



**EWK v LWM (Miscellaneous Civil Application E044 of 2022)  
[2024] KEHC 9701 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9701 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
MISCELLANEOUS CIVIL APPLICATION E044 OF 2022  
SN MUTUKU, J  
JULY 18, 2024**

**BETWEEN**

**EWK ..... APPLICANT**

**AND**

**LWM ..... RESPONDENT**

**RULING**

1. The Applicant, EWK, has filed Notice of Motion application dated 20<sup>th</sup> September 2022 seeking the following orders:
  - a. That this Court be pleased to grant leave to the Applicant to appeal out of time against the judgment delivered on 18<sup>th</sup> March 2022 by Hon. P. Achieng.
  - b. That there be a stay of execution of Order (f) of the judgment delivered on 18<sup>th</sup> March 2022 pending the hearing and determination of this Application.
  - c. That there be a stay of execution of Order (f) of the judgment delivered on 18<sup>th</sup> March 2022 pending the hearing and determination of the intended appeal.
  - d. That costs of the Application be provided for.
2. The Applicant has advanced the grounds supporting the Application on the face of the Application and in the Supporting Affidavit. He has stated that he is dissatisfied with the judgment and has preferred to appeal against it. He has stated that judgment was delivered on 18<sup>th</sup> March 2022 without his knowledge of that of his advocates and only came to know about it on 4<sup>th</sup> July 2022 when a copy of the judgment was shared to his advocate by the advocate for the Respondent by which time the 30 days allowed to file an appeal had lapsed.
3. He has stated that the delay in filing the appeal on time was not attributable to him or his advocate but to the court for failure to communicate the notice when judgment would be delivered. He stated that



he has a triable issue and that granting leave to appeal out of time is in the interest of justice; that the Respondent will not suffer prejudice if the orders sought are granted because she has been providing food for the children during the subsistence of the case.

4. The Application has been opposed by the Respondent through her Replying Affidavit sworn on 25<sup>th</sup> November 2022. I have read the Replying Affidavit. It does not address the issue raised by the Applicant, which is leave to file appeal out of time. It addresses challenges she has gone through in having the matter in the lower court heard and determined and lack of cooperation by the Applicant.
5. Parties were directed to file written submissions. The Respondent has filed her submissions but the Applicant has not. On 14<sup>th</sup> February 2023, this Court allowed Ms Matasi, appearing for the Applicant, 14 days file further affidavit and written submissions and the Respondent 14 days after service to file her submissions. On 15<sup>th</sup> January 2024 I extended time for the Applicant to file submissions. This was not done. On 20<sup>th</sup> May 2024, I listed the matter down for ruling on 18<sup>th</sup> July 2024.
6. I have read and understood the submissions by the Respondent who appears in person. The Respondent's submissions are contesting the appeal that it is unnecessary. In her view, the judgment of the lower court is fair to the parties and children.
7. Order 42 Rule 6 (1) (2) of the [Civil Procedure Rules](#) provides for stay of execution pending an appeal in the following terms:
  - (1) 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.
  - (2) No order for stay of execution shall be made under subrule (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.
8. It is upon the Applicant to satisfy the court that (a) he stands to suffer substantial loss unless the order for stay is granted; (b) he has filed this application without unreasonable delay; and (c) he is ready to deposit security for the due performance of such decree or order as may be binding on him.
9. The Applicant has not provided evidence to demonstrate that he will suffer substantial loss if stay is not granted. The judgment being appealed against grants the following orders:
  - i. Joint legal custody of the children between the Applicant and the Respondent.
  - ii. Actual custody of the minors to the Respondent.
  - iii. Access to the minors by the Applicant on alternate weekends during school days and half of the school holidays.
  - iv. Applicant to pay school fees and all school related expenses and to continue paying rent.



- v. Applicant to pay an additional Kshs 20,000 towards food, clothing and medical expenses.
10. I fail to see how maintaining the children could be termed as substantial loss for a parent even in cases where the amounts awarded are exorbitant and beyond the capability of a parent. It would be, in my view, in the best interests of the children to continue maintaining them until the appeal preferred has been heard and determined.
11. The Applicant has said nothing about providing security as required. Even if this court were to give the Applicant the benefit of doubt that he was not aware of the date judgment in the lower court was delivered, it is my view that the Applicant has failed to argue his case and demonstrate that he deserves the orders he is seeking. He has not filed submissions as directed and therefore his application has not been prosecuted. However, in the interest of justice I will allow prayer (a) of the Application.
12. Consequently, I grant orders as follows:
- i. The Applicant is granted leave to file appeal out of time.
  - ii. Stay of execution pending the hearing and determination of the appeal is declined.
  - iii. Each party shall bear own costs.
13. Orders accordingly.

**DATED, SIGNED AND DELIVERED ON 18TH JULY 2024.**

**S. N. MUTUKU**

**JUDGE**

In the presence of:

Ms Matasi for the Applicant

LWM for the Respondent

