



**IM v SSA alias SGH (Civil Appeal E211 of 2023)
[2024] KEHC 55 (KLR) (10 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 55 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E211 OF 2023
EM MURIITHI, J
JANUARY 10, 2024**

BETWEEN

IM APPELLANT

AND

SSA ALIAS SGH RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 27/11/2023 brought under Order 42 Rule 6, Order 51 Rule 1 of the [Civil Procedure Rules](#), and all the enabling provisions of the law, the appellant seeks that:
 1. Spent
 2. Spent
 3. This honourable court be pleased to order stay of execution of the judgment of Hon. Gavana A. Mohamed, Senior Resident Kadhi at Isiolo in Matrimonial Cause No. No. E016 of 2023 delivered on the November 17, 2023 and all other consequential orders emanating there from pending the hearing and determination of the appeal.
 4. Costs of this application be provided for.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of IM, the appellant herein, sworn on even date. On November 17, 2023, the learned Kadhi rendered a judgment which he was dissatisfied with and he has lodged an appeal. His appeal, which has high chances of success, will be rendered nugatory, without the stay orders that he prays for. The application has been brought without undue delay and he is willing to abide by the orders and directions of the court.



3. The respondent has opposed the application through her replying affidavit sworn on December 18, 2023. She avers that allowing the application amounts to leaving the minors without shelter, food, clothing and other basic needs, as the appellant has a primary duty to provide for his children. The appellant has always made her life and those of her children impossible thus the reason she sought the order of maintenance. In her view, the application is frivolous, vexatious, an abuse of the court process, premature and speculative at best, and she stands to suffer irreparable damage as they will be rendered destitute and homeless without basic needs.

Determination

4. The law concerning applications for stay of execution of a Judgment and/or Ruling is well espoused in the provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#), as follows: -

“6.

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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.
 - 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.”

5. This court notes that the application was filed timeously on 4 /12 / 2023 while the decision sought to be appealed against was made on November 17, 2023.
6. Whereas the appellant contends that his appeal has high chances of success and will, consequently, be rendered nugatory if execution proceeds, the respondent avers that granting stay is tantamount to denying the minors their basic needs.
7. The grounds of appeal as raised in the appellant’s memorandum of appeal challenging jurisdiction of the Kadhi’s Court, payment of maintenance, payment of dowry and the mode of execution of the judgment are certainly arguable but which need not be such as eventually succeed.



8. The Court is under Article 53 (2) of the Constitution required to give paramount consideration to the best interests of the children in all cases, as follows:

“(2) A child’s best interests are of paramount importance in every matter concerning the child.

9. While appreciating the appellant’s readiness to abide by the conditions the court will set for stay, this court has considered the implication of granting stay and the best interests of the minors herein, who need provision in terms of education, medical care, clothing, shelter, food and so on. The Court notes that the first school term for 2024 started only yesterday.

10. This court finds that it is in the best interests of the minors that the appellant remits monthly sum of Ksh.30,000 for their maintenance and accommodation, pending the hearing and determination of the appeal.

Orders

11. Accordingly, for the reasons set out above, this court allows the appellant’s application for stay of execution dated 27/11/2023 on the following terms:

1. An order for stay of execution of the Judgment of Hon. Gavana A. Mohamed, Senior Resident Kadhi at Isiolo in Matrimonial Cause No. E016 of 2023 delivered on the November 17, 2023 is hereby issued pending the hearing and determination of the appeal.
2. The appellant shall by the 5th day of every month pay to the respondent a monthly sum of Ksh.30,000 as maintenance and accommodation of the minors on account pending the hearing and determination of the appeal.
3. The Record of Appeal to be filed within 60 days from the date hereof, in default of which the stay of execution shall lapse and be of no effect.
4. As usual with children matters, the appeal will be heard on priority basis, on a date to be fixed in consultation with counsel.
5. The costs of the application shall abide the outcome of the Appeal.

DATED AND DELIVERED ON THIS 10TH DAY OF JANUARY, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Ochieng for the applicant.

Ms. Nyasani for the Respondent.

