



BBN & 2 others v DNO (Suing as the mother and next friend of AK – Minor (Miscellaneous Civil Application E002 of 2024) [2024] KEHC 4757 (KLR) (19 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4757 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
MISCELLANEOUS CIVIL APPLICATION E002 OF 2024**

**AC MRIMA, J
APRIL 19, 2024**

BETWEEN

**BBN 1ST APPLICANT
GNM 2ND APPLICANT
GKN 3RD APPLICANT**

AND

**DNO (SUING AS THE MOTHER AND NEXT FRIEND OF AK –
MINOR) RESPONDENT**

RULING

Background:

1. This ruling is in respect of an application by way of a Notice of Motion dated 26th January, 2024. It was filed by the Applicants herein.
2. The application yielded from the decision in Kitale Children Case No. E117 of 2012 between the parties herein (hereinafter referred to as ‘the Case’) where the custody of the subject minor was granted to the Respondent herein. The decision was rendered on 14th November, 2023.
3. The Applicants are now challenging the said decision and have, in the instant application, sought for leave to appeal out of time and a stay of the execution of the impugned decision.
4. The application was vehemently opposed. The Respondent filed a Replying Affidavit sworn on 14th February 2024.
5. Given the nature of the application, this Court will consider the two limbs, that is the prayer for leave to appeal out of time and the prayer for stay of execution, separately; and as hereunder.



Leave to appeal:

6. The power of the High Court to inter alia extend time for filing an appeal from a judgment of a subordinate Court is donated by Section 79G of the [Civil Procedure Act](#), Cap. 21 of the Laws of Kenya.

7.

The provision states as follows: -

79G. Time for filing appeals from subordinate courts:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

8. Courts have over time developed the legal principles guiding the issue of extension of time.
9. The Court of Appeal in [Thuita Mwangi v Kenya Airways](#) [2003] eKLR stated as follows in respect to the matter: -

Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in [Leo Sila Mutiso v Rose Hellen Wangari Mwangi](#), (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:

It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that generally the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted [the arguability test]; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

10. And, in [Velji Shahmad v Shamji Bros. and Popatlal Karman & Co.](#) [1957] EA 438, the High Court expressed itself as follows: -

In the interests of the public the court ought to take care that appeals are brought before it in proper time and before the proper court or registry and when a judgement has been pronounced and the time for appeal has elapsed without an appeal the successful party has a vested right to the judgement which ought, except under very special circumstances, to be made effectual. And the Legislature intended that appeals from judgements should be brought within the prescribed time and no extension of time should be granted except under very special circumstances.”

11. The guiding law on extension of time was finally settled by the Supreme Court of Kenya in [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR. The Apex Court derived the following underlying principles which a Court should consider: -



- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
12. Having restated the law, this Court will now apply it to the circumstances of this case.
13. One of the cardinal legal factors discussed above is the arguability of the appeal. In *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another* (2018) eKLR, the Court had the following to say about the said factor: -
16. Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is not required to persuade the appellate Court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal; a demonstration that the Applicant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict.....
14. This Court has intently relooked into the Draft Memorandum of Appeal annexed to the application. The Applicants intend to vehemently challenge the issue of custody of the minor. That was the heart of the case. The intended appeal is, hence, arguable.
15. In consideration of the nature and circumstances of the case in light of the above legal guidance, this Court finds that the Applicants are deserving of the opportunity to lodge and pursue their appeal.

Stay of Execution:

16. Order 42, Rule 6 of the *Civil Procedure Rules* provides that an Applicant must satisfy the following conjunctive requirements for the grant of stay of execution pending appeal; that is to say: -
- i. The application has been made without unreasonable delay;
 - ii. Substantial loss may result to the Applicant unless the order is made; and
 - iii. That the Applicant is willing to furnish such security as the court order for the due performance of such decree.
17. It is not lost that the purpose of stay pending appeal as held in the case of *RWW v EKW* [2019] eKLR, is as follows: -

... 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.

18. The application shall, hence, be determined under the three parameters captioned above.

Whether the application was filed timeously:

19. This can be determined from the transpirations in the matter.
20. Judgment at trial was entered on 14th November, 2023. Thereafter, the instant application was filed around 26th January 2024. The Applicants had 30 days to lodge any appeal from the date of the impugned judgement.
21. Therefore, the time to lodge any appeal lapsed by 13th December 2023. The application was then filed around one month later.
22. The Applicants gave an account of the time lapse. They stated that they had instructed their former Advocates to lodge an appeal against the judgment, but were surprised that their instructions were not effected. They immediately changed Advocates who filed the application under certificate of urgency.
23. This Court, hence, finds and hold that the period taken to file the application was not inordinate considering what transpired between the Applicants' former and current Advocates.
24. The first condition favours the Applicants.

Whether the Applicants will suffer substantial loss:

25. The aspect of substantial loss was discussed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR as follows: -

... No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

26. The principal contention by the Applicants is that the minor had been in their custody for a period of over a year and was in school such that if the judgment is executed then the minor's education will be prejudiced and highly interfered with.
27. On her part, the Respondent does not see it that way. She contended that she had been in full custody of the minor since birth and that the minor was only forcefully and brutally taken away from her. That, the minor now lives with the 2nd and 3rd Applicants who are the parents of the 1st Applicant and the grandparents to the minor.
28. This Court has considered the parties' positions as well as the submissions.



29. The minor is a girl who was born around June 2013. She is by now aged around 11 years old.
30. The trial Court was under a duty to consider various legal parameters when dealing with the minor's custody. Such include the views of the minor in appropriate instances. Under the command of Article 53(2) of the Constitution, the child's best interests are of paramount importance in every matter concerning a child.
31. The case was fully heard and a judgment delivered. The Court decreed that the minor's custody be upon the Respondent herein.
32. The decision is yet to be varied and/or set-aside.
33. The Applicants posited that the Court ought to protect the substratum of the intended appeal from being rendered nugatory.
34. There is no doubt that the minor was born out of a relationship between the 1st Applicant and the Respondent. As such, in law, both are vested with joint parental responsibility.
35. The substratum of the intended appeal is truly the custody of the minor. Given that in law any of the parents to a minor have a right to custody subject to settled principles, it will be remiss of this Court to, at this point in time and in the unique circumstances of this case, unsettle what has been arrived at after a full hearing.
36. To this Court, custody of the subject child to one parent does not shut out the other parent from the life of the child. Access rights are always granted. Further, if it is true that the child was taken over by the 1st Applicant around a year ago, then the issue of schooling does not really pose any danger to the child's interest since it was likely that when the child was with the Respondent she was in school and that changed when the Applicants took over the custody.
37. In other words, as long as the child's right to education is not flouted, there should not be any cause for alarm.
38. This Court would restrain itself from expressing its position on *inter alia* the above issues which are subject of the main appeal. However, in the event the Applicants succeed in the intended appeal, then appropriate orders would issue. Conversely, if they fail, staying the judgment now would have further delayed the Respondent's realization of the decree. In such a case, a balance ought to be struck.
39. It is on the foregoing basis that this Court finds that the Applicants do not stand to suffer any irreparable loss if stay orders are not granted.

Furnishing of security:

40. The parties did not address this aspect. However, since the Court reserves the right to attach any conditions to a stay order, the absence of any proposition of security by an Applicant in a child custody matter like the one here should ordinarily not be fatal. The Court, however, remains alive to the truism that there are certain instances where an Applicant ought to offer security. Such include money decrees or where the subject is being wasted, among others.
41. In this case, the Applicants' failure to offer any security harms no party.
42. Having said as much, on a consideration of the above three conditions, and for equity sake, it is this Court's position that a stay of execution order ought not be granted in the unique circumstances of this matter.



Disposition:

43. Deriving from the above, the following final orders do hereby issue
- a. Leave is hereby granted to the Applicants to lodge an appeal out of time against the judgment in Kitale Children Case No. E117 of 2012.
 - b. The Applicants to file and serve a Memorandum of Appeal within 14 days of this ruling.
 - c. The execution of the judgment in Kitale Children Case No. E117 of 2012 shall Not be stayed.
 - d. This file is hereby marked as Closed.
44. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 19TH DAY OF APRIL, 2024.

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Mr. Ouru, Learned Counsel for the Applicants.

No appearance for Mr. Wanyonyi, Learned Counsel for the Respondent.

Chemosop/Duke – Court Assistant.

