it and further amplified by averments contained in a supporting affidavit sworn on February 25, 2022. It is the applicant's case that the court having made orders of his 1/3 salary attachment on or before 5th of each month commencing March 5, 2022 to cater for the upkeep of the minor, he is likely to suffer irreparable damage and loss hence the prayer for stay.
3. He averred that the said child will not suffer any prejudice if the orders are granted as he has been paying school fees and school related expenses directly to the school and regular M-pesa payments for the upkeep of the child.
4. He attached M-pesa transactions ranging from 2018 to early 2022 (KB1 -KB2) to serve as proof of his commitment towards paying school fees and upkeep expenses directly payable to the school and respondent respectively.



5. He further stated that besides the maintenance of the minor herein, he has a wife with children who also depend on him. To prove that fact, a birth certificate marked as KB3 was attached as evidence. The applicant further stated that he was disputing paternity .He deponed that his appeal will be rendered nugatory should the orders sought be denied.
6. In her response, the respondent filed a replying affidavit filed on March 7, 2011 stating that the applicant's intention is to frustrate justice process to the detriment of the baby.
7. She averred that the applicant has not be paying school fees consistently thus causing the child to miss classes as a result of being sent away. As proof of such failure, a reminder letter for payment of school fees amounting to Kshs 25,400 dated January 13, 2011 (RJ-1) was attached.
8. She deponed that the applicant has not be providing transport to school and other recreational fees as per the court order. To prove that she has been catering for all those expenses she attached receipts for payments made to Wild Spot (K) Ltd (annexure RJ6).
9. Regarding paternity dispute, she averred that orders made by the court for DNA test have been disobeyed by the applicant who on several occasions has failed to turn up for the test. To that effect, a letter from the pathologist indicating that the applicant had failed to turn up for extraction of samples of DNA test had failed to turn up.
10. When the exparte application came up before the Duty Judge under certificate of urgency, the court certified the same urgent on February 25, 2022 and directed the applicant to serve and turn up for interpartes hearing on March 8, 2022.
11. During the hearing, parties' respective counsel made oral submissions. Mr Otwoma for the applicant basically adopted the averments contained in the affidavit in support of the application. Learned counsel submitted that the application before the trial court culminating to the impugned orders was argued exparte thus attaching the applicant's salary without any justification as the applicant had not defaulted before. Learned counsel contended that the applicant is ready and willing to pay school fees and meet other related school expenses besides monthly upkeep.
12. On the other hand, the respondent appearing in person submitted that, the applicant has not been paying school fees and other related school expenses plus monthly upkeep as claimed. That he was served with the application seeking for attachment of his salary but he ignored.
13. I have considered the application herein, affidavit in support and the response thereto. The only issue for determination is whether the applicant has met the threshold for grant of stay orders.
14. There is no dispute that on November 25, 2015 an order was made by the children court directing the applicant to contribute 1/3 of his salary for the upkeep of the child known as SK then aged 2 years and 4 months. For some reason, that order was not implemented by attachment of salary until February 2, 2022 when the court directed the principal secretary Ministry of Defence to attach by deducting 1/3 of the applicant's salary to meet the upkeep expenses of the baby.
15. It is also not clear from the record on the current status of the suit before the trial court. I will nevertheless address the issue of stay of execution. The application is expressed to have been filed under order 45 rule (1) of the Civil Procedure Rules, section 1A, 1B and 3A and 63 of the Civil Procedure Act and articles 48, 50 (1) and 53 of the Constitution. I wish to take note of the fact that the application is seeking stay of execution which ordinarily should be filed under order 42(1) rule 6 (2) of the Civil Procedure Rules.



16. The application herein has been filed under order 45 of the *Civil Procedure Rules* which deals with review applications and orders. Be that as it may, failure to quote proper provision of the law is not fatal.
17. The principles governing stay of execution orders are clearly spelt out under order 42 rule 6 (2) of the *Civil Procedure Rules* which provides that a party seeking stay of execution should prove the following; that he is likely to suffer substantial loss should the order be denied; the application has been filed without inordinate delay and, security for due performance of the decree has been deposited. This position was succinctly expressed in the case of *Kenya Shell Limited v Kibiru* [1986] KLR 44 where the court stated that;

“It is usually a good rule to see if order XLI of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case where an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdiction for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept of their money.”
18. Similar position was held in the case of *Visbram Ravji Halai v Thornton and Turpin* Civil Appeal No Nairobi 15 of 1990 KLR 365 where the court of appeal expressed itself that “ whereas the court of appeal’s powers to grant stay pending appeal is unfettered, the high court’s jurisdiction to do so under order 41 rule 1 of the *Civil Procedure Rules* is fettered by three conditions namely; establishment of a sufficient cause; satisfaction of substantial loss and furnishing of security. Further, that the application must be made without unreasonable delay.
19. In this case, the applicant is claiming that he is likely to suffer prejudice as he has been paying for the upkeep of the minor whose paternity he is not admitting. He attached some M-pesa transactions showing payments made to light Academy Mombasa and some to one R (respondent). One thing that is clear from the monies sent to R, the same was erratic in amounts and time payments was made. There is no consistency nor uniformity.
20. By the court making a special order, the applicant is being forced to comply with an order that has been in force since November 2015. What prejudice will he suffer by maintaining the baby pending the hearing of the appeal? The applicant did not attach his affidavit of means nor payslip to express his financial inability or obligations. What will happen to the child’s upkeep if the stay order were to issue and therefore leave him at the mercy of the applicant?
21. It is trite and indeed a constitutional imperative under article 53 (2) of the *Constitution* that the best interests of a child must be taken into account before any decision affecting a child is made. This position is further amplified under section 4 (2) and (3) of the *Children Act*. In the case of *ZMO v EIM* [2013] eKLR the court was of the view that, where the duty to maintain a child is imposed on a parent by statute , it is not in the best interest of a child to suspend maintenance but rather expedite the appeal process.
22. In the instant case, it will be prejudicial to suspend maintenance of the child by giving a stay order pending appeal. Since the applicant is determined in paying for the child’s upkeep, it does not matter the mode of payment. He has not established sufficiently what substantial loss he will suffer by paying through check off system instead of his erratic payment. To the contrary, it is the child who will suffer. If the amount imposed is excessive or made without being offered a right of hearing, the solution lies on expediting the hearing of the appeal and not stay. Accordingly, that ground is not tenable.



23. As regards timely filing of the appeal, the same was filed within reasonable time considering that the orders complained of were made on February 2, 2022 and this application filed on February 25, 2022.
24. Concerning depositing security, that is a discretionary order for this court to make only if it will serve the purpose of promoting the best interests of the child. In the circumstances of this case, that option is not applicable as it will not benefit the child in any way.
25. Having held as above, the only conclusion appealing to this court is dismissal of the application with directions that parties do fast-track the appeal. Regarding the issue of costs, the same shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF APRIL 2022.

JN ONYIEGO

JUDGE

