Atito v Atito (Civil Appeal E009 of 2025) [2025] KEHC 5713 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5713 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E009 OF 2025

DK KEMEI, J

MAY 8, 2025

BETWEEN

DANIEL SANDE ATITO ..... APPELLANT

AND

MARIAM SANDE ATITO ..... DEFENDANT

RULING

1. The Appellant/Appellant has filed the present application vide a Notice of Motion dated 1/5/2025 seeking the following reliefs:

   i. Spent

   ii. Spent

   iii. That pending hearing and determination of this appeal, there be a stay of implementation of judgment delivered on 30/4/2025 in Bondo Children Case No. E012 of 2024 and consequential orders therein.

   iv. That the Applicant/Appellant do retain actual custody of the minors pending the hearing and determination of the appeal.

   v. That the minors be allowed to continue their education at Machakos Academy pending the hearing and determination of this appeal.

   vi. That the costs of this application be provided for.

2. The application is supported by the grounds thereof as well as his supporting affidavit dated 1/5/2025 which avers inter alia; that unless this application seeking stay of the implementation of the judgment and orders of Honourabler Doughlas Ogoti is heard as a matter of urgency, the children are likely to be removed form Machakos Academy and registered in another school in Bondo, thereby rendering the appeal nugatory and occasioning loss and prejudice to the Applicant; that this appeal will be rendered

nugatory if the stay is not granted as prayed for the reasons inter alia that the children are likely to be removed form their school and taken to Bondo, which would destabilize their education progress; that the balance of convenience clearly weighs in favour of the Applicant in this matter owing to the fact that the children are staying with the Applicant and schooling in Machakos.

3. The Respondent opposed the application vide his replying affidavit dated 5/5/2025 which states inter alia; that the Applicant has exhibited a pattern of filing multiple applications founded on concealment and fabrication of material facts, aimed at obtaining exparte orders to the detriment of the best interest and welfare of the minors. The orders sought in the application dated 1/5/2025 are untenable, frivolous, and vexatious, and it is in the interests of justice that the application be dismissed with costs; that she was advised and believe to be true that the present application is wholly unmeritorious and liable for instant dismissal for the following reasons;

   a. It fails to satisfy the legal and evidentiary thresholds for the grant of stay orders

   b. It undermines the overarching principles of the best interest of the child and the tender years doctrine, notably LL is only two years old and was breastfeeding as recent as December, 2024

   c. It challenges powers properly vested in the Children's Court by legislation *Children Act* 2022, and specifically the powers to issue orders to secure best interests and welfare of the minor.

   d. It introduces extraneous and unfounded allegations, including baseless imputations against the trial court

   e. it contains baseless, scandalous, and irrelevant averments for instance the allegations at paragraph 3(d) and (e) of the Notice of Motion on gender and superior claim are unfounded and amount to an attack against the character of the trial court;

   f. The Applicant deliberately failed to file submissions at trial, and cannot now seek equitable relief.

   g. that upon securing employment with the County Government of Siaya, she relocated with the minors to Bondo where they continue to reside and since separation, she has been the sole provider for the minors, shouldering all responsibilities relating to their medical, educational, shelter and general maintenance needs without any contribution from the Applicant; that owing to the Applicant's abdication of his parental responsibilities, she instituted Bondo Children Case No. E012 of 2024 wherein the court granted her physical custody of the minors and ordered the Applicant to contribute towards their school fees; that in December, 2024 during the school holiday, she travelled with the minors to visit her mother in Kisumu, upon being served with the pleadings and court orders, the Applicant in blatant defiance thereof travelled to Kisumu and forcibly took the minors so as to defeat court orders and block any claim for maintenance; that the Applicant absconded with the minors, leaving her distraught; that the Applicant had not seen the minors since March 2022 until December, 2024 when he unlawfully took them by force, the Applicant had disowned paternity of the minors and even asked her to seek bursary from the Area Chief to help her pay school fees.

That the minors' at Wango Christian Academy in Bondo are due to report back on 6th May, 2025 as per the annexed copies of relevant school fee invoices; that the Applicant and the Respondent had separated on 6th March 2022 when he forcefully and unlawfully evicted the minors and herself from the matrimonial home, notwithstanding that the youngest child L.L was in utero and the she sought refuge at his mother's residence in Kisumu where she catered for her needs, including payment of her maternity expenses; that in an effort to legitimize his contemptuous conduct, the Applicant filed Machakos Children's Case No. E049 of 2024 based on concealment and misrepresentation of material

facts, seeking custody and maintenance orders and seeking to affirm his egregious conduct in the manner he forcefully took the children; that she filed an application seeking to transfer the Machakos file to Bondo and which was allowed by the High Court at Machakos; that the trial court heard the matter and made a determination on 30th April 2025 in her favour; that the Applicant has demonstrated a consistent pattern of contempt of the court process; that it is in the interest of the children that the Applicant's application should be dismissed with costs.

4. The application was canvassed by way of oral submissions.

5. Mr. Ken Abongo, learned counsel for the Appellant/Applicant submitted that the children are currently attending a school in Machakos and that the order of the trial court directing that the children be removed from Machakos and taken to Bondo will disrupt their education. It was further submitted that if a stay of execution is not granted, then the children are likely to suffer. It was also submitted that the Respondent is not in a position to support the children since it is him who is now being forced to take care of everything. Learned counsel submitted that the decision of the lower court was made on 30/4/2025 and that he was directed to hand over the children by 5/5/2025 and that he could not wait for the decree to be prepared by the registry since he needed to obtain conservatory orders from the High Court.

6. M/s Maumo for the Respondent submitted that the application lacks merit since the same has not been accompanied by a decree of the trial court and hence the application is incompetent and should be struck out. It was also submitted that the Applicant has not satisfied the conditions for the grant of stay of execution under Order 42 Rule 6 of the Civil Procedure Rules. It was also submitted that it is not proper to issue an order of stay because it will go against the best interest of the children. It was also submitted that the Applicant secretly filed a case in Machakos and later took away the children but however the High Court Machakos ordered the case at Machakos to be transferred to Bondo Law Courts for hearing and determination. The learned counsel urged the court to dismiss the application as granting the same is not in the best interest of the children and that the Applicant be ordered to hand over the children immediately as directed by the court.

7. I have given due consideration to the application, rival affidavits and oral submissions by learned counsels. It is not in dispute that the parties herein had mitigated before the lower court at Bondo vide Children Case No. E012/2024 wherein the Appellant/Applicant was ordered to hand over the children to the Respondent by close of business on 5/5/2025 failing which the Kenya Police Service, Children protection Unit to step in and oversee the compliance of the court order. It was further ordered that the legal custody was granted in favour of the Respondent. It is also not in dispute that the children had been attending school within Bondo before the Appellant took them away in December 2024 and enrolled them in a school in Machakos. It is also not in dispute that the children are currently still schooling at Machakos and awaiting to be transferred to Bondo to continue with their education at the former school. It is also not in dispute that the Appellant's appeal is yet to be heard and determined. It is also not in dispute that in matters involving children, the court must consider the best interest of those children. I find the issue for determination is whether the Applicant's application has met the threshold provided for under Order 42 Rule 6 of the Civil Procedure Rules.

8. An order of stay of execution pending an appeal is always governed under Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

> " 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 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 sub rule (1) unless -

(a) the court is satisfied that substantial loss may result to the applicant 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.

The Appellant herein is required to fulfil all the aforesaid conditions in order to secure an order of stay of execution pending appeal. The dispute herein relates to custody, maintenance/welfare of children belonging to both the Appellant and the Respondent. The two are embroiled in tough fight over the custody and maintenance of those children. The trial court has already made a determination pursuant to the impugned judgment delivered on 30/4/2025. In determining the rival issues involving these children, the present application presented by the Appellant must be pegged against the prism of the doctrine of the best or paramount interest of the child. The issue of the best interest of a child is provided for in Article 53(2) of the *Constitution* as well as Section 8(1) (a) of the *Children Act* which have one common denominator namely that a child's best interest are of paramount importance and consideration. Hence, the Appellant in prosecuting this application must satisfy the foregoing conditions while ensuring that the best interest of a child are not overlooked.

9. As to whether the application herein was filed without undue delay, it is noted that the lower court delivered its judgment on 30/4/2025 and that the Appellant herein filed the application on 2/5/2025. I find there was no inordinate delay since the application was filed within 3 days. I find the Appellant satisfied this condition.

10. As to whether the Applicant stands to suffer substantial loss if the order of stay is not granted, the Applicant in his affidavit in support of the application as well as the grounds has dwelt on the fact that the removal of the children from their current place of education in Machakos to Bondo is likely to disrupt their education and therefore it is in the best interest of the children to grant the stay of execution of the impugned judgment pending determination of the appeal. The Appellant in his submissions through his learned counsel also dwelt on the issue of consequences the children are likely to suffer if the order of stay is not granted. It would appear therefore that the Appellant has not given satisfactory reasons as to how he himself stands to suffer substantial loss if the stay is not granted. It was incumbent upon him to convince the court that he stands to suffer substantial loss even without involving the children. From the look of things, the Appellant seems to be hiding behind the children and has therefore fronted the doctrine of best interest of the child so that the court while considering his application should look at the situation of the children and not the Appellant. As to what encompasses "substantial loss" Hon. Justice F. Gikonyo, in James Wangalwa & Another v Agnes Naliaka Cheseto [2012] Eklr, stated as follows:

> "No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, or is likely to be put in motion, by itself, does not amount to

substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process. The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal… the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

It is noted that the Appellant has not explained or placed before the court the conditions which can be said to cause him to suffer substantial loss if the stay is not granted. Since he has opted to address the issue of the children suffering loss if the order is declined, it is appropriate to consider the circumstances where substantial loss can be said to be suffered when matters children are involved. It is common knowledge that substantial loss regarding children must be looked at keenly by the courts. In the case of Bhutt v Bhutt Mombasa HCCC No. 8/2014 it was held that in an application of this nature the child's best interest are the primary consideration. The court went on to add 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 Code, must be complemented by the overriding consideration of the best interest of the child in accordance with Article 53(2) of the *Constitution*. Again, in HOO v MGO [2021] eKLR, Justice Thande held that as the court considers the matter and makes its decision that will impact the child herein all circumstances affecting the child must be taken into account and that the overriding focus must be a solution that will be in the child's interest. Also, in the case of LDT v PAO [2021] eKLR, Justice R Ngetich was faced with a similar situation regarding issues to do with children held as follows:

18. 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. I however note that the Applicant averred that he will suffer great prejudice as he will be condemned to pay school fees twice if an order of stay is not granted."

20. 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. The Respondent submitted that she has the actual custody of the minors and the minors are attending [Particulars withheld] and if the orders of stay are granted, it will not be in the best interest of the minors since it will mean the custody reverts to the applicant and the minors attend [particulars upheld] Academy thereby interfering with education of the children."

The Appellant has maintained that the children are currently going on with their education in Machakos where he has enrolled them in an academy. According to him, the children will stand to suffer if they are removed from their present school to another one in Bondo. The Appellant seeks to have the children continue with their education. On the other hand, the Respondent in her replying affidavit has maintained that the children who are of tender years had been with her upto December 2024 and had been enrolled at Wango Christian Academy in Bondo and who are in Grade 2 and 5 before they were forcefully removed by the Appellant. She also contended that the last time the Appellant was with her and the children was in March 2022. It would then appear that the children had been with the Respondent for much longer period before they were moved away by the Appellant and that they have only been with the Appellant for barely four (4) months. Such a period cannot be said to be substantial to suggest that the children have fully settled down and acclimatized in the new place. The children

being still of tender years requires the company/presence of their biological mother. The Court of Appeal in the case of J.O v S.A.O [2016] eKLR, the Court of Appeal held as follows:

> 13. There is a plethora of decisions by this court as well as the High Court that in determining matters of custody of children, and especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother, because mothers are best suited to exercise care and control of the children. Exceptional circumstances include; the mother being unsettled; where she is living in quarters that are in deplorable state; or where her conduct is disgraceful and /or immoral."

The Respondent has given a vivid account of how she has been denied the opportunity to be with her children. The children being of tender age, in my view, leaves no doubt that they have been affected substantially by the separation from their mother. Indeed, they are entitled to continue with their education but of great significance is their emotional and psychological wellbeing. It is not in dispute that the children school far away from Bondo where they used to attend school. Even though, the Appellant has contended that the children will suffer great loss if they are moved from the new place, it is my view that the disruption of the children will have less consequences as compared to when they are made to continue staying in Machakos. I find that the children stand to suffer more psychological trauma if the order of stay is granted. A denial of an order of stay will work in the best interests of the children. It is instructive that the Appellant's Children's Case at Machakos has since been transferred to Bondo where the trial court has made a determination. If the Appellant succeeds in his appeal, then the orders of the trial court will be reversed and that the issue of custody, maintenance and education of the children will be addressed at that juncture. The Appellant will not suffer any prejudice if the order of stay is not granted since he will be at liberty to prosecute his appeal and thereafter the court will make a determination appropriately regarding the orders granted by the trial court in the impugned judgment dated 30/4/2025.

11. Finally, on the issue whether the Appellant has furnished security for the due performance of the decree that may ultimately be binding upon him, it is noted that the Appellant has not made any averment either in the grounds in support of the application or in the supporting affidavit that he is ready and willing to offer security. This is one of the conditions imposed by Order 42 Rule 6 of the Civil Procedure Rules. I find that the Appellant has failed to convince this court that he is in a position to furnish security as required. The Appellant has mainly dwelt on matters affecting the children and failed to take note of the fact that he is under obligation to offer security in order for him to secure an order for stay of execution of decree pending determination of the appeal.

12. In view of the foregoing observations, it is my finding that the Appellant's application dated 1/5/2025 lacks merit. The same is dismissed with no order as to costs. The interim orders of stay are vacated.

DATED AND DELIVERED AT SIAYA THIS 8TH DAY OF MAY 2025.

D. KEMEI

JUDGE

In the presence of:

Ken Abong'o.....for Appellant/Applicant

M/s Maumo.....for Respondent

Okumu.....Court Assistant