O v M (Civil Appeal E071 of 2024) [2025] KEHC 8872 (KLR) (14 February 2025) (Ruling)

Neutral citation: [2025] KEHC 8872 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CIVIL APPEAL E071 OF 2024

AN ONGERI, J

FEBRUARY 14, 2025

BETWEEN

JKO ..... APPELLANT

AND

PWM ..... RESPONDENT

RULING

1. The application coming for consideration in this Ruling is the one dated 24th December 2024 brought under Order 42 Rule 6, of the Civil Procedure Rules 2010, Sections 1A, 1B, 3 and 3A of the *Civil Procedure act*, cap 21 Laws of Kenya and all other enabling provisions of the law seeking the following orders:-

    i. That this application be certified urgent and be heard ex-parte in the first instance.

    ii. That there be a stay of execution of the court's ruling delivered on 9th December 2024 only on the aspect of payment of Kshs. 30,000/= by the applicant and any other consequential orders thereto pending the hearing and determination of this application inter partes.

    iii. That there be a stay of execution of the court's ruling delivered on 9th December 2024 only on the aspect of payment of Kshs. 30,000/= by the applicant and any other consequential orders thereto pending the hearing and determination of the appeal herein.

    iv. That the costs of this application be in the cause.

2. The application is supported by the Applicant's affidavit sworn on 24/12/2024 in which he stated that the trial court rendered its Ruling in Voi MCCHC No. E020 of 2024, P.W.M. vs J.K.O., on 9/12/2024, in respect of the Application dated 24/9/2024, substantially allowing the Respondent's claims.

3. The trial court in its impugned Ruling, issued interim orders directing the Applicant to remit Kshs. 15,000 per month for the children's food expenses and an additional Kshs. 15,000 per month for their home clothing needs, pending the final determination of the main suit.

4. He deponed that being dissatisfied and aggrieved by the said Ruling, he instituted an appeal against the same. However, implementation of the said interim orders would occasion him irreparable harm and financial detriment, particularly in the event his appeal succeeds, as the sums involved are erroneous and would hinder his ability to adequately provide for other essential needs of the children thus subjecting the best interests of the minors' at a jeopardy.

5. He deponed thatthe Respondent is a person of means, fully capable of equitably contributing financially to the upkeep and welfare of the minors, and as such, no significant prejudice would be occasioned to her should stay orders be granted. In any event, no prejudice will be occasioned to the minors'.

6. The application is based on the following grounds:-

   i. That on 9th December 2024 this Honorable Court delivered a Ruling and issued orders mandating the Applicant to remit a sum of Khss. 30,000/= monthly to cater for food and clothing expenses of the minors herein.

   ii. That further to the orders issues on 10th December 2024 the honourable trial court directed the Applicant to also cater for education fees and other related education expenses solely.

   iii. That the honourable trial court only directed the respondent to cater for water and electricity which is an inequitable way of sharing parental responsibilities.

   iv. That the Applicant being dissatisfied and aggrieved by the aforesaid ruling only on the aspect of payment of Kshs. 30,000/= has lodged an appeal against the impugned decision, evidenced by the annexed Memorandum of Appeal filed herewith.

   v. That the Applicant currently meets the minors' essential needs, including sustenance, under an initial arrangement which if reinstated would alleviate the undue financial strain imposed by the contested orders. The applicant is willing to continue providing for the minors' as initially was before the impugned orders were issued.

   vi. That it is imperative and equitable to grant a stay of execution of the said part of the Ruling pending the hearing and determination of the substantive appeal or further directions from this Honourable Court.

   vii. That the Applicant stands to suffer irreparable harm and substantial financial detriment should the orders sought herein be denied, as the appeal which raises triable and meritorious issues, risks being rendered nugatory.

   viii. That the appeal is prima facie arguable and demonstrates overwhelming prospects of success upon hearing and adjudication.

   ix. That no substantial prejudice will be occasioned to the Respondent if the orders sought herein are granted, as the status quo being, the payment of education and related expenses and normal sustenance as per the applicant's means, will remain pending determination of the appeal.

   x. That it is in the overriding interest of justice and fairness that this Honourable Court grants the orders sought to prevent undue hardship and uphold the Applicant's right to a fair appeal process.

7. The Respondent filed a Replying Affidavit opposing the application dated 6/1/2024 in which she stated that it is not true that the impugned ruling issued interim orders that the applicant to provide

Kshs. 15,000 for the children's home clothing per month pending determination of the suit. This application has therefore been brought in bad faith and is misleading in its entirety.

8. She deponed that when she moved to the trial court the three subjects had school fees arrears which were only cleared after the court directed the applicant to do so. the applicant is in a bid to disrupt the education of the minors and to defeat justice he moved secretly and ordered the transfer of FFO from [Particulars Withheld] Academy who is in grade 4 to [Particulars Withheld] Primary School and MF from [Particulars Withheld] who is in grade 8 to[Particulars Withheld] secondary school without consulting or seeking the respondent's consent.

9. The parties filed submissions as follows:- the applicant submitted that the ruling delivered on 19/12/2024 did not fairly apportion parental responsibility as required by *the Constitution* of Kenya and the Children's Act. While the best interests of the child remain paramount in all matters concerning their welfare, the equitable sharing of responsibilities between both parents is essential to ensure fairness. The orders issued placed an overwhelming financial burden on the Applicant while allocating disproportionately minimal responsibility to the Respondent.

10. The applicant argued that the trial court's apportionment disregards the constitutional mandate that both parents must equally contribute to the child's welfare. By placing the majority of the financial burden on one parent, the court effectively relieved the Respondent of her fair share of responsibility, creating an imbalance that is both unjust and contrary to the law. Parental responsibility must not be borne unequally, and neither parent should be unfairly burdened to the detriment of the other. The principle of share responsibility was emphasized in C.I.N =Versus=. J.N.N [20141 eKLR where the court held that both parents must actively contribute to the child's welfare and cannot shift the burden solely to one party.

11. The respondent alternatively submitted that the trial court heard the matter and issued orders in the best interest of the minors. The applicant herein has not demonstrated any difficulty he will endure if he meets the responsibilities bestowed upon him in the said orders. The respondent argued that the applicant has approached this court with bad faith because after the Interim orders were issued, he went on and initiated the process of transferring the minors without even consulting the respondent instead of complying with court orders.

12. The respondent further submitted that it would not be in the best interests of the children for this court to stay the interim maintenance orders of the trial court. The children will suffer and will lack all the basic needs and the Respondent will be forced to foot all the bills on her own. The respondent contended that the trial court was right to issue the said orders basing on the evidence which was presented before it by the Respondent which clearly showed that the Applicant was a man who needed to be pushed for him to even pay school fees for the subjects. The applicant through conduct has shown that he has no interest of the minors who are his children. The applicant does not deserve the orders he seeks and the thus the application herein should be dismissed.

13. The sole issue for determination in this ruling is whether the Applicant should be granted stay of execution pending appeal.

14. The governing provision for stay of execution pending appeal is Order 42 Rule 6 which states as follows:-

    Stay in case of appeal [Order 42, rule 6]

    (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 order set aside.

(2) 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.

15. The current case involves maintenance in respect of minor children and the grant of stay pending appeal is not in the best interest of the children.

16. In the case of ZM =Versus= EIM [2013] eKLR , Musyoka J, 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. 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".

17. Similarly, in the case of JMR =Versus= RNM [2022] eKLR Hon. Lady Justice M. Odero held as follows;

> " The question of whether or not the maintenance awarded is excessive is one which cannot be determined at this interim stage. That is a matter, which can only be determined upon a full hearing of the Appeal.
>
> The orders which the Applicant seeks to stay relate to the maintenance of the minors. It cannot be in the best interests of the minors to stay said orders. The Applicant has not denied paternity and as such, he together with the Children's mother has an obligation to provide for the needs of their children".

18. I find that paternity is not denied in the current case and granting stay pending appeal is not in the best interest of the minors, the subject of this appeal.

19. I direct that the appeal be expedited.

20. The application dated 24th December 2024 is accordingly dismissed.

21. Each party to bear its own costs of the application.

DATED, SIGNED AND DELIVERED THIS 14TH DAY OF FEBRUARY 2025 VIRTUALLY AT VOI.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Maina

Miss Wambura for the Applicant

Mr. Mwandotto for the Respondent