



**SFH v UJM (Civil Appeal E007 of 2023)
[2024] KEHC 3385 (KLR) (Family) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3385 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E007 OF 2023
HK CHEMITEI, J
APRIL 11, 2024**

BETWEEN

SFH APPELLANT

AND

UJM RESPONDENT

RULING

1. This ruling relates to the application dated 23rd January, 2023 filed by SFH seeking for orders that:
 - (a) Spent.
 - (b) The court be pleased to grant leave to the firm of M/S Krhoda & Macharia Advocates to come on record on behalf of the Appellant/ Applicant in place of the firm of Kimani Mwangi Advocates LLP.
 - (c) The court be pleased to grant, stay of execution against the ruling issued in Children’s Court at Nairobi Case No. 1163 of 2017 on 1st December, 2022 pending the hearing and determination of the appeal.
 - (d) The court be pleased to grant a stay of execution against the ruling issued in Children’s Court at Nairobi Children’s Case No. 1163 of 2017 on 1st December, 2022 pending the hearing and determination of the appeal.
 - (e) Any order that the court may deem fit.
2. The application is supported by SFH’s affidavit sworn on 23rd January, 2023 stating inter alia that his restaurant business failed when the Covid – 19 pandemic broke out in 2020 hence he does not have money to make the monthly installments. Consequently, if the orders requested are not given, he



- would suffer irreparable loss because he will be imprisoned in a civil jail indefinitely since he lacks the funds to make the monthly installments. He won't be able to work while incarcerated.
3. He deposes that the Respondent and the minors are fully dependent on him for support, so if he were to be imprisoned indefinitely, they wouldn't have access to even the most basic necessities.
 4. He stated that the trial court denied his request to lower the installments or monthly payments from Kshs. 120000 to Kshs.30000 a figure which he would manage. That the arrears accumulated because his business collapsed in 2018.
 5. The application is opposed vide replying affidavit sworn by UJM on 17th February, 2023 who avers inter alia that the appeal is vexatious and an abuse of the court process, which is meant to delay justice to the minors.
 6. She said that Judgment was delivered on 13th December, 2018 and a decree issued on 18th December, 2018 which the Applicant did not challenge until 4th April, 2022 when he filed an application seeking orders to set aside the judgment and or review the award from Kshs. 120, 000/= to Kshs. 30, 000/=.
 7. She said that he was a man of able means who has several businesses and it is not true that his business was closed due to Covid – 19 pandemics.
 8. That since the inception of the children's case, he has never complied and or obeyed the court orders and the amounts he was ordered to pay by the trial court are arrears on school fee, school related expenses and maintenance since September, 2017 when court issued interim orders and subsequently the judgment.
 9. She accused the Applicant of being very economical with the truth and he is not a poor man as he is claiming since he has a high end home appliances business and a human resource agency, he drives high end motor vehicles and he lives in a high end luxurious estate in Riverside, Nairobi.
 10. That he was charged and found guilty of human trafficking, sexual exploitation of 9 girls from Nepal and Pakistan and enslaving them. He was fined Kshs. 4. 5 million or service of a 4-year jail term in Cr. No. 1359 of 2018 at Milimani Chief Magistrates Court. He raised the fine to avoid going to jail which is a clear indication that he is capable of paying the decretal amounts.
 11. The applicant filed a supplementary affidavit sworn on 10th May, 2023 stating inter alia that that during the proceedings in the trial court, he was not aware that his then advocates on record had not filed a statement of defence. The pre – trial directions were issued on 23rd May, 2018 while he was in custody. He was released on 30th July, 2018. He was not aware that the trial court had fixed the matter for hearing in the absence of his advocates.
 12. He depose that taking advantage of the absence of his advocates, the Respondent filed her witness statement dated 21st August, 2018 on the hearing date on 9th October, 2018 without serving his advocates on record or himself. There is no proof of service of her witness statement which had exaggerated figures. Judgment was delivered on 13th December, 2018 in his absence.
 13. He went on to state that the delay in challenging the judgment was because he was unaware that the judgment had been delivered. He had a reasonable expectation that his advocates on record would give him regular updates concerning the suit. Additionally, he was facing personal and financial turmoil at the time due to the closure of his businesses in 2018 by the government and his subsequent prosecution in Criminal Case No. 1359 of 2018 at the Chief Magistrate's Court at Milimani. His bank accounts were frozen in 2018 and subsequently closed on 5th March, 2019. He lost his sources of income and couldn't meet his financial obligations.



14. He denied that he was charged and convicted with the offences of human trafficking and sexual exploitation on Nepalese and Pakistani girls but instead he was charged for holding his employees' travel documents. The Kshs. 4.5 million was paid by forfeiture of Kshs. 2 million cash bail and an additional Kshs. 1.5 million which depleted his remaining financial resources.
15. He said that the applicant was a lady of means as she owns the house that she lives in with the minors, director at Imran Investments Limited which owns 5 flats erected on Plot No. 209/ 1653 Pangani and collects a monthly income of Kshs. 600, 000/= as well as 2 houses in the UK earning 5, 000 pounds per month.
16. The Applicant has filed submissions dated 18th June, 2023 with reliance being placed on Order 42 Rule 6 (6) which provides that, "Notwithstanding anything contained in sub rule (1) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."
17. He also relied on Patricia Njeri & 3 others vs National Museum of Kenya [2004] eKLR which provides for the principles governing grant of a temporary injunction pending appeal as follows:
 - a. An order of injunction pending appeal is discretionary which will be exercised against an applicant whose appeal is frivolous.
 - b. The discretion should be refused where it would inflict great hardship than it would avoid.
 - c. The Applicant must show that to refuse the injunction would render the appeal nugatory.
 - d. The court should also be guided by the principles in Giella vs Cassman Brown [1973] EA 358."
18. The Respondent filed submissions opposing the application for stay. She relies on the following Article 53 (1) (e) of *the Constitution* of Kenya which states that, "Every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not."
19. She also cited Mbogo & Another vs Shah [1968] EA 93 where the court stated, "...That this court will not interfere with the exercise of... discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on matters on which it should not have acted or because it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Background:

20. This matter relates to the orders issued on 1st December, 2022 by Hon. G. N. Opakasi (Ms.) SRM in Nairobi Children's Case No. 1163 of 2017. The orders issued were that:
 - a. The defendant's application dated 4th April, 2022 is dismissed for lack of merit.
 - b. The plaintiff's notice to show cause is allowed, but the amount shall be paid in ten monthly installments of Kshs. 506, 000/= starting from 1st January, 2023 and if the defendant defaults any of the installments, a warrant of arrest shall automatically issue without notice and the plaintiff shall be at liberty to enforce.
 - c. Parties to file their affidavit of means.
 - d. Children Officer to file a Children Officer's report on or before 23rd January, 2023.



- e. Matter to be mentioned on the 23rd January, 2023 to confirm compliance and for directions on access.

Analysis And Determination

21. I have carefully considered the application dated 23rd January, 2023, the responses thereto and rival written submissions by both parties.
22. The issue for determination is whether the application for stay of execution is merited.
23. The principles for granting stay of execution in children matters was well settled in the case of Bhutt v. Bhutt Mombasa HCCC NO. 8 of 2014 (O.S.) where the Court stated,
- “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*.”
24. There is no doubt that the Applicant has failed to honour the directives by the trial court which had directed him to pay the arrears. The Applicant even at the time of filing and arguing this application has not demonstrated that he has at least complied with what he believes he can afford.
25. It would have been a mitigating factor if he would have shown attempts to comply. He cannot therefore be heard to seek this courts shelter with unclean hands.
26. The issue of the children being of paramount importance cannot be overstated here. They definitely need their rights to be met by both parents.
27. I note that the Applicant did not file affidavits of means as directed by the trial court. It is therefore not possible at this interim stage to know whether or not he has the capacity. My take however is that despite what he considers to be challenges after covid pandemic, there is no evidence of being impecunious.
28. In the premises I do not find the application meritorious and the same is disallowed. The prayers for the counsels to come on record is however allowed.
29. Costs shall be in the cause.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 11TH DAY OF APRIL 2024.

H K CHEMITEI

JUDGE.

