



REPUBLIC OF KENYA



VKM v MM (Civil Appeal E017 of 2024) [2024] KEHC 3795 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3795 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E017 OF 2024
SM MOHOCHI, J
APRIL 11, 2024**

BETWEEN

VKM APPELLANT

AND

MM RESPONDENT

RULING

Introduction

1. The Background is that the Respondent moved the subordinate court for an order of maintenance of a minor; an interim order of maintenance was made during pendency of the proceedings which orders were not complied with culminating to accumulated maintenance of 170,000/- it is inconsequence thereof that resulted in the impugned ruling now subject to an Appeal.
2. While this is a Civil Appeal it emanates from a Children's Cause and thus ought to have been filed in the Family Division.
3. Before me is an application filed under certificate of urgency under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010 whereby Victor Kipkurui Mutai the Appellant/Applicant seeks the following reliefs;
 - i. Spent
 - ii. Pending the hearing and determination of this application, the Honourable Court be pleased to stay the execution arising from the Ruling and Order of R.K. Chebesio (PM) of the 4th day of October 2023.
 - iii. Pending the hearing and determination of this Appeal, the Honourable Court be pleased to stay the execution arising from the Ruling and order of R.K. Chebesio (PM) of the 4th day of October 2023.



iv. Costs of this Application be provided for.

Applicant's Case

4. By a Ruling delivered on 24th January 2024, the Court dismissed the Applicant/Appellant's application seeking to set aside the orders of the 4th day of October 2023, attaching the Applicant/Appellant's Salary without according him the right to be heard on the application.
5. Applicant/Appellant is aggrieved by the Ruling of 24th January 2024, and the order of the 4th day of October, 2023 has preferred a Civil Appeal to this Court.
6. That the Respondent has already written to the Applicant/Appellant's employer, the Kenya Defence Forces, who have already instituted and began processes of deducting and remitting the Applicant/Appellant's salary as demonstrated by the employer's letter dated the 2nd day of February 2024 with reference number DHQ/xxx/xxx/xxx/LEGAL
7. That, if the Application is not granted, the intended appeal will be rendered nugatory, moot, academic and of no consequence.
8. That, both the Application and Appeal has been filed without delay;
9. That, the Appellant/Applicant stands to suffer irreparable loss and harm unless the order of stay of execution is granted by this Honourable Court,
10. That, the Appellant/Applicant is ready to abide by such terms and conditions as may be imposed by the Court on stay, in the interests of justice.
11. That, it is only fair and just that this matter be certified and heard urgently.
12. That, it is in the interest of Justice that the orders sought herein be granted.
13. That, the Respondent obtained attachment orders dated the 4th day of October 2023 without according the Appellant/Applicant the opportunity to be heard in those proceedings and or application.
14. That, on realizing that the Respondent had obtained the order and was in the process of executing it, the Appellant/Applicant made an application dated the 30th day of November 2023 to set aside the attachment order for having been obtained without his knowledge and participation.
15. That, in the pendency of the application, the Respondent progressed the execution and got the attention of the Appellant/Applicant's employer the Kenya Defence Forces who began the process of deducting remitting applicant's salary.
16. That, the Appellant/Applicant is aggrieved with the decision to condemn him unheard by dismissing his application of 30th November, 2023 that sought to set aside the order of 4th October, 2023 and accord him opportunity to respond to the application to attach his salary.
17. That, the Appellant/Applicant is aggrieved and dissatisfied by the decision of the Court and has already filed the instant Appeal and Application.
18. That, the Appellant/Applicant is apprehensive that if the Respondent is allowed to execute the orders of 4th October, 2023, it stands to lose the substratum of the Appeal which will have had him condemned without a hearing.



Respondents Case

19. The Respondent did not defend this Application despite directions being issued.

Analysis and Determination

20. I have given due consideration to the application and the submissions made in favour of. Order 42 Rule 6 of the Civil Procedure Rules, pursuant to which the application has been brought, provides that:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order, but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the Appellate Court to have such order set aside...”

21. Thus, the conditions an applicant for stay of execution of decree or order needs to satisfy, as set out in Rule 6(2) of Order 42 aforementioned, are:

- a. that substantial loss may result to the applicant unless the order is made;
- b. that the application has been made without unreasonable delay.
- c. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

22. The rationale for the conditions aforementioned was aptly given in *Machira T/A Machira & Co. Advocates vs East African Standard (No. 2)* [2002] KLR 63, thus:

“The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

23. It is now trite that, in applications for stay in respect of decrees or orders made in matters involving children, the welfare of the children in question be given utmost consideration. In *Bhutt vs. Bhutt*, Mombasa HCCC No. 8 of 2014 (O.S.), this principle was expressed thus:

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

24. *The Constitution* of Kenya provides at Article 53 (2) as follows:-



(2) A child's best interest are of paramount importance in every matter concerning the child." [own emphasis]

25. Section 8(1) of the Children's Act of 2022 provides as follows:-

"8(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—(a)the best interests of the child shall be the primary consideration;" [own emphasis].

26. Hence, with regard to the best interest of the minors, there is no dispute that the subject child is a minor and the interest of justice ensure its welfare is not jeopardized.

27. This Court notes that, the Ruling and Order of R.K. Chebesio (PM) of the 4th day of October 2023, was made after disregard of previous Court Order and this depicts the Applicant as one seeking equity with unclean hands.

28. Accordingly, although, the application was filed without undue delay, I am far from convinced that substantial loss will be visited on the Appellant/Applicant unless the orders sought are given.

29. The Court has equally perused the impugned ruling subject to appeal and the proceedings giving rise to the ruling and while arguability of the Appeal exists, the ruling was in exercise of discretion with very narrow parameters and remote chances of success.

30. Indeed, the welfare of child dictates that the Lower Court Order be complied with in every aspect thereof by the Appellant/Applicant, pending further orders of the Court upon the hearing of the appeal.

31. In the result, I find no merit in the application the 15th day of February 2024. The same is hereby dismissed with no order as to costs.

It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 11TH APRIL 2024

MOHOCHI S.M

JUDGE

