**PK v SD (Miscellaneous Application E049 of 2024)**
**[2025] KEHC 4014 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4014 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**MISCELLANEOUS APPLICATION E049 OF 2024**

**G MUTAI, J**

**MARCH 21, 2025**

**BETWEEN**

**PK ..... APPLICANT**

**AND**

**SD ..... RESPONDENT**

**RULING**

1. In a judgment delivered on 16th July 2024, the court below ordered, inter alia, that the appellant contributes monthly upkeep in the sum of Kes 12,500/- towards the food for the minor, quarterly contribution of Kes 5,000/- towards the purchase of clothes, and directed that medical and entertainment expenses of the child be shared equally by the parties. The court also ordered the appellant to pay the school fees when the child attains school-going age when the proviso that the school would be identified by both parents.

2. In his judgment, Hon Green Odera stated that the pleadings were served on the defendant on 6th December 2023. He indicated that an affidavit of service to that effect was filed in court. As the appellant never entered an appearance, a request for judgment was filed on 18th January 2024. Thereafter, an interlocutory judgment was entered on 6th March 2024. Formal proof proceeded on 20th May 2024 when the respondent testified and closed her case.

3. I have given the above history as the applicant has stated that he was denied an opportunity to be heard.

4. The application dated 23rd December 2024 seeks the stay of execution of the orders of the court below pending the hearing and determination of the appeal.

5. The applicant contends that he was condemned unheard and that he lacks the capacity to pay the amount ordered by the court as he is indigent.

6. He also contended that the minor wasn't his child. Therefore, it would be unfair to compel him to pay for the upkeep of a child who isn't his.

7. The respondent filed a replying affidavit sworn on 13th January 2025, in which she deposed that the application had no merit. She stated that all the applicant was seeking to do was to resile from his obligations as a parent and to leave the burden solely to the respondent.

8. It was urged that the applicant was aware of the proceedings all along, was given an opportunity to present his case, and that he declined to take up the opportunity to defend himself. It was urged that he was served via WhatsApp through his phone number 0700452235, as evidenced by the affidavit of service sworn on 8th January, 9th April, 5th November and 17th December 2024 and was also served with the notice to show cause through the said number.

9. The respondent contended that the applicant could not deny paternity at this point. The respondent stated that the paternity question ship had already set sail.

10. It was urged that granting the orders sought would be detrimental to the child and not be in his best interest.

11. The applicant filed a supplementary affidavit sworn on 23rd January 2025, denying absconding his duties as a parent. He denied having been in a relationship with the respondent. He reiterated that upon being served with the notice to show cause, he appeared in court and was denied an opportunity to be heard.

12. The applicant stated that though the number he was served with is registered under his name, it did not mean he had it at all times. He insisted that all he wanted was to have a fair hearing.

13. The applicant's counsel filed written submissions dated 23rd January 2025, in which it was submitted that the applicant intends to appeal against the decision of the Hon. Magistrate. Counsel submitted that the intended appeal has a high chance of success.

14. It was urged that the applicant was rightly before the court as there was a threatened intention to execute the orders of the court below.

15. Counsel submitted that a stay of execution be granted. Stay, if granted, would not be injurious to the child as the respondent has the means to take care of her. Counsel further stated the appeal would settle issues such as the paternity of the child will finality.

16. Counsel also submitted that unless the orders sought were issued, his appeal would be rendered nugatory.

17. Regarding costs, counsel submitted that the applicant be awarded costs.

18. The submissions of the respondent are dated 30th January 2025.

19. It was submitted that the applicant had failed to demonstrate that he would suffer substantial loss unless a stay was granted. Counsel for the respondent urged that the trial magistrate made an incontrovertible finding that the child belonged to the applicant.

20. Counsel urged that when looking at what amounts to a substantial loss, the court looks at the matter from the child's perspective. Reliance was placed in the decision of the court in NMM v KMM [2022] KEAC 2954(KLR).

21. Regarding the right to be heard, counsel submitted that the applicant was fully aware of the proceeds in the court below and that he failed to attend court for reasons best known to him. He had also not complied with the orders given. For that reason, it was wrong for him to seek relief from the court.

22. Counsel submitted that the applicant failed to show how the minor would be harmed if the orders sought were not granted. He relied on the court's decision in MMW v JWW & 2 Others [2021] eKLR. It was urged that the interest of the child would be harmed if the orders sought were granted.

23. I have considered the application and response submissions of the parties. The application before me seeks a stay of execution pending appeal.

24. As this is a matter about the welfare of a child. I am guided by Article 53 (2) of *the Constitution* and Section 8 (1) (2) and 3 of the *Children Act*, 2022 which provides as follows:-

Article 53(2) of *the Constitution*:-

"(2) A child's best interests are of paramount importance in every matter concerning the child."

Section 8 (1), (2) & (3) of the *Children Act*:-

"(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.

(2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child; and

(c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.

(3) In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child's age and degree of maturity."

These two provisions of *the Constitution* and the statute express what is popularly called the paramountcy of the best interest of a child in children matters.

25. My understanding of the foregoing provision is that as I reckon whether to grant a stay of execution pending appeal, I must take the afore-stated principles into account.

26. Order 42 rule 6 (2) of the Civil Procedure Rules states that:-

"(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."

27. The applicant must, therefore, show that:-

a. He would suffer substantial loss;

b. The application was filed expeditiously

c. Give security or provide an undertaking as to the due performance of the decree or order that may ultimately be binding on him has been given; and

d. As this is a matter about children, the court would also need to have regard for the best interest of the child.

28. Would the applicant suffer substantial loss? My understanding of the court's decision is that it ordered the applicant to make certain monthly provisions for the child's benefit.

29. It is a trite law that the execution of maintenance orders in respect of children matters is undesirable unless there are very good grounds. I am guided by the case of LDT v PAO [2021] eKLR where the court stated:-

> " While considering stay of execution in respect to children matters, beside the above, the Court has to consider the best interest of the child. The applicant is expected to demonstrate that the minors will suffer if a stay is not granted...The best interest of a child is superior to rights and wishes of parents; they should incorporate the welfare of the child in its widest sense."

30. The reason for the reluctance is that Courts consider substantial loss from the perspective of the child, since it is the minor who is likely to suffer more rather than the appellant. In the case of PNC v NMC [2021] eKLR, the court stated that:-

> " The case before Court involves the custody of a minor rather than a money decree. Reference to substantial loss must be quantified from the point of view of the affected child, who is subject of the subject of the orders being appealed against and is the one likely to suffer."

31. Although the applicant asserts that the burden of raising the funds would be too great for him. I do not see how the payment would cause him a substantial loss. If, as he alleges, the child isn't his and the appellate court makes such a determination, the respondent would reimburse him. In any case, the applicant stated that the respondent has the means to pay.

32. I must state that the applicant appears to be the author of his own misfortune. It is not disputed that service was effected through a number registered in his name and that the notice to show cause was eventually served on him through the said number, triggering his recourse to this court.

33. The impugned judgment was delivered on 16th July 2024. I cannot agree that, in the circumstances of this case, the application was filed without delay.

34. I must state that the conditions listed in Order 42 Rule 6 (2) are conjunctive in that they must all be shown to exist before the remedy is granted. Since the first two elements are missing, it is not necessary that I consider the third.

35. The court observes that the applicant, though seeking to stay execution of the orders of the court below pending appeal, did not seek leave to file an appeal ought of time. Given the said fact, it would appear to me that the application is, in essence, in vacuo and wouldn't have succeeded even if all the conditions for grant of stay of execution were in existence.

36. Given the nature of the matter, the court is of the opinion that rather than grant any stay orders, the court will instead fast-track the appeal so that a determination on the merits is made.

37. In the circumstance: -

    a. I dismiss the application; and

    b. I discharge the orders currently subsisting.

38. Each party shall bear his or her own costs.

39. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF MARCH 2025.**

**DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

Ms Kihara for the Applicant;

Mr Mureti for the Respondent; and

Arthur – Court Assistant.