



REPUBLIC OF KENYA



**KNH v CGO (Civil Suit 6 of 2022) [2022] KEHC 13326 (KLR)  
(Family) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13326 (KLR)

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

**FAMILY  
CIVIL SUIT 6 OF 2022  
MA ODERO, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**KNH ..... APPELLANT**

**AND**

**CGO ..... RESPONDENT**

**RULING**

1. Before this court for determination is the Notice of Motion dated April 12, 2022 by which the appellant/applicant KNH seeks the following orders:-
  - “1. Spent
  2. Spent
  3. Pending the hearing and determination of the Appeal herein, order 5 of the Judgment of Honourable RO Mbogo Magistrate dated April 1, 2022 in the Children’s Court at Nairobi in Childrens Case No MCCC/E824/2021 be stayed
  4. The respondent be restrained from demanding that the appellant complies with the order.
  5. The costs of this applicant be awarded to the appellant/applicant.”
2. The application which was premised upon section 3A, 3B of the *Civil Procedure Act*, order 42 Rule 6 (6) of the *Civil Procedure Rules*, Order 58 rule 3 of the *Civil Procedure* and all other enabling provisions of the law was supported by the affidavit of even date sworn by the applicant.
3. The respondent CGO opposed the application through the Grounds of Opposition dated May 11, 2022. The matter was canvassed by way of written submissions. The Applicant filed the written



submissions dated June 20, 2022 whilst the respondent relied upon her written submissions also dated June 20, 2022.

## Background

4. The genesis of this application is the judgment delivered in Nairobi Children's Case No E824 of 2021 on April 1, 2022. In that judgment, Hon RO Mbogo Resident Magistrate whilst awarding custody of the two subject minors to their mother (the plaintiff) and made the following orders:-
  - “ 1. Parties shall jointly share legal custody of the minors.
  2. The plaintiff shall have actual custody, care and control of the minors.
  3. The defendant shall have reasonable and unlimited access. Parties to agree on the modalities.
  4. The plaintiff will cater for the clothing and shelter for the children by virtue of her having custody.
  5. The defendant shall pay school fees and related expenses at Kshs 30,000/- per child per term. The Plaintiff to top up the balance.
  6. Both parties shall maintain their medical cover for the children to use in case of sickness.
  7. The defendant shall pay Kshs 8,000/- for food and utilities. The same must be paid by the 5<sup>th</sup> of every months beginning April, 2022.
  8. Each party shall bear own costs.
  9. Each party is at liberty to apply.”
5. Being aggrieved by the decision of the trial court the applicant filed the Memorandum of Appeal dated April 12, 2022. Contemporaneously with the said Memorandum of Appeal, the applicant filed this present application seeking a stay of order No 5 requiring him to cater for the school fees of the minor children.
6. The applicant submitted that the order requiring him to pay school fees and related expenses at Kshs 30,000 was oppressive considering that he only earns a stipend of Kshs 14,250 and that he also has to cater for his own rent and upkeep. That if the said order is not stayed the Applicant is liable to be found in contempt of court and will have to face the attendant consequences.
7. As stated earlier the application was opposed. The respondent submitted that the suspension of the orders issued by the trial court would not serve the best interests of the minors. That the application was vexatious and has been filed only for purposes of annoyance.

## Analysis and determination

8. I have carefully considered the applicant before this court, the Grounds of Opposition filed by the Respondent as well as the written submissions filed by both parties.
9. 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.
10. In this case the judgment in issue was delivered on April 1, 2022. The present application was filed on April 12, 2022, barely two (2) weeks after delivery of said judgment. Accordingly, I find that the application was filed in timely manner.
  11. The impugned orders were made in relation to the maintenance, education and upkeep of the minors. It is trite law that in matters concerning the welfare of children courts are required to give priority to the best interest of the child.
  12. 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.”
  13. 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)
  14. In the case of *Bhutt v 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)
  15. The Applicant submits that the court in coming to its decision failed to take into account the fact that he was only earning a stipend of Kshs 14,250/-. He insists that he is financially incapable of meeting the maintenance orders made by the court.
  16. I have carefully perused the judgment delivered in the Children Court. I find that the learned trial magistrate did put into consideration the evidence adduced by both parties and took into account the earning capacity of both parents as well as the financial needs of the minors. It came out in evidence that the Applicant is a published author who undoubtedly makes an earning from the sale of his literary works.
  17. Article 53(e) of the *Constitution of Kenya 2010* provides as follows:-
    - (1) Every child has the right—
      - (a) .....
      - (b) .....
      - (c) .....
      - (d) .....
      - (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not. (Own Emphasis)



18. Section 30 of the [Children Act 2022](#) deals with the question of Parental Responsibility. Section 32 (1) of the same [Act](#) provides for equal parental responsibility and provides that –

“ 32. (1) Subject to the provisions of this Act, the parents of a child shall have parental responsibility over the child on an equal basis, and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility whether or not the child is born within or outside wedlock.” (own emphasis)

19. The Applicant has not denied paternity, therefore under the law he has an equal obligation to provide for the maintenance, education and upkeep of his own children.

20. The Respondent was awarded actual custody for the minors. She is providing for their accommodation, food and clothing. Additionally the Respondent was ordered by the court to top up the cost of the school fees for the minors. Therefore as things now stand the Respondent appears to be bearing the greater burden for the maintenance of the minors.

21. The Applicant as the father must also contribute towards the maintenance and education of the minors. Who does the Applicant expect to educate his children for him? The Applicant cannot shift the entire burden of raising the children to the mother alone.

22. In my view to stay the orders as prayed will negatively prejudice the minors as their right to education is likely to be adversely affected.

23. I find no merit in this application for stay. The education of the minors cannot be stayed as this will be detrimental to their best interests. I am fortified in this finding by the decision of my learned brother Hon Justice William Musyoka who in the case of *SM- v- EIM* [2013] eKLR held as follows:-

“ 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. 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)

23. All in all I find no merit in this application for stay of execution. The Notice of Motion dated April 12, 2022 is dismissed in its entirety. For avoidance of doubt the orders of April 1, 2022 made by the Children's Court in Case No E824 of 2021 remain valid and enforceable. This being a family matter I make no orders on costs.

**DATED IN NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

.....

**MAUREEN A. ODERO**

**JUDGE**

