



REPUBLIC OF KENYA



Moiruri v Moruri (Civil Appeal E004 of 2025) [2025] KEHC 9768 (KLR) (7 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9768 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E004 OF 2025
JK NG'ARNG'AR, J
JULY 7, 2025**

BETWEEN

KENNEDY MOKUA MOIRURI APPLICANT

AND

ANITA NDUHUKIRE MORURI RESPONDENT

RULING

1. The Applicant filed his Notice of Motion Application dated 19th February 2025 seeking the following Orders: -
 - I. Spent.
 - II. That pending the hearing and determination of this Application, the Honourable Court ne pleased to issue an order of stay of execution of the orders of the Honourable Magistrate on 18th September 2024.
 - III. Costs of the Application be provided for.
2. The Application was brought under sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 22 Rule 22, Order 42 Rule 6 and Order 51 Rule 1of the *Civil Procedure Rules*. The Application was premised on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Kennedy Moku Moruri on 19th February 2025.

The Applicant's case.

3. The Applicant stated that he was the Respondent in Sotik Senior Principal Magistrate's Court Children's Case Number E018 of 2024 where he was ordered to pay kshs 25,000/= per month after he had declined paternity of the children. That he made a stay Application but the Magistrate ruled that he ought to comply or be sent to prison.



4. It was the Applicant's case that the Respondent had been texting him with text messages that were meant to ridicule, abuse, intimidate and harass him while the matter was still before court. It was his further case that he had filed an Appeal with arguable grounds and if stay was denied, then it would render his Appeal nugatory and he would be condemned unheard contrary to Articles 27 and 50 of the Constitution of Kenya.
5. The Applicant stated that the power of this court to grant stay was discretionary and that he had good grounds for seeking the stay order. That he would suffer substantial loss if the stay is declined as he would be made to pay for children he has denied paternity. He further submitted that where paternity is disputed, no orders shall be issued to compel a person to pay maintenance as it amounts to father-shopping.
6. It was the Applicant's case that the court should balance the interests of the Appellant and Respondent when granting the stay order.
7. In his submissions dated 18th April 2025, the Applicant submitted that he would suffer substantial loss if the stay order is not granted. That the Respondent was levelling abuses towards him and that if the Appeal is determined in his favour, the loss he would have suffered could be compensated by an award of damages.
8. It was the Applicant's submission that the Respondent was circulating leaflets that he was a dishonest man and it was affecting his business. It was his further submission that his Application was filed timeously.
9. The Applicant submitted that he was willing to deposit a security of Kshs 20,000/= in court.

Response

10. Through her Replying Affidavit dated 28th February 2025, the Respondent stated that the Applicant was represented by two advocates in the trial court and was present in the trial court when the Ruling was delivered. That the Applicant was playing games with the court by filing an Application by one firm denying paternity of the children and the other firm by filing his Defence indicating that he was the father of the children.
11. It was the Respondent's case that the Applicant had not complied with the orders of the trial court and had not demonstrated how he intends to support the minors who need school fees, food, clothing and healthcare. That it was clear that the Applicant did not intend to support the minors unless compelled to do so by the court.
12. Through her written submissions dated 14th February 2025, the Respondent submitted that the Applicant had not met the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules in relation to the prayer for stay of execution. She relied on ZMO v EIM [2013] KEHC 5590 (KLR).
13. It was the Respondent's submission that the Applicant had not offered any security as a condition for the stay to be granted. That his Application was without merit and ought to be dismissed.
14. I have gone through and considered the Notice of Motion dated 19th February 2025, the Replying Affidavit dated 28th February 2025, the Applicant's written submissions dated 18th April 2025 and the Respondent's written submissions dated 14th April 2025. The sole issue for determination was whether the prayer for stay was merited.
15. The principles that relate to stay of execution orders are well settled. Order 42 Rule 6 of the Civil Procedure Rules stipulates: -



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 orders 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 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.
16. Thus, under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), the Applicant should satisfy the court that: -
- i. Substantial loss may result to him unless the order of stay is granted.
 - ii. That the Application has been made without unreasonable delay.
 - iii. The Applicant gives such security as the court orders for the due performance of such Decree or order as may ultimately be binding to them.
17. Regarding the issue of substantial loss, the court in [Jason Ngumba Kagu & 2 others v Intra Africa Assurance Co. Limited](#) [2014] KEHC 2183 (KLR) held: -
- “The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the *Civil Procedure Rules*. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.”
18. However, the present Application concerns minors and their upkeep. I am live to the provisions of Article 53(2) of the [Constitution](#) of Kenya which provides: -
- A child’s best interests are of paramount importance in every matter concerning the child.



19. Section 4(2) of the *Children's Act* provides: -

In all actions concerning the children, whether undertaken by public or private or social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

20. The court in *JKN v MNN* [2023] KEHC 1021 (KLR) held: -

“Notably, in an application as the one before this court, it is the children and not the applicant who need be established to likely suffer substantial loss if the orders sought are not granted. Essentially, the rights of the children override the rights of the applicant.....”

21. Similarly in *ANK v RNM* [2024] KEHC 3469 (KLR), the court quoted *RWW v EKW* Civil Appeal No 13 of 2013 [2019] eKLR where it was held that: -

“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 it. Suspension of a maintenance order is not in the best interests of the child.....”

22. Further, *in re AK, EO andAO* [2023] KEHC 18203 (KLR), the court held: -

“While considering stay of execution with respect to children matters, besides the above, the court must consider the best interest of the child. The applicant is expected to demonstrate that the minors will suffer if a stay is not granted.....”

23. I have looked at the Applicant's assertion on substantial loss. In a nutshell, he made the substantial loss all about him as opposed to the welfare of the minors. The Applicant stated that the substantial loss he suffered was that he was facing a tirade of abuse from the Respondent and that he had tarnished his name and image. The Applicant further stated that the minors will suffer substantial loss as he would not be paying the money expected to cater for their welfare.

24. I find the Applicant's assertion as dishonest as he contradicted himself. On one hand, he denied the paternity of the minors and on the other hand, he purported to act in the minors' best interest.

25. As the authorities above have demonstrated, the minors' best interests will always override their parents or guardians' interests. This court was not afforded the benefit of the maintenance order but it was apparent from the Applicant's pleadings that he had been ordered to pay Kshs 25,000/= per month for the minors' upkeep. That notwithstanding, it is my finding that there is nothing in the Applicant's Application that demonstrated that he was pursuing the stay orders with the minors' best interest at heart.

26. The upshot of the above is that the Notice of Motion Application dated 19th February 2025 has no merit and is dismissed.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 7TH DAY OF JULY, 2025.

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J.K.NG'ARNG'AR

JUDGE



Ruling delivered in the presence of Steve for the Respondent No Appearance for the Appellant. Siele and Susan (Court Assistants)

