



I M v M J (Family Appeal 13 of 2022) [2022] KEHC 10643 (KLR) (20 May 2022) (Ruling)

Neutral citation: [2022] KEHC 10643 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL 13 OF 2022**

JN ONYIEGO, J

MAY 20, 2022

BETWEEN

I M APPLICANT

AND

M J RESPONDENT

RULING

1. On March 30, 2022, Tononoka children's court delivered its judgment in children Case No xxxx/2021 between MJ v IM thereby directing that;
 - a. A declaration is hereby made that both the plaintiff and the defendant have equal parental responsibility over the child herein.
 - b. Both parties to have joint legal custody, the plaintiff to have actual physical custody, the defendant to have unlimited access should the parties divorce.
 - c. The defendant to cater for the medical needs of the children through his employer's medical insurance cover.
 - d. The defendant to provide a monthly sum of Ksh 25,000 per month for upkeep. The same to be payable on or before the 5th of every month by way of m-pesa.
 - e. The children and their mother do continue residing in their current residence or in the alternative, the defendant to rent a house of the same standard as the current one and to pay for the monthly rent.
 - f. The defendant to pay fees and related expenses.
 - g. Clothing needs of the child to be catered for by both parties
 - h. No orders as to costs and either party is at liberty to apply.



2. Aggrieved by the said decision, the appellant/applicant (defendant) filed a memorandum of appeal on April 21, 2021 seeking to challenge the whole judgment.
3. Contemporaneously filed with the memorandum of appeal is a notice of motion seeking stay of execution of the said judgment and the orders arising therefrom pending interpartes hearing of the application and subsequently pending hearing and determination of the pending appeal.
4. The application is hinged on grounds stated on the face of it and averments contained in the affidavit in support sworn by the applicant on April 20, 2022.
5. The applicant's case is to the effect that both the children and the respondent live with him under his care. That from the pleadings it is clear that he was the one providing for the children and the respondent hence cannot be ordered to pay maintenance expenses yet he is the one maintaining the whole family.
6. He averred that the trial court was likely to enforce its orders thus prejudicing his appeal and therefore rendering it nugatory.
7. Despite service of the application and hearing notice upon the respondent, the respondent did not file any response nor attend court. The application was therefore heard *ex parte*.
8. I have considered the application herein, affidavit in support and oral submissions by counsel for the applicant. The only issue for determination is whether the applicant has met the threshold for grant of stay of execution orders.
9. Although the application is not opposed, the applicant has a duty to prove the salient conditions set out under order 42 rule 6(2) of the *Civil Procedure Rules*. The fact that an application is not opposed is no guarantee that the same must automatically succeed. See [Gideon Sitelu Konchella v Julius Lekakeny Ole Sunkuli and 2 others](#) [2018] e KLR.
10. According to order 42 rule 6 (2) of the *Civil Procedure Rules*, the applicant must prove that he is likely to suffer substantial loss should the order for stay be denied; the application has been filed within reasonable time and; that security has been deposited for due performance of the decree or order. See [Kenya Power and Lighting Company Ltd v Esther Wanjiru Wakobi](#) [2014] e KLR where the court emphasized on the need for the applicant seeking stay of execution orders to prove likelihood to suffer substantial loss should the orders be denied and that the application seeking stay has been filed without unreasonable delay.
11. According to the applicant, he is staying with the family at KPA staff quarters and that he is the one providing for them in every respect. His concern is, why should he pay the respondent maintenance expenses yet they are staying in the same house and he is providing everything. This set of facts has not been controverted as there is no response filed against the application. In the absence of any opposition to the claim, I am left with one conclusion to make and that is, it would be punitive and an act of one suffering double jeopardy for the applicant to provide for the family and at the same time pay the respondent separately for the same purpose. *Prima facie*, he is likely to suffer substantial loss as he is not likely to recover the same from the respondent who was declared as not having any source of income.
12. As regards filing of the application within reasonable time, the impugned judgment was delivered on March 30, 2022 and this appeal filed on April 21, 2022. Accordingly, the application was filed within reasonable time.
13. Concerning depositing security, this is a family related issue touching on children. It is not an appropriate case for depositing security as it will fuel more animosity.



14. On the question whether the appeal is arguable with high chances of success, again the same has not been challenged hence the only logical conclusion is, the appeal is arguable and therefore necessary for the appellant to be granted an opportunity to exhaust his legal redress.
15. In a nutshell, it is my finding that the application herein which is not opposed is meritorious and the same is allowed only to the extent that the applicant shall not pay monthly maintenance expenses of kshs25,000 to the respondent until the appeal is heard and determined. For avoidance of doubt, the rest of the orders shall remain in force. Parties to fast track the hearing of the appeal.
16. Mention to confirm filing of memorandum of appeal on July 20, 2022

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF MAY 2022

J. N. ONYIEGO

JUDGE

