



**EGK v LN (Family Appeal E101 of 2021)
[2022] KEHC 13360 (KLR) (Family) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13360 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

FAMILY APPEAL E101 OF 2021

MA ODERO, J

SEPTEMBER 30, 2022

BETWEEN

EGK APPLICANT

AND

LN RESPONDENT

RULING

1. Before this court for determination is the notice of motion application dated February 10, 2022 by which the applicant EGK seeks the following orders:-

- ' 1. Spent.
2. Spent
3. That the honourable court be pleased grant partial order of stay of execution of the judgment and the resultant decree in terms of payment of maintenance, to wit 50% payment of respondent's rent and 50% payment of respondents share of food expenses pending the hearing and determination of the applicants appeal at the High Court.
4. That the alternative, the honourable court be pleased to grant an order for status quo ante August 27, 2021 pending the hearing and determination of this application, that is, the applicant to continue providing school fees, cater for the minor's medical expenses clothing and remit Kshs 20,000/- per month as maintenance.
5. That the alternative, the honorable court be pleased to grant an order for status quo ante August 27, 2021 pending the hearing and determination of the



applicant's intended appeal that is, the applicant to continue providing school fees, cater for the minor's medical expenses, clothing and remit Kshs 20,000/- per month as maintenance.

6. That the costs of this application abide in the intended appeal.'
2. The application was premised upon order 42 rule 6, order 51 of the *Civil Procedure Rules 2010*, sections 1A, 1B, and 3A of the *Civil Procedure Act* and all enabling provisions of the law was supported by the affidavit of even date sworn by the applicant.
3. The respondent LN filed grounds of opposition dated March 10, 2022. The matter was canvassed by way of written submissions. The applicant filed the written submissions dated May 25, 2022 whilst the respondent filed upon her written submissions dated June 7, 2022.

Background

4. This appeal and application emanate from the judgment delivered on August 27, 2021 by Hon F Terer resident magistrate in Nairobi Children Case No Exxx of 2021: LN – vs EGK. In that judgment the learned trial magistrate made the following orders.
 - ' 1. That the legal custody of the minors BNNG and MG shall jointly vest in the plaintiff and the defendant;
 2. That the plaintiff shall have actual custody, care and control of the said minors;
 3. That the defendant is hereby granted access on the following terms:
 - a) During school days on alternate weekends from Saturday 9.00 am to Sunday 5.00 pm.
 - b) During school holidays on a ratio of 50:50;
 - c) During special holidays like Easter, Christmas and New Year on alternating basis;
 - d) At school subject to school rules and regulations;
3. That parental responsibility between the parties is apportioned as follows:-

Plaintiff

- a. 50% of rent – Kshs 30,000.00
- b. 50% of Food – 25,000,000.00
- c. Utilities (water and electricity; and
- d. House help

Defendant

- a. School fees and school related expenses
- b. Months contribution towards upkeep at the rate of Kshs 25,000; payable on or before 10th day of every month effective September 10, 2021.
- c. 50% of rent 30,000.00



- d. Medical
4. That each party to bear his/her own costs.'
5. Following delivery of the judgment in which the applicant was ordered to pay 50% of the rent and to contribute 50% towards the costs for the minor's food, the applicant filed in the children court the application dated September 16, 2022, seeking a partial stay of the judgment.
6. On January 28, 2022, the trial magistrate dismissed the application for stay. The appellant then filed the memorandum of appeal dated September 15, 2021. Contemporaneously with said memorandum of appeal, the applicant filed this present application seeking a partial stay of the judgment of the children's court pending the hearing and determination of his appeal.
7. The applicant is aggrieved by the orders requiring him to pay 50% of the respondents rent and to contribute 50% towards the food expenses for the minors. He submits that the trial court did not properly address the issue of stay.
8. That in coming to his decision the trial court did not appreciate the fact that the applicant is already fully meeting the costs for the minors medical and educational expenses amounting to approximately Kshs 200,000. That if the stay prayed for is not granted the applicant stands to suffer substantial loss. The applicant prays that the court grant an order for partial stay of execution of the judgment delivered on August 27, 2021 and make an order for status quo ante that date allowing the applicant to continue remitting a sum of Kshs 20,000 monthly as maintenance.
9. The application was opposed by the respondent who submitted that the applicant has failed to comply with the orders of the lower court and therefore does not deserve audience before the High Court as he is in active contempt of court orders.
10. The respondent submits that the applicant has the financial capacity to comply with the orders of maintenance made by the lower court. That a stay would not be in the best interest of the minors as the minors would starve if the maintenance was stayed. She urges that this court dismiss the present application with costs.

Analysis and determination

11. I have considered the application before this court, the grounds of opposition filed in reply thereto, the written submissions filed by both parties. The applicant is seeking a partial stay of the judgment delivered by the trial court on August 27, 2021. He prays that the court order that he pay Kshs 20,000 monthly towards the maintenance of the minors which was the position ante August 27, 2021.
12. Order 42 rule 6(2) of the Civil Procedure Rules 2010 provide for the conditions to be met in considering an application for stay of execution. The court must satisfy itself that-
 - (a) The application has been brought without undue delay.
 - (b) The applicant stands to suffer substantial loss if the stay is not granted.
 - (c) The applicant has provided security for the due performance of the decree.
13. In this case the judgment in issue was delivered on August 27, 2021. The present application was filed on February 10, 2022, six (6) months after delivery of said judgment. The application therefore cannot be said to have been filed without unreasonable delay. If the applicant was aggrieved why did he not approach court sooner.



14. The impugned orders were made in relation to the maintenance and upkeep of a minors. It is trite law that in matters concerning the welfare of children courts are required to give priority to the best of the child.
15. The Constitution of Kenya 2010 provides at article 53 (2) that:
 - (2) A child's best interests are of paramount importance in every matter concerning the child.'
16. Likewise Children Act at section 4(2) provides as follows:-
 - ' In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. (own emphasis)
17. In the case of Bhutt vs Bhutt – Mombasa HCCC No 8 of 2014, the court held as follows:-
 - ' In determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution order 42 rule 6 of the Civil Procedure Rules, must be complemented by overriding consideration of the best interest of the child in accordance with 'article 53(2) of the Constitution.' (Own emphasis)
18. The parties herein are the biological parents of the minors in question. Actual custody of the minors was granted to the respondent (mother) with the applicant being allowed regular access to the minors. The trial court additionally made orders regarding maintenance of the minors through payment of rent and provision of the minors food.
19. The respondent has alleged that the applicant has failed to comply with the orders made by the trial court and is therefore in active contempt of court and does not deserve a hearing before this court. The applicant has not denied the allegation that he has failed to comply with the orders made by the trial court.
20. The applicant cannot come to court seeking a stay of orders, which he has in any event disobeyed. It is trite that courts do not make orders in vain. A person to whom a court order is directed is obliged to obey said order however unpalatable it may be, unless or until the same is reviewed and/or set aside. The trial court heard from both parties before delivering the judgment of August 27, 2021.
21. In the case of Hadkinson – Hadkinson [1952] ALL ER it was held:-
 - ' It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.'
22. Nearer home, in the case of Econet Wireless Kenya Ltd – vs – Minister For Information Of Kenya & Another [2005] eKLR, the court relying on the decision of the Court of Appeal in Gillab Chand Papatlal Shah & another – vs - Civil Application No 39 of 1990 stated that:-
 - ' It is essential for the maintenance of the rule of Law and order that the authority and dignity of our courts are upheld at all time. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibilities to deal firmly with proved contemnors.'



23. Finally, on the point in [*Teachers Service Commission – vs – Kenya Union Of Teachers & 2 Others \[2013\] eKLR*](#) the court stated as follows:-

' It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed.'

'A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this court will not be the one to open that door. It one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.'

24. I am in agreement with the respondent that having disobeyed the orders made by the trial court, the applicant does not merit the exercise of this courts discretion in his favour. Moreover, it is pertinent that the orders made relate to the welfare of minors. It cannot be in the interests of the minors to have orders relating to provision of their accommodation and food stayed.
25. It is trite that he who comes to equity must come with clean hands. It is duplicitous of the applicant to approach this court seeking to stay orders, which he has in any event disobeyed.
26. In the case of [*MN – vs – TAN & another \[2015\] eKLR*](#) a case which is on all fours with the present case the court held as follows:-

'A valid court order has to be obeyed or complied with regardless of how aggrieved a party is about it. The order has the force of law. It is not a mere wish or proposition. Disobedience or non-compliance with it attracts severe consequences. It would appear to me that the appellant believes that the orders of July 30, 2013 are not valid, and has explained why he has chosen to disregard or disobey them. Yet he is bound to obey the orders for as long as they are still in force. He has no choice, he cannot decide when and how to obey or comply with them.

The appellant has applied to the court for a discretionary relief, yet he is not ready to obey the orders that he is seeking relief against it. He has therefore come to court with unclean hands. The court cannot exercise discretion in favour of such a litigant who has no respect for the rule of law” (own emphasis).

27. The applicant cannot approach this court seeking to stay orders which he has not fully obeyed. That amounts to an abuse of court process.
28. I find no valid grounds to stay the orders made on August 27, 2021. The welfare of the children is paramount consideration and cannot be stayed, as this would be detrimental to the welfare of the said children.
29. I am fortified in this finding by the decision of my learned brother Hon Justice William Musyoka who is in the case of [*ZM v EIM \[2013\] eKLR*](#) held as follow:-

' As a matter of principle, grant of stay of execution of maintenance orders in children's cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about it. Suspension of a maintenance order is not in the best interests of the child, particularly in



cases such as this one, where paternity is not in dispute. To my mind once a maintenance order is made where parentage is undisputed it should not be suspended pending appeal, where the appeal is on the quantum payable. The solution ideally lies in expediting the disposal of the appeal and staying the matter before the children's court to wait the outcome of the appeal. Tinkering with the quantum at this stage would amount to determining the appeal before arguments are heard from both sides on the merits of the same'. (Own emphasis)

30. All in all I find no merit in this application for stay of execution. The notice of motion dated February 10, 2022 is dismissed in its entirety. For avoidance of doubt the orders of August 27, 2021 made by the Nairobi Children's Court in Case No Exxx OF 2021 remain valid and enforceable. This being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 30TH DAY OF SEPTEMBER 2022.

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MAUREEN A ODERO

JUDGE

