



STK v ENK (Civil Appeal E053 of 2024) [2025] KEHC 2236 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2236 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E053 OF 2024
MA ODERO, J
FEBRUARY 21, 2025**

BETWEEN

STK APPELLANT

AND

ENK RESPONDENT

RULING

1. Before this court for determination is the Notice of Motion dated 26th August 2024 by which the Applicant STK seeks the following orders
 1. Spent
 2. That this Honourable Court be pleased to order stay of execution of the Ruling and order delivered on 8th day of August 2024 by Hon. Edina Nyaboke Angima in Nyeri MCCHCC No. E004 of 2023 pending the hearing and final determination of the appeal.
 3. That cost of this application be provided for.
 4. That this court be pleased to make such further orders that it deems fit for purposes of upholding justice in the circumstances of this case.”
2. The application which was premised upon Article 159 (2) (d) of the *Constitution* Sections 1A, 1B, 3 and 63(e) of the *Civil Procedure Act*, Order 9 Rule 9, Order 42, Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law was supported by the Affidavit and Further Affidavit dated 23rd October 2024 sworn by the Applicant.
3. The Respondent ENK filed a Replying Affidavit dated 4th October 2024 opposing the application.
4. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 23rd October 2024, whilst the Respondent relied upon her written submissions dated 31st October 2024.



Background

5. The parties herein were engaged in Nyeri MCCC No. 004 of 2023. Vide a Ruling delivered on 8th August 2024 the learned trial Magistrate made the following orders:-
- “1. That Education and related expenses for the minors at the [particulars withheld] Academy be catered for by the Respondent herein.
 2. That Health expenses be catered for by the Respondent herein.
 3. That the Applicant will provide shelter and incidental utility bills for the minors being electricity and water bills.
 4. That both the Applicant and Respondent will cater for the food clothing of the minors herein.
 5. Considering the lifestyle that the minors have become accustomed to from the third term of the settlement agreement, both the Applicant and Respondent will provide modest outlays for the minors herein.
 6. The Respondent will continue taking the children out during holidays and will cater for their entertainment expenses twice a year.
 7. On the account of the shared responsibilities, the Respondent will send the Applicant Kshs. 50,000/- on or before the 5th day of every month to her provided Mpesa or bank account for record keeping purposes.
 8. I make no orders on costs as this is a Children matter.”
6. Being aggrieved by this decision the Applicant filed the Memorandum of Appeal dated 16th August 2024.
7. The Applicant also filed this application seeking to stay the orders made by the trial court, pending the hearing and determination of his appeal.

Analysis and Determination

8. I have carefully considered the application before this Court, the reply filed thereto as well as the written submissions filed by both parties.
1. 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.”



2. It is appreciated that grant of stay of execution is a discretionary power, and in setting out the guidelines for granting a stay, the court in the case of *Butt -vs- Restriction Tribunal* [1979] eKLR stated 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 principle in granting or refusing a stay is; if there 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. [own emphasis]
9. In this case the impugned ruling was delivered on 8th August 2024. This application for stay was filed on 24th August 2024 barely a fortnight after delivery of the ruling. In the circumstances I find that the application was filed in a timely manner.
10. In the ruling of 8th August 2024 the learned trial magistrate gave directions in respect of the maintenance of the minors. It is these orders that the Applicant now seeks to stay. The Applicant argues that he is not in a position financially to comply with the orders of the court. That he stands to suffer irreparable harm if no stay is granted.
11. In her reply the Respondent counters that the filing of an appeal does not act as an automatic barrier to the execution of court orders. She argues that to stay execution of the orders will have a negative impact on the life of the minors.
12. The Respondent further avers that the Applicant has not in any event made any attempt to comply with the courts orders and has not remitted any part of the Kshs 50,000 from the date when the judgment was delivered to the present time. That in fact the Respondent is in arrears. She therefore submits that the Respondent is not deserving of any orders of stay.
13. In determining this application this court must be careful not to prejudge the pending appeal. The only issue for determination is whether the application for stay of execution has merit.
14. This court is mindful of the fact that this is a matter which concerns the welfare of a child. It is trite law that in all matters concerning the welfare of children, courts have an obligation to give priority to the 'best interest of the child.'
- (3) The Constitution of Kenya 2010 provides at Article 53 (2) as follows:-
 - (2) A child's best interest are of paramount importance in every matter concerning the child." [own emphasis]
- (4) Section 8(1) of the Childrens Act of 2022, provides as follows:-



- (1) In all actions concerning children, whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies –
 - (a) the best interests of the child shall be the primary consideration; (own emphasis)

15. In the case of MNN -VS- MOK & Another (2017) eKLR the court stated that:-

“.....in determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution under order 42 Rule 6 of the Civil Procedure Rules must be complemented by an overriding consideration of the best interest of the child in accordance with Article 53 (2) of the Constitution.” [Own emphasis]

16. Similarly, in Z.MO vs E.I.M [2013] eKLR Musyoka J. stated:-

“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. [Own Emphasis]

17. I have perused the ruling of the trial magistrate. I note that the court did consider the financial capacity of each spouse vis a vis the needs of the children.

18. It is trite law that he who comes to equity must come with clean hands. I also note that the Applicant has made no effort to comply with the court orders. The Applicant has not availed any proof to show that he has made any attempt to pay even a portion of the amount that the court directed him to pay. The Applicant simply states that he is unable to pay the 50,000 ordered by the court, but makes no proposal on how much he is able/willing to pay or how he intends to settle the arrears due.

19. One cannot blatantly disobey court order and then approach the court seeking the exercise of the courts discretion in his favour.

20. The Applicant is in effect a contemnor who does not deserve any audience from this court. In the case of JMR -VS- RVM [2022] eKLR, Hon. Lady Justice Maureen Odera observed as follows:-

“The Applicant is reminded that courts do not make orders in vain. Parties are obliged to obey court orders even when they do not agree with said orders. 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 it has in any event disobeyed. The Applicant has applied to the court for discretionary relief yet he is not ready to obey the orders that he is seeking relief against. He has therefore come to court with unclean hands. This court cannot exercise its discretion in favour of such a litigant who has no respect for the rule of law. The Applicant cannot approach this court seeking to stay orders which he has never obeyed. That amounts to an abuse of the court process.” [own emphasis]

21. As stated earlier the court in this matter must be guided by the best interest of the child. To stay a ruling requiring payment of arrears of maintenance cannot be in the best interest of the child.



22. The question of the financial capability of the Applicant is not one which can be determined under the auspices of this application. It is a matter for the appellate court.
23. The Applicant claims that he is likely to suffer substantial loss if the stay requested is not granted. However my own view is that it is the children who stand to suffer greater loss if the stay is granted. The interests of the minors supersede the interests of the Applicant.
24. In the case of ZMO -VS- E.I.M [Supra] the court in considering the issue of stay in children’s cases held as follows:-

“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 the arguments are heard from both sides on the merits of the same.” [own emphasis]
25. Finally I note that the Applicant has not yet complied with the orders made by the trial court regarding offsetting the arrears of maintenance. There is no evidence of any attempts made by the Applicant to pay of the arrears due. As such the Applicant is a contemnor. The Applicant cannot come to this court seeking that the court exercise its discretion in his favour when he is in effect a contemnor.
26. For the reasons above I find no merit in this application for stay. The Notice of Motion dated 26th August 2024 is therefore dismissed in its entirety. This being a family matter I make no orders on costs.

DATED IN NYERI THIS 21ST DAY OF FEBRUARY 2025.

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MAUREEN A. ODERO

JUDGE

