



**Akello v Wamuri (Miscellaneous Civil Application E122 of 2022)  
[2024] KEHC 3610 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3610 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS CIVIL APPLICATION E122 OF 2022**

**MW MUIGAI, J**

**MARCH 8, 2024**

**BETWEEN**

**NICHOLAS OWINO AKELLO ..... APPLICANT**

**AND**

**JACKLINE ATIENO WAMURI ..... RESPONDENT**

**RULING**

**Notice Of Motion**

1. Vide a Notice of Motion under a Certificate of Urgency dated 7<sup>th</sup> September, 2022 and filed in court on 8<sup>th</sup> September, 2022 brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21, and Section 8 of the *Children Act* No. 29 of 2022, Article 159 (2) (d) of *the Constitution* of Kenya, 2010 wherein, the Applicant sought Orders that:
  - a. Spent.
  - b. This Honorable Court be pleased to hear the Application of the Applicant herein during this vacation and the Orders sought herein be granted ex-parte.
  - c. There be stay of execution pending the hearing and determination of this application inter partes.
  - d. The Respondent has completely denied the Applicant the right to access the last born minor contrary to the orders of the court and has taken off with the said minor abandoning the first born at the Applicant's house and the Applicant has not seen the last born minor contrary to the judgment of the Court of first instance.
  - e. There be stay of execution pending the Appeal.



- f. Leave be granted to the Applicant to file appeal out of time and as per the draft Memorandum of Appeal hereunto attached.
  - g. There be such other and/or further orders as the court deems just and expedient to grant.
  - h. Cost be in the cause.
2. The grounds upon which the application was/is premised are in the body of the said application.

### **Supporting Affidavit**

3. The said application was/is supported by an affidavit dated 7<sup>th</sup> September 2022, sworn by Nicholas Owino Akello, the Applicant herein, wherein, he deposed that he is the biological father to the minors Jayden Nicholas Akello and Tammicah Ava Ayleen Akello to whom this suit relates.
4. Deposing that judgment was entered against the him on 9<sup>th</sup> March,2021. He deponed that he was unwell for some time and suffered financial constraints as a result of the ailment thus unable to file an appeal within good time. Lamenting that he is now desirous of appealing as there is effluxion of time regarding filing of the said appeal (annexed and marked copy of the judgment and Memorandum of Appeal). He deponed that the Respondent has completely denied him access to the minor despite the order of the Court towards that effect; further that the Respondent does not have a known home or house where she lives and it has become very hard for him to access the minor TAAA. Opining that the Respondent also abandoned the other minor one JNA and he has been under the care of the Applicant despite the judgment.
5. He deposed further that the Appeal will be rendered nugatory unless the stay of execution sought is granted and/or issued. Deposing that he has an arguable appeal and the Respondent will suffer no prejudice if the application is allowed.

### **Replying Affidavit**

6. The Application was opposed by Replying Affidavit dated 24<sup>th</sup> November,2022 and filed in court on 30<sup>th</sup> November,2022, sworn by Jackline Atieno Wamuri, the Respondent herein, wherein, she deposed that it is true that judgment in Chief Magistrate's Court at Mavoko Children's Case No. 12 of 2020 Nicholas Awino Akello Vs Jackline Atieno Wamuri was delivered on the 9<sup>th</sup> March,2021 in the best interest of the children. Opining that the Applicant has not produced any evidence before this Court indicating why it has taken 1 year 183 days to file the Application and she urged the Honorable Court to dismiss the same with costs. He deponed that in response to paragraphs 6, 7 and 8 inclusive of the Supporting Affidavit, she denied the allegations set out thereof and stated as follows that:
  - a. It is not true that she had denied the Applicant access to the minor Tammicah Ava Ayleen Akello since the said judgment gave her actual custody of the Children and the Applicant was granted access rights.
  - b. The Applicant has been staying with Jayden Nicholas Akello before and after delivery of judgment despite him being granted custody by the said judgment.
  - c. In December,2021the Applicant who wanted to access the minor at a specified venue, violently declined to return baby Tammicah Ava Ayleen Akello to her who was unwell and he insisted that he wanted to travel with her upcountry which was not in the best interest of the minor.
  - d. She travelled with the Applicant upcountry since baby Tammicah Ava Ayleen Akello was still breastfeeding and was unwell.



- e. Upon their return, the Applicant declined to return custody of baby Tammicah Ava Ayleen Akello stating that he would live with her in his house which was contrary to the judgment.
  - f. The Applicant gave her an ultimatum to stay with him and baby Tammicah Ava Ayleen Akello at his residence in Mlolongo as he makes arrangements to rent a nearby house or she leave without the baby and she had no choice but to stay with the baby.
  - g. In July 2022, the Applicant demanded that she leave his house with both Children and she only managed to leave with baby Tammicah Ava Ayleen Akello since Jayden Nicholas Akello was in school.
  - h. She has been staying with baby Tammicah Ava Ayleen Akello since then.
7. She lamented that the Applicant has stopped catering for food, clothing and entertainment of baby Tammicah Ava Ayleen Akello and the Applicant further indicated that she should never contact him which is not in the best interest of the children and that the Applicant's conduct of failing to honor and comply with the orders given in the judgment indicates that the Applicant approaches this Honorable Court with unclean hands is therefore not deserving any orders. She deposed further that the Applicant has reneged his parental responsibilities and it is clear that the intended appeal has no merit and is not in the best interest of the children.

#### **Further Affidavit**

8. By further affidavit dated 21<sup>st</sup> February,2023 and filed in Court on 3<sup>rd</sup> March,2023, sworn by Nicholas Owino Akello, the Applicant herein, wherein, he deposed that replying affidavit as sworn by the Respondent is full of non-disclosures and is nothing but a well calculated tactic intended to mislead this Honorable Court. deposing that by the time the judgment of the Lower Court in the Chief Magistrate's Court at Mavoko was being delivered on 9<sup>th</sup> March,2021 the Respondent had already brought herself back to his house at Mlolongo till 19<sup>th</sup> July,2022 and this Application was instituted on 24<sup>th</sup> September,2022, two (2) months after the Respondent left with his last born daughter TAAA. Lamenting that the Respondent blocked all his telephone numbers, thereby denying him access to the minor, ability to know where his daughter was, as well as the right to provide to her. He deponed that it is true that the judgment was delivered in the presence of his advocate, the firm of Messers Chebon & Company Advocates but his Advocate changed from self- employment to employed and he could not handle his appeal on his own thus he was compelled by circumstances to change advocates first, and it came with financial implications and the fact that he was unwell at some point took longer thus the Application is/was not a mere afterthought but one with genuine merits all for the best interest of the minors. He opined that the brief reconciliation that was celebrated when the Respondent went back to live with him was after the 25<sup>th</sup> December,2020, celebrations which was another delay window as the reconciliation appeared like a lasting solution to their problems only to go back to square zero with the worst scenario of being denied access to baby TAAA and it thus necessitated filing this Application. He lamented further that it is true he had been staying with his son JNA before and after the judgment of the Lower Court at Mavoko as the Respondent left on 19<sup>th</sup> July,2022 while the minor was at school and given that he his child the Respondent could not chase him away. The deponent herein denied all other averments of the replying affidavit and deposed further that in July, 2022 the Respondent became very hostile and violent towards him assaulting him in front of the rest of his family members including their children, tore the money he had given her over time into pieces and even went ahead to undress in front of a police officer he had called to come and intervene in his house as the hostility had escalated and he had no choice but to ask her to leave as it was not clear what else she would have done with her hostility and violence.



9. The matter was canvassed by written submissions.

## **Submissions**

### **Applicant's Submissions**

10. The Applicant in his submissions dated 21<sup>st</sup> February,2023 and filed in court on 3<sup>rd</sup> March,2023, wherein counsel for Applicant raised the following issues:
1. Whether the Applicant has adduced sufficient reasons to warrant grant leave to file an appeal out of time.
  2. Whether the delay is reasonable or inordinate.
11. Counsel submitted that the Applicant has stated that he was unwell and had some financial problems as the ground as to why he did not file the appeal within statutory period of thirty days after the delivery of the judgment. Submitting that the Applicant has also stated that his then advocates changed from self-employment to employment and he needed to gather funds to be able to hire another advocate for purposes of instituting the appeal proceedings, and given that his net income is not much, he delayed before putting his financial needs in order, hence seeking leave of this Honorable Court to file an Appeal out of time as per the annexed draft Memorandum of Appeal. Reliance was placed on the case of Abdul Azizi Ngoma Vs Mungai Mathayo [1976] Kenya LR 61, 62 the Court of Appeal, and submitted that his client was financially incapacitated as result of his being unwell hence moving this Honorable Court for leave to file an appeal out of time. Contending that this is a sufficient reason to allow the Appellant leave to file an appeal out of time coupled with the principle of the best interest of the child as the intended appeal stems from the judgment in a children's case.
12. Counsel further relied on the case of SNM Vs Sub-County Children's Officer & PNN [2021] eKLR, to buttress his case on filing an appeal out of time. It was the contention of the counsel that the Applicant's application meets the threshold of a prima facie case with high probability of success, as espoused in the locus classicus case of Geilla Vs Cassman Brown 1975, where the prerequisites of granting temporary injunctions were laid down to include but not limited to establishment of a prima facie case, as per the common law dictates.
13. Counsel implored the court to find that the Applicant's application has merit and allow him leave to file an appeal out of time.

### **Respondent's submissions**

14. Respondent in her submissions dated and filed in court on 8<sup>th</sup> June,2023, counsel for the Respondent raised the following issues for determination:
- a. Whether the application is merited.
  - b. Whether allowing the application is in the best interest of the children.
15. On whether the application is merited, counsel submitted that the order sought as framed is incapable of being allowed since the Applicant has not filed an appeal and merely has an intention to appeal the judgment of the Honorable Trial Court and they urge the Honorable Court to dismiss the application with costs. Counsel relied on Order 42 Rule 6 of the Civil Procedure Rules and submitted that the Applicant has not demonstrated before this Honorable Court the extent and nature of the substantial loss he stands to suffer and that the Applicant has failed to satisfy the requirement to demonstrate that he stands to suffer substantial loss.



16. Counsel invited the Honorable Court to note that the judgment before the Trial Court directed the Applicant to provide food, clothing and entertainment for the minors which paternity was not contested hence it is not in the best interest of the children since the Respondent is unemployed and urge the Honorable Court to dismiss the application.
17. Contending that the Applicant has failed to offer any security and therefore he has not met the required legal threshold to warrant granting the order of stay of execution.
18. Opining that *Civil Procedure Act* under Section 75G grants the Honorable Court discretionary powers in granting applications for enlargement of time. Further counsel submitted that Judgment was delivered by the Trial Court on the 9<sup>th</sup> March, 2021 and the instant application was filed on 8<sup>th</sup> September, 2022 which is a record 1 year and 184 days, averring that the Applicant depones that he failed to lodge his Memorandum of Appeal due to illness. While relying on Sections 108 and 109 of the *Evidence Act*, counsel argued that the Applicant did not indicate the period within which it is alleged he was unwell and further failed to attach evidence such as medical report or treatment notes to prove that he was unwell hence he failed to discharge the statutory burden of proof under Sections 108 and 109 of the *Evidence Act* hence his evidence cannot be believed and the said application be dismissed with costs.
19. As to Whether allowing the application is in the best interest of the children, counsel opined that it is not in the best interest of the minors to grant the application since it appears that the Applicant who did not contest paternity during the pendency of the suit before the Trial Court, seeks to abandon his parental responsibility which included the provision of food.
20. It was contended that the Applicant has not been maintaining baby Tammicah Ava Ayleen Akello as stated under Paragraph 8 of the Respondent's Replying Affidavit sworn on 24<sup>th</sup> November, 2022 and this is evidenced by the fact that the Applicant has not attached any evidence that he has been buying inter alia food as directed in the judgment. To buttress this point counsel relied on Article 53 of *the Constitution* as read with Section 8 of the *Children Act*, and submitted that the Applicant approached this Honorable Court with unclean hands and is not deserving any discretionary orders of this Honorable court, hence urged the court to dismiss the application with costs.

### **Determination/analysis**

21. I have considered the application, affidavits in support and in opposition to, submissions and the authorities relied upon.
22. The application is premised on Order 42 rule 6(2) of the Civil Procedure Rules, 2010 provides that:-

“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 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.

23. It therefore follows that no appeal or second appeal will operate as a stay. A party must show sufficient reasons why stay orders should be granted. See *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nairobi 15 of 1990 [1990] KLR 365.
24. The Court, in *RWW vs. EKW* [2019] eKLR, addressed its mind to 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.”
25. The issue necessary for determination would be whether the application seeking stay of execution is merited.
26. While considering stay of execution in respect to children matters, beside the above, the Court has to consider the best interest of the child. The applicant is expected to demonstrate that the minors will suffer if a stay is not granted.
27. It is now trite that, in applications for stay in respect of decrees or orders made in matters involving children, the welfare of the children in question be given utmost consideration.
28. In *Bhutt vs. Bhutt*, Mombasa HCCC NO. 8 of 2014 (O.S.), this principle was expressed thus:
- “In determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution Order 42 rule 6 of the Civil Procedure Rules, must be complemented by an overriding consideration of the best interest of the child in accordance with the injunction of Article 53(2) of *the Constitution...*”
29. The Applicant averred that the respondent had completely denied him the right to access the last born minor contrary to the orders of the court and had taken off with the said minor abandoning the first born at the Applicant’s house and has not seen the last born minor.
30. The Applicant also averred that he had not appealed against the judgement entered against him on 9<sup>th</sup> March 2023 and that the delay in filing the appeal was as a result of ailment and or sickness which rendered him financially constrained.
31. On the ground of substantial loss, the applicant has not demonstrated on what loss he will suffer if the stay is not granted, in any case the substantial loss that he should demonstrate is how the minors will suffer substantial loss which in this case, none has been availed. It is not disputed that the children herein are of tender age and are better placed being in the custody of their mother unless there is proof that their stay with their mother will negatively affect the children and in any case the judgement was very sound and fair in considering the best interest of the children and the applicant as he was granted unlimited access to the minors.



32. On the issue of maintenance, I find that the judgement of the trial court was very balanced in apportioning the responsibilities as between the Applicant and the Respondent. I have noted the opinion of Musyoka, J. in two decisions – Z.M.O. v. E.I.M. [2013] eKLR and M.N. v. P.A.S. [2015] eKLR, and I, agree with the learned judge that it is in very rare cases that courts grant stay of maintenance orders in cases involving minor children, where the duty to maintain a child is imposed on a parent by statute, as it is not in the best interests of the child to suspend a maintenance order particularly where parentage is not in dispute and that an expedited hearing of the main appeal might be a solution where there is a challenge on quantum of maintenance rather than staying the orders of the trial court pending appeal.
33. On the ground of unreasonable delay, there is obviously very unreasonable delay in filing of both the application and the applicant is asking the court to grant him leave to file out of time. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR. They include the following:
- i) The period of delay;
  - ii) The reason for the delay;
  - iii) The arguability of the appeal;
  - iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
  - v) The importance of compliance with time limits to the particular litigation or issue; and
  - vi) The effect if any on the administration of justice or public interest if any is involved.
34. The judgment was delivered on 9<sup>th</sup> March 2021, the Applicant filed this application on 8<sup>th</sup> September 2022, one year and few months later which is such unreasonable delay and he gave the reason that he was sick and financially constrained. If the court is to look at the factors to consider whether to grant leave to appeal out of time, in this instant case and in the best interest of the children, there is no arguable appeal as the judgement given by the Trial Court is very sound and reasonable.

### **Disposition**

1. In the premises the Court declines to grant stay orders against the judgment of the Trial Court dated 9<sup>th</sup> March 2021 as matter regarding welfare and wellbeing of a child/children cannot be stayed. Although there has been inordinate delay in filing an Appeal, the Court record reflects for a while the child's whereabouts were unknown and the Court sought to confirm and see the child(ren) through the intervention of OCS Machakos & Children Officer to ensure that the best interest of the children are met by both parents.
2. The Applicant may file Appeal within 30 days from date of this Ruling.
3. Each Party to bear their own cost.

It is so ordered.

**RULING DELIVERED DATED SIGNED IN OPEN COURT IN MACHAKOS ON 8<sup>TH</sup> MARCH, 2024 (VIRTUAL/PHYSICAL CONFERENCE).**

**M.W.MUIGAI**



## **JUDGE**

In The Presence Of:

Ms Waithera - For The Applicant

No Appearance - For The Respondent

Geoffrey/patrick - Court Assitant(s)

