



**FJO v VAA (Family Appeal E009 of 2024) [2024] KEHC 7216 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 7216 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY APPEAL E009 OF 2024  
G MUTAI, J  
APRIL 12, 2024**

**BETWEEN**

**FJO ..... APPELLANT**

**AND**

**VAA ..... RESPONDENT**

**RULING**

1. The trial Court, in a ruling dated 7<sup>th</sup> February 2024, ordered that “The defendant purchases the non-perishables capped at Kes.4000/- which he can choose to buy directly and send to the Plaintiff or send her money via Mpesa. The plaintiff shall buy the perishable foodstuff. The said foodstuff or equivalent amount shall be sent or paid to the Plaintiff’s Mpesa number on or before the 5<sup>th</sup> day of every month until otherwise ordered or the child attains the age of majority. Parties at liberty to apply.”
2. The Appellant/Applicant was aggrieved by the said decision. Consequently, he filed the instant appeal. The Memorandum of Appeal raises 10 grounds of appeal. As the appeal is not under consideration now, I shall say no more about it.
3. The Appellant/Applicant also filed the Notice of Motion dated 16<sup>th</sup> February 2024, vide which he sought, inter alia, the stay of execution of the ruling delivered on 7<sup>th</sup> February 2024 pending interpartes hearing of the application and also pending the hearing and determination of the appeal. The application is based on the grounds listed in the Notice of Motion and the Supporting Affidavit of the Appellant/Applicant sworn on 16<sup>th</sup> February 2024.
4. The Respondent opposed the Application. She filed a Notice of Preliminary Objection dated 22<sup>nd</sup> February 2024 opposing the application on the grounds that it was res subjudice as a similar application dated 14<sup>th</sup> February 2024 had been filed at the trial Court and also that the application was premature as the Respondent had not commenced any “motion geared towards executing the orders dated 7<sup>th</sup> February 2024.”



5. The application was canvassed by way of Written Submissions. The Appellant/Applicant's counsel filed Written Submissions dated 11<sup>th</sup> March 2024. The learned counsels for the Appellant/Applicant identified 3 issues as coming up for determination to wit:-
  1. Whether the Court has jurisdiction to hear and determine the instant application;
  2. Whether the application dated 16<sup>th</sup> February, 2024 is res subjudice; and
  3. Whether the Application dated 14<sup>th</sup> February 2024 filed before the trial Court is still pending.
6. Regarding the 1<sup>st</sup> ground the counsels for the Appellant/Applicant, relying on the case *Athanas Bonaventure Wanyama & another versus Land Registrar, Kiambu District & another* [2014] eKLR submitted that both the Court appealed from, and the Court to which the appeal is preferred have jurisdiction to entertain an application for stay of execution. That notwithstanding it was urged that the application before the trial Court was withdrawn prior to the filing of the instant application.
7. The counsels for the Appellant/Applicant urged this Court to afford him an opportunity to be heard. Reliance was placed on the decision of the Court of Appeal in *Abdirahman Abdi, also known as Abdirahman Mubumed Abdi versus Safi Petroleum Products Ltd & 6 others*, Civil Application No. 173 of 2010. It was therefore urged that I dismiss the Notice of Preliminary Objection.
8. The Respondent filed Written Submissions dated 19<sup>th</sup> March 2014. In the said submissions, she identified two issues as coming up for determination. Firstly, whether the Notice of Motion dated 16<sup>th</sup> February 2024 is res subjudice and secondly, what would be in the best interest of the minor.
9. On whether the instant application is res subjudice, the Respondent relied on section 6 of the *Civil Procedure Act* and the definition given to the term by the *Black's Law Dictionary*. It was urged that I have the jurisdiction to strike out pleadings under Order 2 Rule 15 of the *Civil Procedure Rules*, which disclose no reasonable cause of action, are scandalous, frivolous and vexatious, may prejudice, embarrass or delay the fair trial of the action or are otherwise an abuse of the process of Court.
10. The Respondent urged that the application was not in the child's best interest and should, hence, be dismissed with costs. She submitted that the objective of the appeal was "basically to frustrate the Respondent to the detriment of the well-being of the subject minor who is entitled to support from her father."
11. I have perused the application and the response thereto. I note that the application before the trial Court dated 14<sup>th</sup> February 2024 was withdrawn before the instant application was filed. In the circumstances, there are no 2 concurrent applications for stay before 2 Courts with jurisdiction. I note that Order 42 Rule 6 gives a litigant appealing against a decision of a Court the option of applying for a stay either at the trial court or before the Court the Decision is appealed to. The preliminary objection is based on a misapprehension of facts. I find and hold that the Preliminary Objection has no merit in the circumstances. The same is for dismissal.
12. Should I grant a stay of execution pending appeal? I note that the matter before the trial Court was the subject of a court-annexed mediation. The parties entered into a partial settlement agreement dated 18<sup>th</sup> October 2023, vide which the responsibilities towards the minor were shared. The Respondent agreed to provide shelter, pay utility bills and provide entertainment to the minor while the Appellant/Applicant is to provide school fees and school-related expenses, settle medical expenses or provide medical cover and also to buy clothes for the minor. In addition, he is also to provide food, shelter, entertainment, and house help "while with the minor."



13. The only issue the partial settlement Agreement did not address was maintenance. The Court, noting the partial settlement agreement, made the impugned decision, which I have referred to.
14. Order 42 Rule 6(2) of the [Civil Procedure Rules](#) provides that: -
  - “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.”
15. In addition to the foregoing considerations, the Court must also consider the child's best interest. In [Bhutt v Bhutt](#), Mombasa HCCC No. 8 of 2014 (OS), the Court stated as follows:-
  - “In determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution under 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](#).”
16. In [LDT vs PAO](#) [2021]eKLR Rachel Ngetich, J held that:-
  - “the Applicant is expected to demonstrate that the minors will suffer if a stay is not granted... the best interest of a child is superior to rights and wishes of parents.”
17. The Appellant/Applicant's expressed reason for seeking a stay, given in paragraph 5 of the grounds in support of the application, is that “The Appellant/Applicant will suffer substantial loss and the intended appeal, if successful, will be rendered nugatory if the stay is not granted.”
18. It is, therefore, evident that the Appellant/Applicant's concern at this point is his own convenience, not that of the minor, who may not be able to have food if the stay of execution is granted. I further note that the sum involved of Kes.4,000.00 is modest. I don't agree that he will suffer a substantial loss in the circumstances. In any case, it is the view of this Court that justice will be served if the appeal is expedited.
19. Given the circumstances of this matter, I find and hold that granting a stay of execution pending appeal would not be in the best interest of the minor. The application dated 16 February 2024 is, therefore, dismissed. As this is a children's matter, I order that each party bear its own costs.
20. Orders accordingly.

**DATED AND SIGNED THIS 12<sup>TH</sup> DAY OF APRIL 2024 AT MOMBASA. RULING DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

Ms Alogo for the Appellant/Applicant;

The Respondent (pro se litigant); and



Arthur - Court Assistant.

