



PSA v PNG (Civil Appeal E099 of 2023) [2024] KEHC 2463 (KLR) (Civ) (8 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2463 (KLR)

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

CIVIL

CIVIL APPEAL E099 OF 2023

PM NYAUNDI, J

MARCH 8, 2024

BETWEEN

PSA APPLICANT

AND

PNG RESPONDENT

RULING

1. Before this court is the Notice of Motion application dated 21st September 2023 by which the Applicant PSA seeks the following orders:-
 1. Spent.
 2. That this Honourable Court be pleased to grant an order of stay of execution and enforcement of the Decree dated 25th August 2023 and issued on 28th August 2023 in Milimani Children’s Court Case No 1712 of 2019 in favour of the Respondent herein and impending and or imminent execution thereof pending determination of the Appeal.
 3. Spent
 4. That this Honourable Court be and is hereby pleased to make any other order(s) as it may deem fit in the circumstances and interests of justice.
 5. That the costs of the Application do abide the outcome of the inter-partes hearing of this Application.
2. The Application is premised upon Articles 50 & 159(1)(d) of the *Constitution* of Kenya, Sections 1A, 1B, 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya; Order 22 Rule 52, Order 42 & Order 51 Rule 1 of the *Civil Procedure Rules, 2010* all other enabling provisions of the law, and was supported by the Affidavit of even date sworn by the Applicant.



3. The Respondent PNG opposes and has filed a Replying Affidavit dated 20th November 2023. She avers that the application is bad in law and is frivolous and that the Applicant is in contempt of court orders of 25th August 2023 and is undeserving of the orders sought. She further avers that the application is not in good faith as the Applicant has been litigating and filing several applications in an attempt to abscond from his parental responsibility.

Background

4. The parties are the biological parents of the minors subject of the proceedings. This application emanates from the judgment in Nairobi Children Case No E1712 of 2022. The trial court was tasked to determine legal custody, care and control of the minors as well as maintenance. The court was also tasked to determine an application dated 14th March 2023 where the Applicant sought the following orders;
 - a. Review and/or setting aside the orders issued on 2nd February 2023.
 - b. Court to declare the orders dated 19th November 2020 as lapsed due to effluxion of time.
 - c. Court to issue orders that the Notice to Show Cause dated 22nd September 2022 is invalid for being based on lapsed orders.
5. On 25th August 2023, Hon. C.C.Oluoch , Chief Magistrate made the following orders;
 1. That the parties shall have joint legal custody of the minors.
 2. That the Plaintiff shall have actual custody, care and control of the minors.
 3. That the Defendant is at liberty to arrange for access to the minor directly with the Plaintiff or through the advocates on record.
 4. That the Defendant shall pay a monthly sum of Kshs. 10,000/= as contribution for the upkeep of the minors, by the fifth (5th) day of every month.
 5. That the Defendant shall cater for the medical needs of the minors through a medical cover.
 6. That the Defendant shall pay school fees and cater for the minor's school related expenses at current school or any other to be agreed in the future.
 7. That the order issued on 2nd February 2023 is amended to read that the Defendant shall settle the balance outstanding from a sum of Kshs,. 218,200/= in four equal monthly instalments by the last day of every month from September, 2023.
 8. That each party shall bear its own costs.
6. The Applicant was aggrieved by the court's orders and filed an appeal vide Memorandum of Appeal dated 13th September 2023, before this court.

Applicant's Submissions

7. The Applicant submitted that there was no delay in filing the application .
8. The Applicant challenges the Judgment delivered on 25th August 2023 on 14 grounds. The Appellant challenges the orders of maintenance made against him and the decision of the Court to dismiss his Application dated 14th March 2023.



9. He submitted that the purpose of stay is to give him ample opportunity to ventilate his appeal which raises weighty issues.
10. The applicant further submitted that executing the decree will destabilize him thus prevent him from continuing to honor his obligations. He submitted that he is willing to subject himself to any directions this court will issue to safeguard the interests of the minors and his interest in the outcome of justice. He urged this court to allow this application.

Respondent's Submissions

11. The respondent submitted that in determining stay of execution in children matters, the best interest of the child is paramount as provided by Section 53(2) and Section 8 of the *Children Act*. She submitted that although the Applicant argues that the judgement was delivered in the absence of the parties, he does not demonstrate the prejudice suffered. She further asserts that he filed a similar application at the trial court which was dismissed. She concludes by stating that the applicant is litigious and is avoiding his parental responsibility.
12. She further submitted that the Applicant has not demonstrated that he will suffer substantial loss if the orders are not granted and no security for performance has been provided. She urged the court to dismiss the Applicant's application as the application for stay is not in minors the best interest.

Analysis and Determination.

13. I have carefully considered the application before me alongside with the submissions made, authorities cited and the relevant law. The Applicant seeks to stay the orders issued by the trial court on 25th August 2023.
14. The principles guiding the Court in granting stay are well articulated in the locus classicus case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal held that
 - “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 6. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”



15. These principles were summarised in *RWW v EKW* [2019] eKLR, where the Court considered 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.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

16. An additional factor for consideration in matters touching children is found under Article 53(2) which provides that:

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

17. In the case of *Bhutt v Bhutt* Mombasa HCCC No 8 of 2014, the Court held as follows:-

“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 overriding consideration of the best interest of the child in accordance with “Article 53(2) of the *Constitution*.” (Emphasis Supplied)}

18. The Application is hinged on two grounds firstly that the Notice to Show Cause issued on orders that had lapsed and secondly the quantum of maintenance does not consider the means of the Appellant and is therefore unsustainable.

19. I observe that the Appellant argues that the terms of the judgment are onerous on him but does not state that unless stay is granted, his appeal will be rendered nugatory. The orders which the Applicant seeks to stay relate to the maintenance of the minors. I subscribe to the reasoning of Musyoka J as articulated in *Z.M.O v E.I.M* [2013] eKLR where he stated

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. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute. To my mind once a maintenance order is made where parentage is undisputed it should not be suspended pending appeal where the appeal is on the quantum payable.

20. In the case of *DOB v DMA* [2021] eKLR the court addressed itself on the issue of staying maintenance orders as follows:

“In matters concerning children, the best interests of the child are of paramount importance. The accepted principle in applications for stay of execution of maintenance orders in children’s cases is that the suspension of the maintenance order is not in the best interests of the child.”



21. It has been revealed that the Applicant has not complied with the orders of maintenance made by the Children Court. The Applicant has not denied this allegation. The Applicant is reminded that courts do not make orders in vain. Parties are obliged to obey court orders even when they do not agree with said orders.
22. It is trite that he who comes to equity must come with clean hands. It is duplicitous of the Applicant to approach this court seeking to stay orders, which he has in any event disobeyed.
23. In the case of *MN v TAN & another* [2015] eKLR a case which is on all fours with the present case the court held as follows:-

“ A valid court order has to be obeyed or complied with regardless of how aggrieved a party is about it. The order has the force of law. It is not a mere wish or proposition. Disobedience or non-compliance with it attracts severe consequences. It would appear to me that the appellant believes that the orders of 30th July 2013 are not valid, and has explained why he has chosen to disregard or disobey them. Yet he is bound to obey the orders for as long as they are still in force. He has no choice, he cannot decide when and how to obey or comply with them.

The appellant has applied to the court for a discretionary relief, yet he is not ready to obey the orders that he is seeking relief against it. He has therefore come to court with unclean hands. The court cannot exercise discretion in favour of such a litigant who has no respect for the rule of law” (own emphasis).

24. Whereas the Applicant has demonstrated that he has an arguable appeal, I am not satisfied that the Appeal will be rendered nugatory unless the stay is granted. The scales are tilted by the fact that it is not in their interests to stay execution of their maintenance.
25. I find therefore that there aren't valid grounds to stay the orders made on 25th August 2023. The welfare of the children is paramount consideration and cannot be stayed, as this would be detrimental to the welfare of the said children.
26. Based on the foregoing I find no merit in the present application. The same is dismissed in its entirety. For avoidance of doubt the orders of 25th August 2023 made by the Childrens Court in Case No E1712 of 2019 remain valid and enforceable. This being a family matter I make no orders on costs.

SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 8th DAY OF MARCH, 2024.

P M NYAUNDI

HIGH COURT JUDGE

In the Presence

Ms Ndungu for Respondent

Mr. Ntogoaiti for Applicant

