



PWK v NMW (Civil Appeal E081 of 2021) [2022] KEHC 15219 (KLR) (2 August 2022) (Ruling)

Neutral citation: [2022] KEHC 15219 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E081 OF 2021
SN MUTUKU, J
AUGUST 2, 2022**

BETWEEN

PWK APPELLANT

AND

NMW RESPONDENT

RULING

The Application

1. PWK, the Appellant, has brought this application (Notice of Motion) dated December 17, 2021 under Order 22 Rule 22 (1), Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules, 2010*, Article 50 (1) of the *Constitution* of Kenya, 2010 and sections 63 (e), 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya and all other enabling provisions of the law seeking the following orders:
 - i. Spent.
 - ii. That temporary orders of stay of the enforcement, execution and/or implementation of the part of the ruling dated November 24, 2021 made in Kajiado Children’s Case No 8 of 2018 ordering the attachment of the Appellant’s salary be and are hereby issued pending the inter-partes hearing and determination of this application.
 - iii. That temporary orders of stay of the enforcement, execution and/or implementation of the part of the ruling dated November 24, 2021 made in Kajiado Children’s Case No 8 of 2018 ordering the attachment of the Appellant’s salary be and are hereby issued pending the hearing and determination of this appeal.
 - iv. That costs of this application be borne by the Respondent.
2. The grounds in support of this application are found on the face of it and in the Supporting Affidavit of the Appellant sworn on December 17, 2021 to the effect that the subordinate court delivered its ruling on November 24, 2021 in which it dismissed the Respondent’s application for execution of the



judgment dated December 9, 2020 and allowed the Appellant's application dated October 21, 2021 for the review of the said judgment; that the court also ordered for attachment of the Appellant's salary of Kshs 12,000, which order has aggrieved the Appellant necessitating the filing of the instant appeal.

3. He stated that he possesses good and arguable grounds of appeal based on the fact that the attachment order was made before issuing a notice to show cause warning the Appellant of the imminent intended attachment of his salary and that he was not afforded an opportunity to respond to such a notice; that he will suffer substantial loss if the orders sought are not granted on account of the fact that he will in each month be subjected to the unlawful attachment and retention of nearly half of his net salary until the determination of this application and the appeal and that if the orders sought are not granted the appeal will be rendered nugatory.
4. He has stated that he is ready and willing to provide security of the appeal as the court may deem fit and that he filed this application without undue delay.
5. The Applicant deposed that his salary was subjected to attachment in the month of February 2022 and therefore unless the orders he is seeking in this application are granted he will be prejudiced.
6. In opposition to that application, the Respondent has filed a Replying Affidavit sworn on May 26, 2022, in which she has deposed that the Application is frivolous, vexatious and an abuse of the court process and ought to be dismissed with costs and that the Applicant has failed to demonstrate sufficient cause to justify the exercise of this court's discretion in granting him the orders of stay.
7. The Respondent has, in her Replying Affidavit, narrated the chronology of events leading to the Ruling delivered on November 24, 2021 which forms the basis of this Appeal and the application under considerations. The Respondent has deposed that as at July 2022, the outstanding amount has accumulated to Kshs 336,000 as calculated in paragraph 19 of the Replying Affidavit.
8. The Respondent deposed that stay orders should not be granted in this matter for reasons that the orders would have the effect of staying maintenance of the minors thereby prejudicing them; that the lower court exercised its discretion in attaching the Applicant's salary rightfully; that an order of stay is an equitable remedy which does not favour the Applicant whose conduct has been inequitable by failing to pay accumulated maintenance.
9. The Applicant filed a Supplementary Affidavit in which he deposed that it is misleading to claim that he is in arrears of Kshs 336,000 because his salary has been attached since February 2022; that he has largely complied with maintenance order; that the Respondent has failed to demonstrate that she is capable of refunding the attached amounts should the orders of stay not be granted and the appeal succeeds.

Oral submissions

10. Parties made oral submissions through their respective counsel in virtual proceedings conducted on July 7, 2022. Mr Gikonyo for the Applicant submitted that the attachment order in the Ruling delivered on November 24, 2021 is the only order being challenged in this application; that the reasons for challenging that order is because it was not preceded by a Notice to Show Cause and therefore the attachment is irregular and ought not to be enforced.
11. Mr Gikonyo argued four issues. He submitted that the Applicant will suffer substantial loss if stay orders are not granted; that the attached amount will continue to compound each month during the tenure of the appeal; that the Applicant is apprehensive that in the event that the appeal succeeds, the Respondent, who is the recipient of the money, will not be able to refund it as she is a person of meagre



- means; that this will result in substantial loss and therefore to safeguard the substratum of the appeal, stay should be granted.
12. On the issue of security for costs, counsel submitted that the Applicant is willing to provide security for the appeal. He cited *Focin Motorcycle Co Limited v Ann Wambui Wangui & another [2018] eKLR* to support his submissions.
 13. On the issue of unreasonable delay in filing the application he submitted that the application was filed only 21 days after the ruling and therefore there was no delay.
 14. He submitted that the appeal is arguable as shown in the Memorandum of Appeal dated December 15, 2021. He submitted that the reliefs sought are discretionary but that discretion should be exercised in a manner that does not prevent the appeal or cause it to become nugatory. Counsel urged the court to consider that the amount of maintenance should not be compelled through an irregular order made in contravention of the law.
 15. It was submitted that the Applicant has satisfied the conditions for granting stay pending appeal. He told the court that prayer 2 of the Application has been overtaken by events but prayer 3 ought to be allowed to prevent prejudice.
 16. Mr Botany for the Respondent submitted that a Notice to Show Cause was presented in court following the Applicant's failure to pay maintenance; that in the ruling delivered on November 24, 2021, the lower court considered the best interest of the child and that the Applicant is applying Order 22 of *Civil Procedure* strictly; that the Respondent is looking at the best interest of the child.
 17. Counsel submitted that the Applicant has never paid a single payment of Kshs 20,000 even before the amount was reduced to Kshs 12,000 and is in arrears; that failure to remit the money is prejudicial to the children; that the Applicant has attached a pay slip showing deductions for loans and SACCO contributions and has not explained what the loans are for; that the Applicant has not obeyed court orders to provide for the children and therefore he does not deserve the orders he is seeking.
 18. Counsel further submitted that the Respondent is not the recipient or beneficiary of the money but the children; that the fact that the marriage between the Applicant and the Respondent does not exist does not prevent maintenance of the children.

Determination

19. I have read the record of the lower court, specifically the Ruling dated November 24, 2021. This is the Ruling that gave rise to the issues being canvassed in this instant Application. In that Ruling, the learned Magistrate was dealing with two applications: there was an application by the Respondent herein seeking to have the Applicant committed to civil jail for failure to comply with maintenance orders of the that court. There was the second application by the Applicant for review of decretal amount of Kshs 20,000 downwards.
20. Both applications were determined to the effect that the Applicant's application was allowed by reviewing the maintenance amount downwards to Kshs 12,000. The Respondent's application was resolved by attaching his salary to recover the maintenance money instead of committing him to civil jail. In addressing the application to commit the Applicant to civil jail, which is a notice to show cause why he should not be committed to civil jail, the lower court addressed itself on the merits and demerits of committing the Applicant to civil jail against the best interest of the child in the circumstances. The trial court found it fit to attach salary instead of committal to civil jail.



21. Central to this application is the argument by the Applicant that the order for attachment of his salary is irregular and unlawful because he was not served with Notice to Show Cause why his salary should not be attached. I have considered this issue. I have noted that the Applicant was accorded an opportunity to argue his case in response to the Respondent's application which was a notice to show cause why he should not be committed to civil jail.
22. The trial court invoked the discretion and instead of jailing him she attached his salary. To my mind it is not correct to state that he was not accorded an opportunity to show cause. The order the trial court was dealing with was in respect to maintenance of children. It is not maintenance of the Respondent. The monies to be paid are for the benefit of the children and not for the benefit of the Respondent. It cannot be argued that the Respondent will not be able to refund the money should the appeal succeed.
23. I wish to point out that the authorities relied on by the Applicant do not assist him because they do not deal with issues of maintenance of children. I have considered authorities touching on maintenance of children and the reason of the courts is different from that found in other cases not involving maintenance of children.
24. In ZMO v EIM [2013] eKLR and MN v PAS [2015] eKLR, the learned judges were of the view that "it is in very rare cases that courts grant stay of maintenance orders in cases involving minor children, where the duty to maintain a child is imposed on a parent by statute, as it is not in the best interests of the child to suspend a maintenance order particularly where parentage is not in dispute and that an expedited hearing of the main appeal might be a solution where there is a challenge on quantum of maintenance rather than staying the orders of the trial court pending appeal."
25. In Bhutt v Bhutt Mombasa HCCC No 8 of 2014 (OS), the court held similar view that "in determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution under Order 42 rule 6 of the Civil Procedure Rules, must be complemented by a an overriding consideration of the best interest of the child in accordance with Article 53 (2) of the Constitution".
26. Proceedings for stay of execution pending an intended appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules which stipulates that:
 1. "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 orders 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 1st 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.
27. The Applicant before the court must satisfy this court that: Substantial loss may result to him unless the order is made; that the application has been made without unreasonable delay; and that the applicant



has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

28. While this court finds that the application was filed without undue delay, it is clear to me that the Applicant has not provided security for the Appeal. He has also not shown that he will suffer substantial loss if stay is not granted. This being a maintenance matter, it is clear to me, going by the authorities cited above, that stay a maintenance order goes against the best interest of the child principle.
29. Secondly, the Applicant has not provided evidence that he has complied with the orders of the lower court. The Respondent has submitted that Kshs 336,000 is outstanding. The Applicant was required to provide evidence that he is not in arrears. In my view, anyone coming to the court to seek orders from the court must demonstrate that he/she deserves those orders first by obeying any orders issued against them.
30. To my mind therefore, the Applicant has failed to demonstrate that he will suffer substantial loss by paying maintenance for his children when the law places that duty on his to maintain them. He ought to have paid maintenance even as he seeks to be heard on any issue he was uncomfortable with.
31. The Applicant is not deserving of the orders he is seeking. He has failed to demonstrate substantial loss on his part. I am unable to fault the learned trial magistrate for exercising her discretion in attaching the Applicant's salary to satisfy the decree instead of committing him to civil jail.
32. This application is not merited and must fail. It is hereby dismissed with costs to the Respondent.
33. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF AUGUST, 2022.

S N MUTUKU

JUDGE

