



REPUBLIC OF KENYA



**Hamisi v Kalahi (Appeal E152 of 2024)
[2025] KEHC 8249 (KLR) (Family) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8249 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

APPEAL E152 OF 2024

H NAMISI, J

JUNE 12, 2025

BETWEEN

ROBINSON HAMISI APPELLANT

AND

JOSEPHINE KALAH I RESPONDENT

RULING

1. The Application dated 5 November 2024 seeks stay of execution of the Orders made by the Children’s Court on 24 October 2024 as well as stay of execution of the default judgement entered on 28 July 2021 against the Appellant. The Application is brought under Sections 32 and 113 of the [Children Act](#) and premised on the following grounds:
 - i. That this matter proceeded for Notice to Show Cause on 24th October, 2024 and the Appellant appeared in person;
 - ii. That the Appellant indicated to the Court that he was condemned unheard and an erroneous judgment was entered without the court being aware of his financial capacity;
 - iii. That there is need for the Court to stay the orders issued in the Court as it was obtained through concealment of material facts which if the Court is seized will agree that there was misapprehension of facts;
 - iv. That no proper service was undertaken in the suit and the judgment was entered irregularly without participation of the Appellant;
 - v. That the judgment of the Court deviated from the sound principle of equal parental duties as enshrined in the [Constitution](#) and the Respondent should not be left to thrive on unfair orders;



- vi. That the Appellant would like the Court to stay execution as the orders entered without the Court, being aware of his financial capacity which shall result to undue hardship being visited upon him;
 - vii. That the Respondent in pursuing this suit approached the Court with unclean hands without disclosing that she is a salaried person who works under the Teacher Service Commission with equal strength to raise the children;
 - viii. That the Appellant can only be compelled to provide maintenance only within his financial capacity and unless stay of execution is granted it will lead to injustice;
 - ix. That it is in the interest of justice that this application is allowed.
2. The Applicant has filed a Supporting Affidavit as well as a Memorandum of Appeal.
 3. Despite service upon her counsel, the Respondent did not enter appearance nor file any response to the Application.
 4. I have keenly read the judgement dated 28 July 2021, which the Appellant refers to as ‘default judgement’. The matter was instituted in the lower court in September 2019 and proceeded to hearing on 9 February 2021, when the Respondent testified. The Record of Appeal is yet to be filed; thus, I am unable to tell if the Appellant participated in the lower court proceedings. However, from the averments at paragraph 9 of the Supporting Affidavit, I discern that the Appellant was aware of the proceedings in the lower court. The Appellant admits that monies had been previously deducted from his salary over maintenance of the same child, though it is unclear when the deductions were done.
 5. The principles guiding the Court in granting stay are well articulated in the locus classicus case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal held:
 - “ 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 is 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. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 6. 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 for costs as ordered will cause the order for stay of execution to lapse.”



6. These principles were summarised in *RWW v EKW* [2019] eKLR, where the Court considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”
7. Under Article 53(2) of The Constitution and section 8(1) and (2) of the *Children Act*, this Court is commanded that in all actions and cases concerning children the best interests of the children shall be the paramount consideration.
8. In *Z.M.O v E.I.M* [2013] eKLR, the Court 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. 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.”
9. In the case of *DOB v DMA* [2021] eKLR the Court addressed itself on the issue of staying maintenance orders as follows:

“In matters concerning children, the best interests of the child are of paramount importance. The accepted principle in applications for stay of execution of maintenance orders in children’s cases is that the suspension of the maintenance order is not in the best interests of the child.”
10. Further, Order 42 Rule 6(2) of the *Civil Procedure Rules 2010* provides that in exercising its jurisdiction to grant a stay of execution, the Court is required to satisfy itself of the following: -
 - a. The application has been brought without undue delay.
 - b. The Applicant stands to suffer substantial loss if the stay is not granted.
 - c. The Applicant has provided security for the due performance of the decree.
11. The Applicant seeks stay of execution of orders touching on the maintenance of his child. It has not been demonstrated how the appeal will be rendered nugatory if the stay is not granted. On the other hand, the child’s best interests will be negatively impacted if the stay is granted. The Appellant has not made any proposals on how he intends to provide for the child in the interim.
12. For the foregoing reasons, the Application is without merit and the same is dismissed. I make no orders as to costs.



DATED AND DELIVERED AT NAIROBI THIS 12 DAY OF JUNE 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

N/A.....for the Appellant/Applicant

.N/A.....for the Respondent

Libertine Achieng Court Assistant

