



MKM v JMW (Civil Appeal E036 of 2021) [2022] KEHC 15218 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 15218 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E036 OF 2021
SN MUTUKU, J
JULY 28, 2022**

BETWEEN

MKM APPELLANT

AND

JMW RESPONDENT

RULING

Introduction

1. Under consideration in this ruling are two applications. The Notice of Motion dated July 30, 2021 and the Chamber Summons dated April 27, 2022. The Ruling giving rise to the two applications and this Appeal, is the one dated July 8, 2021 in Kajiado CMC Children Case No E002 of 2021, granting the following orders:
 - (i) That actual custody, care and control of all the three minors be and is hereby granted to the plaintiff/applicant pending the hearing and determination of this suit.
 - (ii) That the defendant/respondent be and is hereby granted limited and supervised access to the minors pending the hearing and determination of this suit.
 - (iii) That the defendant/respondent to cater for school fees and school related expenses for the minor pending the hearing and determination of this suit.
 - (iv) That the defendant/respondent contributes Kshs 30,000 per month towards the maintenance of the minors pending the hearing and determination of this suit.
 - (v) No order as to costs.



Notice of Motion dated 30th July 2021

2. In this Notice of Motion dated July 30, 2021, the MKM, the Appellant, is seeking the following orders:
 - (i) Spent.
 - (ii) That there be a temporary stay of execution of the order and ruling of the Chief Magistrate's Court in Kajiado CMC Children Case No XXXX of 2021 requiring the appellant to pay all the school fees and other related school expenses together with a monthly contribution of Kshs 30,000 pending the hearing and determination of this application.
 - (iii) That there be a temporary stay of execution of the order and ruling of the Chief Magistrate's Court in Kajiado CMC Children Case No XXXX of 2021 requiring the appellant to pay all the school fees and other related school expenses together with a monthly contribution of Kshs 30,000 pending the hearing and determination of the appeal.
 - (iv) That there be a temporary order directing that the parties herein do contribute equally to the school fees as per their earlier arrangements and or agreement pending the hearing and determination of the appeal.
 - (v) That the costs of the application be provided for.
3. The grounds in support of the application are found on the face of it and in the Supporting Affidavit sworn by the Appellant. In brief, the case for the appellant, who was the Defendant in the lower court, is simply that the Respondent, Plaintiff in the lower court, earns a monthly salary of Kshs 316,000 while he is jobless and earns his keep from farming; that he has provided for the children in terms of food, clothing and any other need; that he was ordered to pay a monthly contribution of Kshs 30,000 in addition to full school fees together with related school expenses of all the children; that the school fees of Kshs 381,150 is too high for him to raise alone and that the court discriminated against him.
4. The Respondent, through her Replying Affidavit sworn on September 28, 2021, has opposed this application. She has deposed that she has been catering for all the children's needs in terms of shelter, food, medical, clothing and daily needs which is a big financial burden to her. She has deposed that the Appellant is a man of means and capable of taking care of the minors' expenses as he owns various properties under the family company name, rental houses, treasury bonds and large-scale farming; that he lives in a privately-owned house and does not incur expenses in terms of rent.
5. The Respondent further deposed that her salary is subject to monthly deductions leaving her with little money to cater for the needs of the children alone and that the Appellant is the one who selected the school for the minors and has been paying school fees.

Submissions

6. The Appellant has submitted that he has met the conditions for grant of stay of execution and ought to be granted the orders sought. He has submitted that he will suffer irreparable loss because he is likely to face civil jail for contempt of court for being unable to raise the amount ordered by the court and his chances of getting formal employment in future will be ruined and that he will have lost the opportunity to know the reasons behind the ruling of the court.



7. He submitted that the application has been made without unreasonable delay, on July 30, 2021 following ruling on July 8, 2021 and that he ready to comply with any orders this court may give in respect to providing security for costs.
8. He cited *Bbutt v Bbutt* Mombasa HCCC No 8 of 2014 (OS) where the court held that:

“In determining an application for stay of execution involving children, the general principle for the grant of stay of execution, Order 42 Rule 6 of the Civil Procedure Rules, must be complimented by an overriding consideration of the best interest of the child in accordance with Article 53 (2) of the *Constitution*.”
9. In her submissions in opposition, the Respondent has submitted that the Appellant has not met the conditions for grant of stay of execution under Order 42 Rule 6 of the *Civil Procedure Rules*; that he has not demonstrated what loss he will suffer if stay is not granted and that he has continued to disobey court orders and stopped giving the support he was giving before, although he was doing this when it was convenient to him.
10. She submitted that the Appellant has not offered any security for costs nor has he shown any willingness to provide security; that children’s matters are guided by the best interest of the child principle; that the *Children Act* does not expressly provide for stay of execution and that an order for stay of execution will militate against the best interest of the children herein. She cited *KKPM v SWW [2019] eKLR* where the court held that “the best interests of the child are superior to the rights and wishes of parents, and they incorporate not just the physical comfort of the child but the welfare of the child in its broadest sense. The orders sought would result in depriving the minor of the maintenance amount which in my view would militate against the best interest of the child.”
11. The Respondent submitted further that the Appellant has not demonstrated any payment towards maintenance since the order was granted, a period of over 9 months; that it is the children, and not the applicant, who will suffer irreparable loss if the orders sought are not granted; that after the Respondent was forced out of the matrimonial home, she has been shouldering the expenses related to the children alone and that ordering the parties to contribute towards maintenance of the children equally will prejudice the Respondent.

Chamber Summons dated 27th April 2022

12. The Respondent seeks, through this Chamber Summons, that:
 - (i) Spent
 - (ii) That this court direct that this application be placed for inter partes hearing on May 10, 2022 when the matter is scheduled to come up.
 - (iii) That pending the hearing and determination of this application, the Honourable court be pleased to exercise its supervisory jurisdiction by calling for the file in Kajiado CM XXXX of 2021 for appropriate revisionary/supervisory orders.
 - (iv) That in exercising its supervisory power that the lower court file be transferred to the High Court for further proceedings and or directions.



- (v) That the court to allow execution due to disobedience to the orders of July 8, 2021 issued by the lower court and which process the same lower court has unlawfully blocked.
 - (vi) That the court do make such order or further orders as it may deem fair and just in the interest of justice and in the best interest of the children.
13. The grounds in support of the Chamber Summons are that the Appellant has ignored, neglected and disregarded the orders of the court and he completely stopped paying school fees for the children; that the Respondent filed an application dated November 12, 2021 seeking leave to take out a Notice to Show Cause but the court declined to issue the notice to show cause but instead directed parties to make submissions; that the court made a ruling stating that it would not issue warrant of arrest in an application the Respondent had only sought leave to take out a notice to show cause and not warrant of arrest.
 14. It is deposed, further, that the court went further to direct the Appellant to provide a payment plan of the accrued arrears and order that the parties file affidavit of means; that on March 15, 2022, the court delivered a ruling that the Appellant contributes Kshs 20,000 per month towards the upkeep and maintenance of the minors; that the remaining Kshs 10,000 per month to be paid in arrears together with arrears for the months the Appellant had not remitted Kshs 30,000 per month following the orders of May 8, 2021; that the Appellant to cater for school fees and school related expenses and review in 3 months.
 15. It is deposed that the lower court has frustrated the execution and therefore the High Court has the powers to stop this in order to have the best interest of the minors realized.

Submissions

16. The Respondent has majorly reiterated her submissions in opposition to the application dated July 30, 2021 and submitted that after the ruling dated July 8, 2021 was delivered, the Appellant stopped making contributions to the minors including paying school fees and that efforts to have the execution undertaken has been frustrated.
17. The Respondent cited section 4 of the *Children Act* and section 101 of the same Act on maintenance order and faulted the magistrate for varying the maintenance order before hearing the parties and for failing to make a finding regarding the accrued maintenance amounts. She faulted the magistrate for failing to hear them on April 26, 2022 and adjourning the matter to June 14, 2022 which effectively granted the Appellant stay of execution.
18. On his part, the only remedy available to the Respondent is to file an appeal from the orders of the lower court instead of seeking revision or supervisory orders; that the Respondent is accusing the lower court of bias yet she has not placed these accusations before the trial magistrate to recuse herself; that the Respondent has not applied for the record of the lower court to enable her to compile a record of appeal or revision/supervision and place the file before this court and therefore this court's jurisdiction has not been properly invoked.
19. The Appellant further submitted that this court can only grant the prayers sought in the application after hearing the substantive appeal; that the prayers sought are final in nature and cannot be granted at an interlocutory stage.



Determination

20. I have considered both applications and the supporting grounds in various affidavits. It is clear to me that the decision giving rise to both applications is the ruling of the lower court delivered on July 8, 2021. It is also the ruling being appealed against. I have also considered the submissions in support and in opposition to both applications and the authorities cited. I have read the memorandum of appeal that raises 7 grounds, all challenging the orders of the lower court contained in that ruling.
21. This is a matter concerning children. None of the orders have been made for the benefit of the Respondent. The law, from the *Constitution* and other provisions including international conventions signed by Kenya, are vocal on the rights of children.
22. Article 53 spells out the rights of a child. Article 53(1) (c) recognizes the right to basic nutrition, shelter and health and 53 (1) (e) recognizes right to parental care and protection which includes equal responsibility of the mother and the father to provide for the child whether they are married to each other or not. Sub-article 2 Article 53 provides that “A child’s best interests are of paramount importance in every matter concerning the child.
23. The *Children Act*, 2022 No 29 of 2022 which was assented to on July 6, 2022 and came into effect on July 26, 2022, on the date I was writing this Ruling provides, under section 8 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;
 - (b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.
 - (2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—
 - (a) safeguard and promote the rights and welfare of the child;
 - (b) conserve and promote the welfare of the child; and
 - (c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.
24. Similar provisions are found in section 4 (2) of the *Children Act*, No 8 of 2001.
25. Paragraph 10 of the Best Interest Considerations of a Child set out in the First Schedule of *Children Act* No 29 of 2022 provides that “The capacity of each parent and/or guardian(s) to cooperate or to learn to cooperate in child care.” This is one of the considerations of the best interest of the child.
26. Turning to the two applications under consideration, it seems to me that each party, Appellant as father and Respondent as mother of the minors in this matter need to learn something about the Best Interest



- Consideration under paragraph 10 cited above – their capacity to cooperate or to learn to cooperate in child care.
27. Stay of execution pending an appeal is provided for under Order 42 (6) (2) of the *Civil Procedure Rules* as follows:
- (2) 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.
28. For substantial loss, the Appellant cites, inter alia, likelihood of facing civil jail in the event that he is unable to pay the amount ordered and ruining his chances of formal employment in the future. He told the court that for payment of security for costs he is willing to abide by any conditions set by the court. Although he claims to have paid school fees, the Respondent stated that he has not done so. Secondly, it is claimed that he has not paid maintenance.
29. I have not seen any evidence that the Appellant obeyed court’s orders to pay maintenance. The fact that he is before this court seeking stay of execution means that he is contesting the maintenance orders.
30. On the other hand, the Respondent seems unhappy with the lower court and has moved this court to revise or supervise the lower court. As I have stated, all these issues, raised by both applications, form the basis of the Appeal as can be seen from the Memorandum of Appeal. In one of the authorities cited by both parties, *Bhutt v Bhutt*, it is clear to me that in determining stay of execution applications in a case involving children, especially if that stay sought has the impact of affecting maintenance or any other welfare related issue, courts must act with caution because by granting that order, the court might be aiding a party to disregard the principle of the best interest of the child.
31. I agree with the decision in *Bhutt v Bhutt* that “In determining an application for stay of execution involving children, the general principle for the grant of stay of execution, Order 42 Rule 6 of the *Civil Procedure Rules*, must be complimented by an overriding consideration of the best interest of the child in accordance with Article 53 (2) of the *Constitution*.” A case involving children like this one cannot be treated like any other civil matter where parties are adversarial. In fact, the parties, who are normally parents or guardians, should exhibit the spirit of the *Constitution* and the law, considering the best interest of the child, as they argue other matters. Any parent who seeks to be excused from performing his parental duty towards his/her children can only be against the letter and spirit of the *Constitution*.
32. After careful consideration of this matter, specifically both applications, it is my view that parties pursue the determination of the main appeal. In canvassing the main appeal, parties are able to present their case and enable this court make substantive directions/orders that serves the best interest of the child. Nothing was stopping the Respondent from cross petitioning for appeal.
33. I decline to grant any of the two applications, the Notice of Motion dated July 30, 2021 and the Chamber Summons dated April 27, 2022 and instead grant the following orders:
- (i) That the Appellant shall, within 60 days, prepare, file and serve a Record of Appeal together with written submissions.
- (ii) Upon service the Respondent shall file and serve written submissions within 21 days.



- (iii) Submissions shall not exceed five (7) pages of Times New Roman, font size 12 with 1.5 spacing. Parties are at liberty to annex authorities to the submissions.
- (iv) This matter shall be mentioned on September 22, 2022 to confirm compliance and give further directions.
- (v) Each party shall bear own costs of the two applications.

34. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF JULY 2022.

S N MUTUKU

JUDGE

