



KCK v MJT (Civil Appeal E009 of 2023) [2025] KEHC 3083 (KLR) (4 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3083 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E009 OF 2023
PN GICHOHI, J
MARCH 4, 2025**

BETWEEN

KCK APPELLANT

AND

MJT RESPONDENT

RULING

1. By a Notice of Motion dated 6th July, 2023, the Appellant moved this Court under certificate of urgency under Articles 53 and 159 of *the Constitution*, 2010, Sections 5, 6 and 8 of the Children's *Act, No. 29 of 2022*, Sections 1A, 1B and 63(c) and (e) of the *Civil Procedure Act*, Order 42 Rule 6 of the Civil Procedure Rules seeking:-
 1. Spent.
 2. Spent.
 3. Stay of execution of the judgment, decree and all consequential Orders of the Children's Court made in Nakuru Chief Magistrate's Court Children's Case No. E354 of 2022 on the 5th July 2023 pending the hearing and determination of this appeal.
 4. Spent.
 5. Stay of the Order issued in Nakuru Chief Magistrate's Court Children's Case No. E354 of 2022 on the 5th July, 2023 directing the Children Officer and Police-Officer to accompany the Respondent herein to ensure compliance of the Orders of the court pending the hearing and determination of this appeal.
 6. The costs of this application be provided for.
2. The application is based on the grounds on the face of the application and supported by the Affidavit sworn by Appellant on 6th July, 2023. He depones that on 5th July 2023, the trial court entered



judgement in Nakuru Chief Magistrate's Court Children's Case No. E354 of 2022 granting actual, legal and physical custody of the minors to the Respondent while he was granted access/visitation rights.

3. He was further ordered to contribute Kshs. 500/= every month towards NHIF medical cover, pay monthly maintenance of Kshs. 6,000/= and also cater for school fees together with school related items in a school he can afford while the Respondent was directed to cater for shelter and utility bills.
4. He states that the said Orders are in conflict with the wishes and best interest of the minors as they implied that the minors will be taken forcefully in the company of Police Officers without any evidence that the Appellant herein is an unfit parent.
5. The Appellant contends that the execution of the said Orders will negatively impact on their school progress and cause the minors emotional and psychological harm considering that from 25th November, 2021 when the Respondent deserted their matrimonial home, he had actual custody of the minors herein and the minors are currently undertaking their studies at Anna Linda Preparatory school located at Kampi ya Moto Nakuru.
6. While annexing receipts (KCK 3), he states that he has paid school fees for the minors herein and therefore, the execution of the trial court's orders will interrupt their learning and cause him more financial hardship.
7. He further contends that if the stay orders are not granted, his Appeal will be rendered nugatory when it has triable issues with high chances of success. Lastly, he states that the application has been filed without unreasonable delay and that he is able to provide for the minors wholly during the pendency of the Appeal.
8. The Respondent opposed this application. In her Replying Affidavit sworn on 19th July 2023, she states that the Appellant did not pray for stay of execution when the trial court delivered the said judgment and therefore, execution process is within the law.
9. She further states that when she received the impugned order, she attempted executing it with the assistance of Police Officers but the Respondent disappeared with the children to date as such, he violated the order of the Court and therefore, he should not be granted the stay order sought.
10. She reiterates that the trial court's decision to give her custody of the minors was sound and in accordance with the law.
11. Terming the Appeal untenable, she states that the allegations that fees have been paid is inconsequential and she in turn, averred that she is able to pay the said fees and take the children to better schools. She contends that the Appellant is using this Application as lottery to weight the merits of his Appeal.
12. She depones that the application is a re-litigation of the subordinate court case which can only be done in the Appeal and not in this application. She therefore urges that the application be dismissed for being frivolous and an abuse of court process.
13. On security for due performance, she urges this Court to order the Appellant to deposit a sum of Kshs 50,000 in a joint interest earning account in the name of the advocates for the parties within 45 days.
14. In his Supplementary Affidavit sworn on 3rd April, 2024, the Appellant states that the Judgment was delivered on 5th July 2023 and this application filed on 7/7/2023 hence done without any delay.
15. He maintains that he has been solely taking care of all the needs of the minors without the help of the Respondent from 25th November, 2021 . Further, he reiterates that removal of the minors from their



current home will interrupt their lives and more specifically their studies. It is his position that since the minors have not been in the Respondents custody from 25th November, 2021, she will suffer no prejudice if stay of execution is granted pending Appeal.

Determination

16. From the material placed before this Court, the only issue for determination is whether an order of stay of execution pending appeal should issue against the Judgment of the Children's Court.
17. First and foremost, it is noted that as soon as judgement was delivered, the Applicant moved this Court seeking stay of execution of the said orders and indeed, T. A. Odera, J granted stay orders in the interim on 10th July, 2023 which is about 5 days after judgement was delivered and therefore, the Respondent's allegation that the Appellant violated the Orders of the trial Court lacks any basis.
18. Generally, grant of stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules where the following conditions must be satisfied:-
 - a. The application has been made without unreasonable delay.
 - b. That the applicant will suffer substantial loss unless the order is granted.
 - c. Such security as the Court orders for the due performance of such decree.
19. On first condition, there is no doubt that this application was filed timeously as the trial court's Judgement was delivered on 5th July, 2023 while this application was filed 7th July, 2023 which is two (2) days later.
20. On the second condition, it is borne in mind that this is a matter involving minors and therefore, the Appellant has to demonstrate that they will suffer if stay of execution is not granted as what is critical is that the best interests of the children will be the guiding principle. Indeed, Article 53 (2) of *the Constitution* provides that:-

“A child's best interests are of paramount importance in every matter concerning the child.”
21. Further, the principles applicable for grant of stay of execution in children's matters were well captured in the case of *Bhutt v. Bhutt Mombasa HCCC No. 8 of 2014 (O.S.)* where 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 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*.”
22. In this case, the Appellant argues that the children would suffer loss in that they will be removed from their primary home and forcefully moved midterm from one school to another. He further argues that he has cleared school fees for the term and annexed copies of receipts as proof of payment. On the other hand, the Respondent argues that no loss will be visited on the children as she is capable of moving them to an even better school.
23. It is noted that under Order (f), the trial court had directed that the Appellant herein shall cater fully for school fees and accessories in a school he can afford. There is proof of compliance with that Order in the evidence has been tabled herein showing that the minors are in Anna Linda School and the Appellant is fully catering for their school fees.



24. Further, both parties admit that the minors have been in the sole custody of the Appellant from 25th November, 2021. It is also clear from the trial court's Judgement that the Respondent herein was given custody of the minors solely because she is the mother of the said children and they were of tender age. However, there was no mention that the Appellant herein was an unfit parent.
25. This Court has considered that the minors are currently under the custody of the Appellant from 25th November, 2021 and that the said minors are in school within Kampi ya Moto where the Appellant is fully and solely responsible for fees and their upkeep.
26. It is clear that moving the children at this stage would not be in the best interest of the minors as in the event the Appeal succeeds, the minors will be forced to move schools once again and this will cause interruption on their studies and their lives too.
27. In the circumstances, it is in the best interest of the minors to reside in their current place of abode , that is, with the Appellant, until this Appeal is heard and determined.
28. Whereas the issue of security for the due performance of decree is provided for under Order 42 Rule 6 of the Civil Procedure Rules, there is no justification for such an Order as prayed for by the Respondent herein and if such sum is possibly hinged on the trial court's Order directing the Appellant herein to pay the Respondent children maintenance of Kshs. 6,000/= monthly, that amount was ordered for the maintenance of the minors when the Respondent assumes their custody.
29. However, with the interim Orders of stay of execution having been granted herein as earlier stated, the minors remained in the custody of the Appellant and therefore, there is no basis for ordering the Appellant to deposit a sum of Kshs 50,000 as prayed for by the Respondent in the circumstances.
30. Indeed, there is no basis for requiring an Order for the Appellant to provide any form of security. Further, there can be no costs accrued to the Respondent to require any security.
31. In conclusion, the Appellant's application is merited and allowed in the following terms: -
 1. There shall be a stay of execution of the judgment, decree and all consequential orders of the Children's Court made in Nakuru Chief Magistrate's Court Children's Case No. E354 of 2022 on the July 5, 2023 pending hearing and determination of this Appeal.
 2. The Appellant to file the Record of Appeal within forty-five (45) days from the date of this ruling.
 3. Due to the nature of this matter, each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 4TH MARCH, 2025.

PATRICIA GICHOHI

JUDGE

Appellant present in person

N/A for the Respondent

Ruto, Court Assistant

