



**RO v TKO (Civil Appeal E089 of 2023)
[2024] KEHC 2446 (KLR) (Family) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2446 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E089 OF 2023
PM NYAUNDI, J
MARCH 8, 2024**

BETWEEN

RO APPLICANT

AND

TKO RESPONDENT

RULING

1. Before this court for determination are two applications, dated 5th August 2023 and 3rd October 2023 filed by the Applicant and the Respondent respectively. The Court directed that both Applications would be heard concurrently.

Summary of Applications

Application dated 5th August 2023.

2. The Applicant’s Notice of Motion dated 5th August 2023 (sic) is presented under Order 22 Rule 22, Order 42 Rule 6(1), (2) and (6) and Order 51, Rule 1 of the *Civil Procedure Rules*, 2010, Sections 1A& B, 3A &80 of the *Civil Procedure Act* and all other enabling provisions of law and was supported by the Affidavit of even date sworn by the Applicant.
3. The Applicant seeks the following orders;
 1. Spent.
 2. Spent.
 3. That pending the hearing and determination of the Appeal filed herewith, this Honourable Court be pleased to grant a stay of execution of the ruling and orders of Principal Magistrate,



Hon. Jackie Kibosia delivered on 31st August, 2023 in Nairobi Chief Magistrate's Court Children's Case No. XXX of 2014: *TKO v RO*.

4. That this Honourable Court be pleased to grant any other order, relief, and or further orders or reliefs as it may deem fit and necessary to grant in the interests of justice and fairness.
5. That costs be in the cause.
4. In his supporting affidavit, he averred that on 31st August 2023, the court delivered a ruling ordering him to pay maintenance arrears of kshs. 83,000 plus college fees of kshs. 37,900 by 5th September 2023 failure to which warrants of arrest would issue. In an attempt to comply with the said orders, he visited his son's school and paid kshs. 37,900. He was later served with a Notice to Show Cause for arrears totalling kshs. 176,000. The maintenance arrears were enhanced from kshs. 176,000/= to kshs. 332,000/= without being given an opportunity to challenge the figures.
5. He deposed that he was given a short notice to make payments without the court considering the fact that he is retired and diabetic. He stated that he is willing to continue to pay school fees for JO who is already 20 years old. However, he should not be compelled to pay school fees for Abigail Mwendu who has never joined any college. He stated that she works at KWFT and is over 25 years old.
6. The Respondent opposed the application vide a Replying affidavit dated 3rd October 2023. She stated that the trial court issued orders extending parental responsibility on 26th September 2018. The court gave an order that the parties do reconcile their accounts and appear before court on 3rd August 2023. The Applicant did not appear in court on 3rd August 2023 forcing the court to issue warrants of arrest against him.
7. The Applicant then filed an application seeking stay of execution of the warrant of arrest. Stay was granted and the parties were ordered to appear in court on 31st August 2023 to reconcile accounts. The Applicant did not attend court but his counsel indicated to the court that he had instructions to proceed with the reconciliation.
8. She and the Applicant's advocate agreed on the accrued monies and it was agreed that the Applicant should remit the amount in four equal instalments. She stated that school fees for Joseph were already in arrears of kshs. 40,900. She argued that the Applicant is a man of means who has pension and receives kshs. 200,000 from a rental house in Katani and enjoys the matrimonial home to her exclusion.
9. She averred that Abigail Mwendu does casual jobs because of the Applicant's reluctance to pay her school fees. She argued that she has since then secured an admission to KIM College and there is need to pay school fees.
10. Notice to Show Cause was issued on 3rd August 2023. The notice to show cause was defended by the Applicant who was represented by his advocate. She averred that she is equally sick and unemployed but she does casual jobs to make ends meet. She urged the court to dismiss the Applicant's application.

Application 3rd October 2023.

11. The Respondent filed Chamber Summons dated 3rd October 2023, presented under Sections 4(2), 25 (1) (a), 28, 76(1)(2) (3a,b,c,e,f,i) , 82 (1)(2) (3a), 83(1a, b,c, d,e,j), 84, 91 (b), 113 (1)(2b)(30(sic)(4) (5), 114 (a)(b) of the *Children's Act* 2001 and Article 53(b) of the Constitution of Kenya and all the enabling provisions of the law and seeks the following orders;
 1. Spent.



2. That the Honourable Court be pleased to release funds deposited in the court's account in the sum of Kenya Shillings, One hundred and twenty thousand , nine hundred (kshs. 120,900) as a condition of stay to cater for payment of college fees for the issue Abigael Mwendu Ogembo.
3. That costs of this application be in the cause.
12. In her supporting affidavit, the Respondent averred that she and the Applicant are the biological parents of AMO. The trial court on 30th June 2023 gave an order extending the Applicant's parental responsibility beyond 18 years. On 6th September 2023, the court ordered the Applicant to deposit kshs. 120,000 as condition of stay.
13. She argued that AMO has re-secured an admission at Kenya Institute Management and is in dire need of school fees which can be actualised by releasing the money to cater for her school fees. She averred that she depends on casual jobs and she is unable to meet the needs of her children. She urged the court to allow the application so that Abigael does not miss the chance to join college.
14. The Applicant opposes this application vide a Replying Affidavit dated 19th October 2023. He deposed that the Respondent did not seek leave to litigate on behalf of AMO who is 24 years old. He averred that Abigael has not demonstrated any special circumstances to warrant issuing of the said orders as she is engaged in meaningful employment after clearing basic education in 2017. That the respondent's application is an afterthought because A did not attain good grades and even failed to go to college after he had paid her school fees.
15. He stated that the amount deposited in court is for security pending hearing and determination of appeal and the same cannot be withdrawn. He averred that the Respondent's application lacks in merit, is scandalous, frivolous, vexatious and an abuse of the court process and the same should be dismissed with costs.
16. On 31st October 2023, the court directed parties to file their submissions. The Applicant filed submissions dated 15th December 2023 . The Respondent's submission are dated 15th January 2024.

Analysis And Determination

17. I have carefully considered the two applications, the affidavits on record as well as written submissions by both parties alongside the relevant law.
18. The issues that fall for determination from the two applications are;
 - i. Whether the Application dated 3rd October 2023 is incompetent and should be struck out?
 - ii. Whether stay of execution should issue with regard to the ruling of 31st August 2023 rendered by the trial Court
 - iii. Who should pay costs
19. On the 1st issue Whether the Application dated 3rd October 2023 should be struck out for being incompetent?
20. The Applicant in his replying affidavit stated that the Respondent ought to seek leave before filing the present application because the children are now at the age of majority. The Respondent submitted that since the trial court extended parental responsibility, she has every right to continue representing the interests of her children who are now over 18 years old.



21. According to the record, the respondent filed an application under sections 28 and 91 of the then *Children's Act*, 2001. One of the prayers sought in that application was 'extension of parental responsibility. The trial court extended parental responsibility of the two children.
22. Since the trial Court was satisfied that the issues raised be dealt with at the trial of the main suit, and having already granted the extension sought, I am unable to find that the suit had been filed against the law as contended by the appellant. I am satisfied that the respondent had complied with the provisions of section 28 of the *Children's Act* 2001 (now repealed) that provided for extension of parental responsibility. This is a matter to be canvassed at the appeal.
23. I observe that the Application is stated to be presented under provisions of the *Children's Act*, 2001. The Act was repealed and the law in force is now the *Children Act*, 2022. On this ground I would be inclined to strike out the Application as it is presented under a repealed statute and therefore incurably defective.
24. I observe that the Application is also said to be presented under Article 53(1) of the *Constitution* that enjoins this Court to consider the best interests of the Child as a primary consideration in all matters relating to children. The question is whether reference to Article 53(1) of the *Constitution* can cure the defects of the Application as cited. I do not think so, I am fortified by the decision of the Court of Appeal in the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others* [2013] eKLR; where the Court stated as follows with regards to Article 159(2)(d) of the *Constitution*

“...the right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159 (2) (d) of the *Constitution*. We do not consider Article 159 (2) (d) of the *Constitution* to be a panacea, nay, a general white-wash that cures and mends all ills, misdeeds and default of litigation”. (Emphasis Supplied)
25. For this reason I dismiss the Application in its entirety.
26. On the 2nd Issue Whether stay of execution should issue?

Grant of stay of execution of an order pending appeal is discretionary. Order 42 Rule (6) (2) of the *Civil Procedure Rules* 2010 provides that in exercising its jurisdiction to grant a stay of execution, the Court is required to satisfy itself of the following:-

 - a. The application has been brought without undue delay.
 - b. The Applicant stands to suffer substantial loss if the stay is not granted.
 - c. The Applicant has provided security for the due performance of the decree.
27. The Applicant annexed a payment receipt in his supporting affidavit sworn on 5th August 2023. In his averments the Applicant is blowing hot and cold. In one instance he states he is prepared to provide for both the Children and has been frustrated in his efforts to provide for the Children on account of the actions of the Respondent.
28. In the same instance he avers that he should not be compelled to provide for the one child as she is an adult and not enrolled in any institution of learning. The requirement of parents to meet their obligations is non-negotiable under both Article 53 (e) of the *Constitution* of Kenya 2010 and Sections 31 and 32 of the *Children Act*, 2022. A parent cannot wiggle out of this responsibility.



29. The Applicant seeks stay of execution of orders touching on the maintenance of his children. It has not been demonstrated how the Appeal will be rendered nugatory if the stay is not granted. On the other hand both the Children's access to education will be negatively impacted if the stay is granted.

30. I align myself with the decision of Muchelule J (as he then was) in [FGW v GWT](#) [2017] eKLR where he stated;

Whether the lower court appreciated the principle of common and shared responsibility of the two parents and properly applied it in this case are matters that the appeal will deal with. For the time being the Court is being asked to suspend the provision. The Child's right to education, medical care and shelter are protected under Article 53 (1) (b) and (c) of the *Constitution of Kenya, 2010*. The provision of the child's education, medical care and shelter is a statutory and constitutional responsibility of the Appellant from which he cannot escape. If the provision is suspended by order of stay it will mean the child does not go to school, has no medical care and has no shelter. The Court cannot expose the child to such eventuality given the circumstances of the case. Such exposure will not be in the best interests of the child

31. In [ZMO v EIM](#) [2013] eKLR Musyoka J 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

32. The Applicant admits paternity, there is a Court order extending parental responsibility, both the Children are in need of parental support to attend school. I am not also satisfied that the applicant will suffer any loss by paying school fees for his children. In the premises I see no merit in this application for stay of execution and I hereby dismiss the same.

33. Arising from the foregoing the Applicants Application is dismissed for want of merit and that of the Respondent is struck out for being incompetent and fatally defective.

34. On the 3rd and final issue, who should pay costs? Having regard to the fact that this is a family matter each party will bear their respective costs.

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

P M NYAUNDI

HIGH COURT JUDGE

In the presence of:

Court Assistant Sylvia

