JMM v LK (Civil Appeal E097 of 2024) [2025] KEHC 6258 (KLR) (2 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6258 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E097 OF 2024

HM NYAGA, J

MAY 2, 2025

BETWEEN

JMM ..... APPELLANT

AND

LK ..... RESPONDENT

RULING

1. By an application dated 18th July 2024, the appellant/application sought the following orders:
   a. Spent
   b. That the Honourable court be pleased to issue an order staying all further proceedings and/or execution in the lower court pending hearing and determination of the mai appeal intr-parties.
   c. That the Honourable court be pleased to review, set aside and stay payment of rent of KSh. 15,000/= to the respondent.
   d. That the Honourable court be pleased to issue any other or better relief as shall meet the ends of justice.
2. The application is supported by the grounds set out in its face and the applicants affidavit sworn on even date.
3. In a nutshell, the applicant's case is that he is aggrieved by the ruling of Hon. S. K. Ngetich SPM delivered on 3rd July, 2024 and lodged an appeal against the said whole decision. That he has fully offered to take care of the minors' education, school related expenses and medical needs. That in issuing the order that he pays rent of Ksh. 15,000/=, the trial court acted in disregard of well -established principles, which grant every child right to equal parental responsibility. That while he tendered evidence on his means to the trial court,the respondent failed to do so and neither did state the amount she is willing to contribute towards the minors. That if he is compelled to pay the rent of Ksh. 15,000/ = he will be unable to sustain the minors, and himself, and thus he will suffer irreparable harm.

4. In response, the respondent filed an affidavit sworn on 29th July, 2024. She avers that she was married to the applicant from 2015 and they were blessed with two children. That the couple built a matrimonial home for which she obtained a loan to assist in the construction. That later the applicant threw her and the children out of the house. That it took the intervention of the trial court to have her access the house and let children's clothes and other personal property. That upon realizing that this suit was filed, the applicant rushed to pay some school fees in order to wood wick the court that he had been doing so. That since she is till repaying the loan she took to develop the matrimonial house, she is left with little money to fend for herself and the children.

5. The respondent further avers that the trial court duly considered all the evidence before it came up with the decision and she urges he court not to interfere with the same for the sake of the children.

6. The respondent further avers that she is currently earning a salary of Ksh. 20,000/= and cannot afford to pay the house rent of Ksh. 15,000/=, buy food and take care of other needs, of the children. That the applicant is a banker and is currently living with another woman in the house they built together.

7. The respondent urged the court to dismissed the application with costs.

8. Directions were given that the application be canvassed by way of written submissions, which I have duly considered.

9. The gist of the appeal herein is that the applicant is aggrieved by the order issued by the trial court vide its ruling of 3rd July, 2024, where it ordered the applicant to among other things, pay to the respondent a sum of Ksh. 15,000/= towards rent.

10. Parties filed their respective submissions which I have considered and will refer to them in this ruling.

11. It was correctly submitted by both parties that being an application for stay of execution pending appeal, the applicant has to bring himself under the provision of order 42 rule 6 (2)of the Civil Procedure Rules which states that;

    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 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 of stay shall be made under sub rule (1) unless-

        a. The court is satisfied that substantial loss may result to the applicant unless the order is made and 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"

12. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

    a. Substantial loss may result to him/her unless the order is made;

    b. That the application has been made without unreasonable delay; and

c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

13. These principles were enunciated in Butt Vs Rent Restriction Tribunal [1979] eKLR where the Court of Appeal set out what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

> " The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
>
> Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
>
> Thirdly, 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.
>
> Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse. "

14. As to what amounts to substantial loss, this has been the subject of consideration by courts. In James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR, the court stated;

> " No doubt, in law, the fact that the process of execution has been 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 CPR. 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"

15. The applicant states that he is not in a fia=nacial postion to pay the rent ordered by the trial court. That he had presented his affidavit of means to the trial court but it still ruled against him.

16. While the applicant's argument may hold some water, it is also to be remembered that this is a matter that involves children. Article 53(2) of the *Constitution* provides as follows;

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

17. In addition to Section 8 of the *Children Act*, 2022 provides as follows;

(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.

18. The court in the case of MAA v ABS [2018] eKLR dealt with section 4(3) (b) of the now repealed Act, which was replaced by section 8. The court stated:-

> " What is stated in Section 4 (3)(b) of the Act is the paramountcy principle which is vital in all matters concerning children and must be given prominence. While considering this matter, this Court was alert to the welfare of the child herein who is of tender years. The matter is not about the Appellant and the Respondent and their interests are secondary to those of the child. The foregoing provisions require this Court to treat the interests of the child as the first and paramount consideration and must do everything to inter alia safeguard, conserve and promote the rights and welfare of the child herein. Acting in the best interest of the child, I am of the view that his welfare will best be served if he remains with his mother the Respondent."

19. It follows that while the court is to consider the right of the parties to ventilate the appeal, there is the more crucial issue, that of the welfare of the children. The applicant has sought to have the order of the trial court reviewed or set aside. With tremendous respect, this court cannot be called upon to review the said order.

20. An application for review brought under Section 80 of the *Civil Procedure Act* and order 45 rule 2 of the Civil Procedure Rules, ought to be made to the court that issued the orders in question. This court can only be called upon to stay the same pending appeal and if the appeal is heard and determined it can then set the same aside.

21. Therefore prayer 3 of the application is untenable and cannot be granted at this stage.

22. Should the court grant a stay of execution of the order in question?

23. I am of the considered view that a wholesome stay of the said orders may prejudice the children. This court, just like the trial court held, has to make orders that give breath to the provisions of Article 53(2) of the *Constitution* and Section 8(1) of the *Children Act*. Of course, the court the court cannot totally overlook the right of the appellant to ventilate his appeal.

24. Having considered the matter, I am inclined to grant a stay of the orders of the lower court on the following terms;

    a. The Appellant/Applicant shall pay 50% of the rent, being Ksh. 7,500/- as his contribution until further orders of this court, or pending the outcome of the appeal.

    b. For the avoidance of doubt the contribution above shall commence from the end of May 2025, and shall be paid on or before the end of each succeeding month.

    c. The applicant shall continue to meet the other expenses as ordered by the trial court.

    d. In default of the above payments, these stay orders shall lapse automatically without further reference to the court.

    e. The Appellant/Applicant is to file and serve the record of appeal within 45 days from the date hereof.

    f. The lower court record to be availed.

g. Each party shall bear its own costs on this application.

DATED, SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF MAY 2025.

H.M NYAGA

JUDGE