



**VWM v COM (Family Appeal E018 of 2023)
[2024] KEHC 1150 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1150 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
FAMILY APPEAL E018 OF 2023
HM NYAGA, J
FEBRUARY 7, 2024**

BETWEEN

VWM APPELLANT

AND

COM RESPONDENT

RULING

1. By an application dated 2nd November 2023, the Appellant, Appellant has sought the following orders:
 - i. That pending the hearing and determination of the Application inter-partes or further orders of the Court, this Court be pleased to grant the Applicant an order of stay of execution of the Ruling and order made on 1st November, 2023 in Nakuru Children’s Case No. XXX of 2023.
 - ii. That pending the hearing and determination of the Application inter-partes or further orders of the Court, this Court be pleased to call for and examine the Record of proceedings in Nakuru Children’s Case No. XXX of 2023 for purposes of satisfying itself on the correctness, legality and propriety of the Court’s Ruling made on 1st November, 2023 by Hon. Ruth Kefa (P.M.)
 - iii. That pending and hearing and determination of the Intended Appeal or further orders of the Court, this Court be pleased to grant the Applicant an order of stay of execution of Ruling and order made on 1st November, 2023 in Nakuru Children’s Case No. XXX of 2023.
2. The Application is premised upon the grounds set out on its face and is supported by the Affidavit sworn by the Applicant on 2nd November, 2023.
3. In a nutshell, the Applicant states that she is dissatisfied with the Ruling of the Lower Court ad has preferred an appeal which is arguable and with high probability of success.



4. The Applicant avers that despite the subject being a toddler, the trial court ordered that she hands over him to the Respondent relying on a Children's Officer's Report that was done in a covert and unclear manner without giving the Applicant a chance to submit on the same. That the Court relied on this report to deliver its impugned ruling.
5. The Applicant further argue that both parties had conceded that the subject lived with her and her parents at Narumoru and as such, the Children Officer's Report ought to have been done by an officer from where the child was residing.
6. The Applicant also argues that the Report in question had glaring omissions and failed to address the best interest of the child; the psychological ramifications of removing the subject from the home environment he was used to an unknown place.
7. The Applicant further states that the Application has been brought without delay and should the stay not be granted then the appeal will be rendered nugatory.
8. Lastly, the Applicant states this Application has been brought in the best interest of the child/subject herein.
9. The Application was opposed by the Respondent who filed a replying affidavit sworn on 20th November, 2023.
10. In summary, the Respondent states that the order in question were issued in the best interest of the subject herein.
11. The Appellant avers that he is well known to the subject as he had lived with him until sometime in October, 2022 when the Applicant removed the child from his home. That he has continually communicated with the subject until when the Applicant moved to Kijabe and cut off all communication with the child.
12. The Respondent argues that the Children Act 2022, has dispensed with the issue of tender age when dealing with custody and considers that both parents have primary and equal responsibilities toward the subject.
13. The Respondent further avers that the Applicant does not live with the subject but with his grandparents who are 3rd parties who cannot have higher right than the subject parents. That during the separation of the parties he has co-parented the child and he should have access to the child so he is not a stranger to the child as alleged.
14. In regards to the Children Officer's Report, the Respondent depones that the same is not defective as both parents were interviewed and the Court was to determine the issue of custody between him and the Applicant and not the Applicant's parents.
15. The Respondent further avers that the Applicant has denied him access to the subject. That her father has threatened him with death and he has filed a report with the police. That the Applicant does not have custody of the child as she is doing her internship at Kitale and has left the subject with her parents.
16. The respondent urged the court to dismiss the application and uphold the ruling of the trial court.
17. The parties did not file submissions and left the matter to the Court to determine.



18. The Application has been brought under several provisions of the law, including order 42 rule 6 of the *Civil Procedure Rules*. The same provides as follows: -

“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the 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.”

19. Clearly, the said rule envisages a ruling, judgment or order that has a monetary value to it. That is why the provision of security is prescribed.

20. In the instant case, the matter has to do with the subject herein.

21. Article 53 (2) of *the Constitution* provides that in all matters concerning a child, the Court shall consider the best interest of the child. Thus order 42 of the *Civil Procedure Rules* ought not to be strictly applied in a case like this.

22. It must also be remembered that a matter like this one before me, needs not take an adversarial posture since the Court is primarily concerned with the best interest of the child. Therefore, while there are principles under order 42 rule 6 that the Court can rely upon, some requirements, like security, are totally inapplicable.

23. The gist of the Application is that unless the orders of the trial magistrate are stayed, then the Appeal will be rendered nugatory. The Applicant also points to the psychological trauma the child will face if he is to be moved from his usual place of residence, that is with the Applicant and her parents.

24. I have considered the rival arguments. I note that the Ruling against this appeal has been filed and was availed. The Lower Court record was not availed to enable the Court examine the documents filed.

25. However, it is easy to decipher from the Children Officer’s Report filed with the Application that the subject lives with the Applicant and her parents.

26. The Respondent claims that the Applicant has left the subject in the custody of her parents who are hostile to him.

27. The Trial Court while appreciating that the subject is of tender years and the generally settled law of such children, it went ahead to find that there were exceptional circumstances that warranted her not to grant custody to the Applicant herein. She found that the Applicant was unable to live with the child as she is a student.



28. At this stage, it is not right to delve into the merits of the Ruling in question. I believe that the parties will adequately address the court on the same.
29. For now, and having looked at the circumstances of the case, it cannot be denied that the Applicant has been having custody of the subject.
30. In my view, removing such a child from his familiar surroundings will be prejudicial to him. The Report by the Children officer concentrated on the views of the parties and not the best interest of the child. I note that no home visit was done to establish the status of the subject. That was a fundamental flaw with the said report. It cannot be relied upon as an accurate, independent and unbiased report.
31. For the above reasons, I find that the Applicant has succeeded in establishing an arguable appeal. An arguable appeal it has been said is not necessarily one that will succeed. It is an appeal which is not frivolous. I am unable to term this appeal as frivolous.
32. I also find that the Applicant has established that if a stay is not issued, then the appeal will be rendered nugatory.
33. It is also my finding that the Application was filed without unreasonable delay.
34. As such, I allow the Application and grant orders of stay of the ruling delivered on 1st November, 2023, in so far as the Respondent was to have custody of the subject.
35. The said orders were issued on an interim base. Proceeding with the Appeal herein whilst the main suit is still pending will mean that parallel proceedings are being undertaken here and in the Lower Court.
36. It is thus my view that, the parties ought to go back to the Lower Court to conclude the hearing of the suit itself.
37. This file shall be mentioned at a date to be given shortly to confirm that the suit has been disposed of.
38. The Trial Court is at liberty to make any orders on access as it deems fit, subject to compliance of the orders herein.

DATED AND DELIVERED AT NAKURU THIS 7TH DAY OF FEBRUARY, 2024.

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H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer

Mr. Ndichu for Ms. Wairimu for Appellant

Respondent present in person

