



REPUBLIC OF KENYA



KENYA LAW
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**Mwenda v Geoffrey (Miscellaneous Application E10 of 2022)
[2022] KEHC 15761 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15761 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS APPLICATION E10 OF 2022
RB NGETICH, J
NOVEMBER 24, 2022**

BETWEEN

MWEMA MASAI MWENDA APPLICANT

AND

IRENE WAMBUI GEOFFREY RESPONDENT

RULING

1. This is a ruling on two applications dated January 27, 2022 and on February 2, 2022 by the applicant herein Mwema Masai Mwenda. The application dated 27th January 2022 seeks the following orders:
 - a. Spent
 - b. Pending the hearing and determination of the intended appeal, this Honourable Court does stay the execution of the judgment of the orders of Hon OM Wanyaga dated April 1, 2021 ordered the defendant/applicant to remit a sum of Kshs 7,000 as maintenance.
 - c. Pending the hearing and determination of the application this honourable court be pleased to order for stay of execution of the orders of Hon OM Wanyaga dated April 1, 2021 ordered the Defendant/Applicant to remit a sum of Ksh 7,000 as maintenance.
 - d. The court to order a stay of proceedings in Thika Children's Case No 33 of 2020 forthwith.
 - e. The applicant be granted leave to appeal out of time.
 - f. Upon prayer (e) being allowed the annexed Memorandum of Appeal herewith be deemed to be duly filed upon payments of requisite fees.
 - g. Costs are provided for.
2. The application is premised on the grounds that in Thika Children's Case No 3 of 2020, the applicant was condemned to pay monthly maintenance of Ksh 7,000. The applicant averred that he is a man



- earning a meagre salary of Kshs 15,000 and has another family and the Respondent has taken out a notice to show cause for Kshs 73,000.
3. He averred that on January 1, 2018, the respondent invaded the matrimonial home and sold goods worth Kshs 500,000.; further that the respondent has exposed him to psychological torture and financial loss. He is apprehensive that the respondent will cause financial losses and damages and wishes to appeal the decision of the trial court and seek stay of execution is granted pending the intended appeal in the interest of justice.
 4. The application is supported by the annexed affidavit sworn by Mwema Masai Mwenda. He averred that this court is vested with the duty to vary or modify or discharge orders made for maintenance and averred that due to his nature of work and his family, he is able and willing to remit kshs 1,500 monthly.
 5. In response to the application dated February 28, 2022, the respondent Irene Wambui Geoffrey filed a replying affidavit sworn on even date. She averred that on 30th September 2020, the trial court ordered the applicant to pay monthly maintenance of Kshs 11,000 to the respondent and subsequently, the orders were reviewed and the applicant ordered to pay monthly maintenance of kshs 7,000 but the applicant has disobeyed the trial court orders. The applicant is in arrears of Kshs 80,000 for the period between April 2021 and February 2022 and stated that the current application is an abuse of the court process, intended to shield the applicant from the execution of the notice to show cause that has been issued.
 6. The respondent further averred that the applicant has the financial muscle of paying the monthly maintenance which is evidenced by his hiring the services of an advocate to the detriment of his children. She urged the court to disallow the application with costs.
 7. The application dated 18th march, 2022 is spent. It sought to discharge warrants of arrest or order release of applicant pending this application.
 8. The second application for determination was filed on 2nd February, 2022. It seeks a list of prayers:-
 - i. Spent.
 - ii. That, pending hearing and determination of the intended Appeal this Honourable Court be pleased to stay execution of Judgment of the orders of Hon OM Wanyanga dated April 1, 2021 ordering the defendant/applicant to be remitting a sum of Ksh 7,000 as maintenance.
 - iii. Spent.
 - iv. That, this Honourable Court be pleased to order stay of proceedings in Thika Children's Case No 33 of 2020 forthwith.
 - v. That, the applicant be granted leave to file an Appeal out of time.
 - vi. That, upon prayer (v) being allowed the annexed Memorandum of Appeal herewith be deemed to be duly filed upon payment of requisite fees.
 - vii. That, costs of this application be provided for.
 9. Directions were taken on May 16, 2022 to canvass both applications by way of written submissions. At the time of writing this ruling submissions were filed by respondent only.



Respondent's Submissions

10. The respondent filed submissions on June 15, 2022 and submitted that she has been in the care, control and custody of the minors since they were born; that the trial court suit was filed on 6th July 2020 and the applicant duly served but failed to enter an appearance and on 3rd October 2020 the applicant was thereafter served with the decree of the court.
11. The respondent submitted that despite the court reviewing its orders, the applicant failed to comply by remitting the monthly maintenance and the applicant has been avoiding his parental obligations.
12. The respondent further submitted that it is not fair or reasonable for the applicant to plead to remove a warrant rightly issued by the trial court and argue that parental responsibility is a shared responsibility that the applicant should not shy away from and submitted that the children are of tender age and in need of parental care. She urged this court to compel the Applicant to clear the pending arrears immediately.

Analysis And Determination

13. I have considered grounds of the two applications, averments in the affidavits filed. I will first deal with the application dated 27th January 2022. The application is brought under order 42 rule 6(1) (2), 43 and order 51 rule 1 of the Civil Procedure Rules. Order 42 of the Civil Procedure Rules. Rule 6 (2) provide as follows:-

“6(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.”

14. The order being appealed was issued on April 1, 2021. It was reviewed downwards from monthly contribution of Kshs 11,000 to Kshs 7,000. The application for the stay of execution was filed on 2nd February 2022 about a year from the date of the said order. No explanation has been given for delay in filing the current application. He stated that he is not able to pay the monthly contribution of Kshs, 7,000 as he is not a man of means.
15. The respondent submitted that the applicant has failed to honour the trial court decree of remitting Kshs 7,000 monthly maintenance for the children and is in arrears amounting to Kshs 98,000. The arrears have seen the respondent proceed to seek warrant of arrest in execution of the decree and is of the view that the application is an abuse of the court process.
16. The respondent has pointed out the children are young and in need of care and protection from the parents. I do agree with the respondent that parental responsibility is a shared responsibility and thus both parents are obligated to contribute to their good upbringing and maintenance.
17. I am in agreement with Musyoka J in RWW vs. EKW Civil Appeal No. 13 of 2013 [2019] eKLR where he stated 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 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 for 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."

18. I note that the applicant had not complied with the order of the trial court to pay monthly maintenance of Kshs 7,000. The current application has not therefore been made in good faith. The Applicant approached the court with unclean hands.
19. From the foregoing I see no merit in the first application and decline to grant reliefs sought.

Leave to Appeal out of Time

20. Application filed on February 2, 2022 seek to appeal against ruling/decre issued on April 1, 2021. Time within which to file appeal is thirty (30) days from the date of the ruling. Section 79G of the [Civil Procedure Act](#) cap 21, provides as follows: -

"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

21. The applicant contends the orders were issued ex-parte and he was not aware of the orders issued and the court failed to consider he had a parallel responsibility. He has attached a draft memorandum of appeal in which he contends the impugned decision is prejudicial and against the appellant's financial capacity. I will however not ventilate the merits of the appeal at this stage.
22. In view of the fact that the applicant was not granted the opportunity to state his case before the trial court arrived at amount payable for children upkeep, I am inclined to allow the applicant prayer to file appeal out of time but on condition that he pays arrears of the upkeep amount ordered by the trial court and continue making monthly payments of Kshs 7,000 until hearing and determination of the intended appeal.

Final Orders:-

1. Applicant is allowed to file appeal out of time on condition that arrears of monthly upkeep at the time of this ruling is paid.
2. The arrears referred to in order (2) above to be paid within thirty (30) days from the date of this ruling.
3. Failure to comply with order 1 & 2 above, the leave to appeal out of time to stand discharged and if complied, the annexed memorandum of appeal to be deemed as duly filed upon payment of requisite fee.
4. Costs of this application to abide by the outcome of the appeal if filed.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU



THIS 24TH DAY OF NOVEMBER, 2022.

RACHEL NGETICH

JUDGE

In the Presence of:

Kinyua/Martin – Court Assistant

No appearance by Parties

For Applicant – Absent

For Respondent – Absent

