



REPUBLIC OF KENYA



KENYA LAW

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**CKM v EMM (Family Appeal HCFA/E026 of 2022)
[2022] KEHC 15887 (KLR) (Family) (18 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15887 (KLR)

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

FAMILY

FAMILY APPEAL HCFA/E026 OF 2022

MA ODERO, J

NOVEMBER 18, 2022

BETWEEN

CKM APPLICANT

AND

EMM RESPONDENT

RULING

1. Before this Court for determination is the Notice of Motion dated February 27, 2022 by which CKM the Appellant seeks the following orders:-
 - “(i) Spent.
 - (ii) Spent
 - (iii) Pending the hearing and determination of this Appeal the Honourable court be pleased to order a stay of execution of the Ruling and subsequent orders of February 25, 2022 in Children Case No 1239 of 2017 Nairobi and
 - (iv) Costs of the Application be provided for.”
2. The application which was premised upon section 1A, 1B, 3,3A and 63 (e) of the *Civil Procedure Act* and order 42 (6) (1) of the *Civil Procedure Rules 2010*, is supported by the Affidavit of even date sworn by the Applicant.
3. The Respondent EMM vehemently opposed the application for stay through his Replying Affidavit dated May 10, 2022. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated June 8, 2022 whilst the Respondent relied upon his written submissions dated July 28, 2022.



Background

4. The Appellant and the Respondent herein are the biological parents of the two (2) minors JBM born on February 3, 2012 and FMM born on July 19, 2015. The couple who were married in the year 2008 separated in the year 2017.
5. Following a consent entered into between the parties in the Nairobi Childrens Court it was agreed that legal custody of the two (2) minors be vested in the couple jointly whilst actual care and custody control was to vest in the Applicant (mother).
6. The Applicant avers that due to the Covid-19 Pandemic, she lost her job as a lecturer at the [Particulars withheld] University. The Applicant later secured a job in the Democratic Republic of Congo which necessitated her relocating to that Country with the children. She then filed in the lower court an application under certificate of urgency dated March 18, 2021 seeking authority to relocate with the two (2) minors to the DRC.
7. The Applicant states that due to reduced judicial operations arising from the Covid-19 Pandemic her application was not listed for hearing with expediency. That she had no option but to travel with the minors to the DRC.
8. On May 7, 2021 the trial court issued orders barring the Applicant from leaving the jurisdiction of the court with the two (2) minors. On May 10, 2021 having been notified that the Applicant had already left the Country with the minors, the court found that the Applicant was in contempt of court orders which finding was re-affirmed on July 5, 2021.
9. The Respondent then filed a chamber summons dated September 10, 2021 seeking the committal to civil jail of the Applicant for disobedience of court order directing her to produce the children in court. On September 29, 2021 Hon G.M. Gitonga Principal Magistrate issued international warrants of Arrest against the Applicant.
10. In allowing the Respondents application the court vide a Ruling delivered on February 25, 2022 made the following orders:-
 - i. That the defendant is guilty of disobedience of the orders made on September 27, 2019 by removing the minors out of jurisdiction of the court without the concurrence of the court;
 - ii. That as a result of such said contempt, the Defendant is committed to civil jail for a period of six (6) months;
 - iii. That pursuant to order (2) above, an international warrant of arrest is hereby issued against the Defendant, CKM for her to be brought to this court for purposes of being committed to civil jail.
 - iv. The said warrant of arrest to be enforced by the head of Interpol National Bureau-Kenya, the Inspector General of Police, the Directorate of immigration Service-Kenya, Ministry of Foreign Affairs, the Foreign Embassies, High Commissions and Consulates.”
11. The Applicant being aggrieved by the above orders filed the Memorandum of Appeal dated February 27, 2022. Contemporaneously with that Appeal the Applicant filed the present application seeking a stay of the orders made on February 25, 2022.



12. The Applicant pleaded that due to a change in circumstances regarding her employment situation and based on the delay in hearing and determination of her application dated March 18, 2021 seeking leave to travel to the DRC with the minors. She had no option but to travel with the minors to the DRC. The Applicant indicated that she had challenges in producing the children physically in court.
13. The Applicant prays that the orders made on February 25, 2022 be stayed pending the hearing and determination of her appeal. She states that if she is to be arrested her employment which is her only source of income will be terminated which will be detrimental to the welfare of the minors. The Applicant submits that she is a law abiding citizen who has always obeyed court orders and has always presented herself in court as and when required. The Applicant states that the trial court found her to be in contempt without first granting her an opportunity to be heard.
14. On his part, the Respondent averred that the Applicant was not deserving of audience from the court as her contempt still remained unpurged. He argued that the removal of the minors from the jurisdiction of the court interfered with his rights of access to the minors. That given that the court had awarded legal custody to both parents, the Respondent had an equal right to make decision concerning the minors.
15. The Respondent states that the Applicant is a business woman and thus had another source of livelihood, and states that she is not being candid on the reasons why she relocated to another Country.

Analysis and determination

16. I have carefully considered the application before this court, the Affidavit filed in reply as well as the written submissions filed by both parties. The court is mindful of the fact that at this stage the court ought not to make a determination on the impending appeal. The only issue at this stage is whether the application for stay is merited.
17. Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) provides for guiding principles that one must satisfy before the court can grant a stay of execution, it provides as follows:-

“No order for stay of execution shall be made under subrule (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.”
18. It is appreciated that stay of execution is a discretionary power however the court in setting out the guidelines for granting a stay, stated in the case of [Butt v Restriction Tribunal](#) [1979] eKLR as follows:-
 - “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.



3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements.”

19. In the case of *Loice Khachendi Onyango v Alex Inyangi & another* [2017] eKLR it was stated:-

“The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the Court should be guided by the three pre-requisites provided under Order 42 Rule 6 of the Civil Procedure Rules. Firstly, the Application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted; and thirdly 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.....”

20. The Applicant has applied for a stay of the ruling delivered by the Children Court on February 25, 2022. The impugned orders were made on February 25, 2022 and the current application for stay was filed on February 27, 2022. Therefore, I find that application having been filed barely two (2) days after the impugned order was made, was filed in a timeous manner.

21. It is pertinent to note that this is a matter which involves minors. The court is therefore obliged in reaching its decision to give priority to the best interest of the child. In every decision affecting children, their best interests are paramount. Article 53(2) of the *Constitution* provides:-

“A child’s best interest are of paramount importance in every matter concerning the child.”

22. Section 8(1) of the *Childrens Act* of 2022 provides:-

“(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.”

23. It goes without saying and cannot be gainsaid that courts do not make orders in vain. Court orders must be obeyed by the persons to whom they are directed. However, the interest of the minors will trump any other consideration in this matter. The two (2) children herein are both of tender years being aged ten (10) years and seven (7) years respectively. The Applicant has enrolled them in school in the DRC and they are probably now adjusting to life in their new environment. The Applicant is the custodial parent. To have the warrant of arrest executed will obviously result in massive upheaval in the lives of the minors. It cannot be in the best interests of the minors to have them shuttled from one country to the other.



24. The minors in my view deserve stability in their lives. For this reason, I am inclined to grant the stay orders prayed for. It would in my view better serve the interests of justice to expedite the hearing of the appeal and to obtain a final decision from this court.

25. The Applicant submits that she stands to suffer substantial loss if the order of stay is not granted.

26. In the case of *Century Oil Trading Company Ltd v Kenya Shell Limited* Nairobi HCMCA No 1561 of 2007 the court stated as follows: -

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that.....The court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the Appeal so that his Appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgment.”

27. In the case of *Silverstein v Chesoni* [2002] 1KLR 867 it was stated that:-

“The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by the preserving the status quo because such a loss would render the appeal nugatory.”

28. Undoubtedly if the warrant of arrest is executed, the Applicant stands to suffer a loss of her personal liberty. This in my view would render her appeal nugatory. Moreover, the arrest of the applicant will likely lead to a loss of employment. Regardless of whether or not the Applicant has other sources of income as alleged by the Respondent, loss of employment in the current economic worldwide decline in my view would definitely amount to a substantial loss.

29. Based therefore on the foregoing I made the following orders:-

- (1) A stay of execution be and is hereby issued of the Ruling delivered by the Children’s Court on February 25, 2022 and all subsequent orders pending the hearing and determination of the Appeal.
- (2) The Appeal is to be prepared and listed for hearing within sixty (60) days.
- (3) Since this application has been necessitated by the actions of the Applicant she is to meet the costs thereof .

DATED IN NAIROBI THIS 18TH DAY OF NOVEMBER, 2022.

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MAUREEN A. ODERO

JUDGE

