



REPUBLIC OF KENYA



**LAK v COO (Civil Appeal E056 of 2023)  
[2024] KEHC 7968 (KLR) (Family) (14 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7968 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPEAL E056 OF 2023  
PM NYAUNDI, J  
JUNE 14, 2024**

**BETWEEN**

**LAK ..... APPLICANT**

**AND**

**COO ..... RESPONDENT**

**RULING**

1. Before this court is the Notice of Motion application dated 29<sup>th</sup> June 2023 by which the Applicant, LAK seeks the following orders: -
  1. Spent.
  2. Spent.
  3. That this Honourable Court be pleased to issue a stay of execution of judgement delivered by the children's court at Milimani in Children's Case No E228 of 2023 on 20<sup>th</sup> June 2023 specifically order 6 on the Plaintiff's contribution capped at Kshs 10,000 towards food and all consequential orders pending the hearing and determination of the appeal.
  4. That costs of this application be provided by the Respondent.
2. The Application was premised upon Article 53 of the *Constitution* of Kenya 2010, Section 1 A and 2A, Order 42 Rule 6, Order 50 Rule 6 of the *Civil Procedure Act*, Sections 23 and 119 of the *Children's Act* 2022 and was supported by the Affidavit of even date sworn by the Applicant.
3. The Respondent COO opposed the application through a Replying Affidavit dated 18<sup>th</sup> July 2023. He avers that the application is ill advised, brought in bad faith and amounts to utter abuse of the processes



of this court as it is brought as an afterthought calculated to frustrate the best interest of the minors who are the subject in Milimani Children's Case No E228 of 2023.

## **Background**

4. The parties are the biological parents of the minors subject of the proceedings. This application emanates from the judgment in Nairobi Children Case No E228 of 2023. The Appellant in the trial court filed a plaint dated 7<sup>th</sup> February 2023. She prayed for judgement against the Respondent who was the defendant in the trial court for;
  - a. Legal and actual custody of the minors be vested in the plaintiff/mother.
  - b. Free and unlimited access of the minors to be granted to the defendant/father.
  - c. Any other relief this Honourable court may deem fit to so grant for the best interest and welfare of the minors herein.
5. After full hearing, the trial court delivered a judgement on 20<sup>th</sup> June 2023 in the following terms;
  - i. That both parties shall have joint legal custody of the minors herein with the Defendant(father) having actual custody, care and control for now.
  - ii. That parties to undergo parental coaching at the nearest Children Office; 14 days from today's date and a report filed within 6 months.
  - iii. That none of the parties should leave the court's jurisdiction with the children without the express consent of the other.
  - iv. That this being a family matter, each party to bear its own costs.
  - v. That mention be on 25<sup>th</sup> July 2023.
  - vi. Apportionment of parental responsibility.  
Plaintiff.  
Contribution towards food: 10,000-per monthClothing  
Defendant.  
ShelterSchool fees and school related expensesComprehensive medical cover  
Access  
Alternate weekend: Friday 5pm to Sunday 5pmHalf-holidays alternative Christmas and Easter.
6. The Applicant was aggrieved by the court's orders, specifically order number 6 on apportionment of parental responsibility and filed an appeal vide Memorandum of Appeal dated 26<sup>th</sup> June 2023, before this court.

## **Applicant's Submissions.**

7. The Applicant submitted that there was no delay in filing the application.
8. She argued that substantial loss is on the custody of the children who are being raised by the respondent's lover while she is still alive and can take care of her children. That it will be in the best interest of the children that custody is given to her.
9. She submitted that the court did not rely on any affidavit of means in apportioning her to pay Kshs 10,000 monthly. She urged the court to allow this application.



### **Respondent's Submissions.**

10. The respondent submitted that in determining stay of execution in children matters, the best interest of the child is paramount as provided by Section 53 of the Constitution of Kenya and Section 8 of the Children Act. Relying on the decision in RWW v EKW Civil Appeal No 13 of 2013 [2019] eKLR, he submitted that suspension of maintenance orders is not in the best interests of the minors. He further submitted that the Applicant's application has not met the three conditions for stay. Firstly, she has failed to prove that the application was made without unreasonable delay. Secondly, she has not established that substantial loss will occur if the stay is not granted. Thirdly, that the applicant has failed to furnish security and has not offered to comply with conditions that the court may set, in any event the stay is granted.
11. The Respondent submitted that parental responsibility is shared between both parents. He argued that he has the custody of the minors and it comes with a heavy responsibility as compared with the applicant who is only supposed to contribute Kshs 10,000 monthly which she has never paid up to date. That she is underserving of the court's discretion. He relied on the decisions in AKK v SMM[2020] eKLR and Z.M.O v E.I.M [2013] eKLR .

### **Analysis And Determination.**

12. I have considered the application before me, the Reply filed by the Respondent as well as the written submissions filed by each party.
13. The issue that arise for determination is;
  - i. Whether this is an appropriate case for an order of stay of execution pending Appeal
14. Grant of an order for stay of execution 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.
15. In this case, the judgment in issue was delivered on 20<sup>th</sup> June 2023. The Applicant filed a Memorandum of Appeal on 29<sup>th</sup> June 2023 and the present application was filed on 29<sup>th</sup> June 2023, nine (9) days after delivery of said judgment. Accordingly, I find that the application was filed in timely manner.
16. The principles guiding the Court in granting stay are well articulated in the locus classicus case of Butt v Rent Restriction Tribunal (1982) KLR 417 where the Court of Appeal held that;
  - “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.



3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  4. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
  6. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
17. These principles were summarised in *RWW v EKW* [2019] eKLR, where the Court considered the purpose of a stay of execution order pending appeal, in the following words:
- “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. An additional factor for consideration in matters touching children is found under Article 53(2) which provides that:
- A child’s best interests are of paramount importance in every matter concerning the child.
19. In the case of *Bhutt v Bhutt* Mombasa HCCC No 8 of 2014, the Court held as follows: -
- “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*.” (Emphasis Supplied)
20. The Application is hinged on the quantum of maintenance on the ground that it does not consider the means of the Appellant and is therefore unsustainable.
21. The applicant does not state that unless stay is granted, her appeal will be rendered nugatory. She is aggrieved by the custody orders and the quantum of her contribution to the maintenance of the minors. I subscribe to the reasoning of Musyoka J as articulated in *Z.M.O v E.I.M* [2013] eKLR where he 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.

22. In the case of *DOB v DMA* [2021] eKLR, the court addressed itself on the issue of staying maintenance orders as follows:

“In matters concerning children, the best interests of the child are of paramount importance. The accepted principle in applications for stay of execution of maintenance orders in children’s cases is that the suspension of the maintenance order is not in the best interests of the child.”

23. It has been revealed that the Applicant has not complied with the orders of maintenance made by the Children Court. The Applicant has not denied this allegation. The Applicant is reminded that courts do not make orders in vain. Parties are obliged to obey court orders even when they do not agree with said orders.

24. It is trite that he who comes to equity must come with clean hands. It is duplicitous of the Applicant to approach this court seeking to stay orders, which she has in any event disobeyed.

25. In the case of *MN v TAN & another* [2015] eKLR a case which is on all fours with the present case the court held as follows: -

“A valid court order has to be obeyed or complied with regardless of how aggrieved a party is about it. The order has the force of law. It is not a mere wish or proposition. Disobedience or non-compliance with it attracts severe consequences. It would appear to me that the appellant believes that the orders of 30<sup>th</sup> July 2013 are not valid, and has explained why he has chosen to disregard or disobey them. Yet he is bound to obey the orders for as long as they are still in force. He has no choice, he cannot decide when and how to obey or comply with them. The appellant has applied to the court for a discretionary relief, yet he is not ready to obey the orders that he is seeking relief against it. He has therefore come to court with unclean hands. The court cannot exercise discretion in favour of such a litigant who has no respect for the rule of law.”

26. Whereas the Applicant has demonstrated that she has an arguable appeal, I am not satisfied that the stay is in the best interests of the minors subject of these proceedings.

27. I find therefore that there aren’t valid grounds to stay the orders made on 20<sup>th</sup> June 2023. The welfare of the children is paramount consideration and cannot be stayed, as this would be detrimental to the welfare of the said children.

28. Based on the foregoing I find no merit in the present application. The same is dismissed in its entirety. For avoidance of doubt the orders of 20<sup>th</sup> June 2023 made by the Childrens Court in Case No E288 of 2023 remain valid and enforceable. Earlier interim of orders of stay are vacated. This being a family matter I make no orders on costs.

29. The Appellant to proceed to serve record of appeal within 30 days. Mention on 25<sup>th</sup> July 2024 to confirm compliance and take directions on the hearing of the Appeal.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14<sup>TH</sup> DAY OF JUNE 2024.**

**P M NYAUNDI**



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**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In the presence of:**

Fardosa Court Assistant

Ms Gicheha Advocates for the Applicant

Omondi Respondent in person

