



REPUBLIC OF KENYA



**in re TFW- F & SRW- F (Minors) (Civil Appeal E037 of 2025)
[2025] KEHC 9862 (KLR) (Family) (4 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9862 (KLR)

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

FAMILY

CIVIL APPEAL E037 OF 2025

PM NYAUNDI, J

JULY 4, 2025

CIVIL APPEAL NO. E 037 OF 2025

**IN THE MATTER OF TFWF &
SRWF(MINORS)**

BETWEEN

MF APPELLANT

AND

MWFNQ RESPONDENT

RULING

1. The Applicant presents Chamber Summons Application dated 6th March 2025 and seeks the following orders-
 1. Spent
 2. Spent
 3. Spent
 4. Spent
 5. This Honourable Court be pleased to grant a stay of execution of Order Number 3 issued on 6th February 2025 by Hon. A Munene in Nairobi Children Case No. E1718 of 2023 MF V MWFNQ



6. This Honourable Court be pleased to grant a stay of execution of the Ex- parte Orders Number 3 issued on 5th March 2025, by Hon. A Munene in Nairobi Children Case No. E1718 of 2023 MF V MWFNQ attaching 1/3 of the Applicant salary pending the hearing and determination of this appeal.
2. The Applicant is aggrieved by the orders issued by the Court on 6th February 2025 and 5th March 2025. It is averred that the Magistrate erred in making orders in the absence of a formal application by the respondent and further that the orders of 5th March 2025 were issued ex parte and therefore the respondent denied his right to be heard.
3. The respondent avers that the Orders of the Court are valid and enforceable and that states that the applicant has infact complied with part of the order and it is only the payment of the repairs of the car that he has declined to settle.
4. The Applicant has therefore lodged appeal against the orders of 6th February 2025 and 5th March 2025. The applicant objects to paying for the repairs as the vehicle is registered in the name of the respondent and further it was under her control when it got damaged.
5. Pending the appeal, the applicant prays that there be a stay of execution of the orders. In considering this application, the issue for determination is whether the applicant has met the threshold set out at Order 42 Rule 6 of the Civil procedure Rules which states,
 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 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 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.
 - (3) Notwithstanding anything contained in subrule
 - (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
 - (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.



- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
6. In *Butt v Rent Restriction Tribunal* [1979] KECA 22 (KLR), the Court pronounced on the principles to guide a court when considering an application for stay of execution. Primarily the Court must guard against the intended appeal being rendered nugatory. The Court had this to say while citing the decision in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:
- “I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”
7. At the same time, the Court is obligated to safeguard the interests of the successful litigant with a judgment at hand even as it considers the interests of the appellant. The decree-holder ought not to be precluded from enjoying the fruits of his/her judgment. This principle was aptly explained in the case of *RWW v EKW* [2019] eKLR, as follows:
- 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.
8. Further, In the case of *Macharia t/a Macharia & Co Advocates v East African Standard*, No 2 (2002) KLR 63, the court observed that:-
- To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.
9. At paragraphs 12, 13 and 14 of his supporting affidavit, the applicant avers that (1.) The Appeal has high chances of success; (2) if the stay orders sought herein are not granted the applicants salary will be attached at any moment and he will suffer financial loss and damage. (3) it is in the best interest of justice that this Honourable court grants the orders sought herein.
10. In the case of *PSA v PNG* [2024] KEHC 2463 (KLR) this court emphasized that in a matters touching on children it was important to show that it was in the best interests of the child(ren) to grant a stay pending appeal and that in addition to demonstrating that the appellant had an arguable appeal, the applicant had to demonstrate that unless the stay is granted the appeal would be rendered nugatory.



11. In the case before me it is not disputed that the car is used to drop the children to and from school. It is in the best interests of the Children therefore that the car be made available to run this errand. The Applicant has not suggested that the appeal will be rendered nugatory. I will therefore disallow the appeal and direct that his employer be served with the order so that the amount of Kshs 141, 752 (as per invoice dated 8th January 2025) is deducted from his salary on or before 31st July 2025 and paid to A-one Auto Services Ltd
12. Owing to the relationship between the parties, there shall be no order as to costs.
It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF JULY 2025.

P. M. NYAUNDI

JUDGE

In the presence of:

Mugu for Applicant

Irene Kiarie holding brief for Ms. Ndirangu for Respondent

Fardosa Court Assistant

