



FKO v Mmt ((Suing as Mother and Next Friend of the Minors)) (Family Appeal E014 of 2022) [2024] KEHC 8347 (KLR) (4 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8347 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
FAMILY APPEAL E014 OF 2022
SM MOHOCHI, J
JULY 4, 2024**

BETWEEN

FKO APPLICANT

AND

MMT RESPONDENT

(SUING AS MOTHER AND NEXT FRIEND OF THE MINORS)

RULING

1. The Appellant/Applicant through the Notice of Motion dated 21st June, 2023 brought under Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* seeks the following prayers:-
 - a. Spent
 - b. Spent
 - c. That stay of execution of the Orders issued by the Learned Trial Magistrate Honourable Ruth Kefa Principal Magistrate given on 21st March, 2023 and issued on 8th June, 2023 in Nakuru Chief Magistrate’s Children Cause No. 183 of 2019 specifically Order 2 attaching the Applicant’s salary to the tune of 45% in satisfying the orders of maintenance made on 17th March, 2022 and the amount be deposited in the Plaintiff’s account No. 0170XXXXXX376 Equity Bank and all consequential orders be granted pending the hearing and determination of the appeal.
 - d. That the costs and incidental to this application do abide the result of the appeal herein.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit sworn on even date by the Applicant himself. He deposes that by a Ruling delivered on 2nd November, 2022 in Children Cause No. 183 of 2019, the Court issued orders that the Applicant’s salary be attached to satisfy the maintenance order of 17th March, 2022. He argued that the Application was later dismissed



but by Orders issued on 8th June, 2023 the Court reviewed its decision of dismissing the Application and attached 45% of the Applicant's salary.

3. He also deposed that the attachment leaves him with a negative salary with consequences of being subjected to disciplinary action which may include losing his job. He added that he has other children who are in school that he is responsible for and unless the Court intervenes he is unlikely to meet their needs. He also stated that he has an ailing father that he is also taking care of.
4. He stated that he has been complying with the orders issued on 17th March, 2022. He added that he will suffer substantial loss unless stay is granted and that he was willing to furnish security for due performance of the decree of 12th March, 2022.
5. The Respondent filed a Replying Affidavit sworn on 11th August, 2023 opposing the Application. She stated that she had to seek attachment of 45% of the Applicant's salary in order to satisfy the decree issued on 6th April, 2022. The Applicant had refused to cater for the needs of the children and would not make payments on time. He was still in arrears of Kshs. 547,350 of school related expenses and maintenance as per the letter dated 22nd March 2023.
6. She stated that she had other financial responsibilities therefore was not in a position to adequately provide for the children without the Applicant's input.
7. It was further deposed that the matter was mentioned severally to confirm whether the Applicant had paid school fees which he had not done. That the Applicant cannot willingly cater for the children's maintenance and the refusal to cater for school expenses forced the minors to stay at home.
8. That it would be in the interest of justice that the attachment orders remain in force pending the determination of the appeal. She argued that the Applicant is a man of means and no prejudice will befall him whereas the Respondent and the minors will suffer prejudice if the orders sought are issued. The attachment is enough to cater for school fees and maintenance of Kshs. 10,000.
9. On 11th June, 2024 the Court directed that the Application be disposed by way of written submissions. The Respondent filed her submission on 24th June, 2024 whereas the Applicant filed his submissions on 1st July, 2024.

Applicant's Submissions.

10. It was submitted that the 45% attachment of salary is beyond the provision of the law. The allegations of arrears are unfounded with no proof to back them up. That an order of attachment should be issued when a judgment debtor has not made any effort to satisfy the decree.
11. The Respondent argued that the fact that he was making payments, his salary ought not to have been attached and that if attachment was necessary then it should be done under the confines of the law. He argued further that Section 19(3) of the [Employment Act](#) provided for the deductions not exceeding two-thirds of one's wages in recovery of a debt due.
12. He submitted that were he to lose his job the bests interest of the children would be affected. He relied on the pronouncement in *Geoffrey Onsare Onchiri v Leah Makori* Children Appeal No. 5 of 2017 where the Court held;

“It is manifestly clear that the apportionment of responsibility was not pegged on any concrete evidence of the respective earnings of the parents.



In the circumstances like the one before this Court, a Court is enjoined to make a thorough inquiry as to the actual earnings of the parties and to ascertain with the most achievable precision the actual needs of the children.

That way the Court would be in a position to make an informed decision as to the apportionment of responsibilities. Orders of maintenance should not lie whimsically or capriciously. They must be based on proved income and pegged on ascertained needs which the parents then share accordingly.”

Respondent’s Submissions

13. The Respondent on the other hand submitted that she moved Court for the said orders as the Applicant had failed to discharge his responsibilities.
14. It was argued that she caters for food clothing shelter and medication and if the orders sought are issued she stands to suffer prejudice. She relied on *GKL v FK (minor suing through his mother and guardian ad litem JVV)* [2020] eKLR. The Court in this case held that in applications seeking stay in children matters, what should get utmost consideration would be the welfare of the child.
15. It was further submitted that the Applicant has not proven the loss he stood to suffer as it has been over a year since the orders for attachment were issued in November 2022. Reliance was placed in the case of *SKM v JLG* [2024] eKLR where the Court declined to grant and order for stay pending appeal as it opined it would not have been in the best interest of the children.

Analysis and Determination:

16. The conditions to be met before stay is granted is provided for in Order 42 Rule 6(2) of the *Civil Procedure Rules* as follows: -
 - “No order for stay of execution shall be made under sub rule (i)” Unless:-
 - a. The Court is satisfied that substantial loss may result to the applicant unless the order is made.
 - 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.”
17. The rationale for the conditions aforementioned was aptly given in *Machira T/A Machira & Co. Advocates v 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.”



18. The Court of Appeal In *Butt v Rent Restriction Tribunal* (1982) KLR 417 gave guidance on how a Court should exercise discretion and held that:

- a. The power of the Court to grant or release an application for stay of execution is a discretionary power.
- b. 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.
- c. The Court in exercising its powers under order XLI Rule 4(2)(b) of Civil Procedure Rules can order security upon application by either party or on its own motion. Failure to put security for costs as awarded will cause the order for stay of execution to lapse”.

19. 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 v 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...*”

20. Hence, with regard to the best interest of the minors, there is no dispute that the subject children are minors aged 9, 7 and 5 years respectively. They are in custody of the Respondent and it would be in the interest of the minors and the interest of justice to ensure that their welfare is not jeopardized during the Appeal; particularly noting that the Applicant has accumulated Kshs 547.350/- as at 22nd March 2023.

21. However, the Court notes that the Applicant has and has in the past ignored monthly maintenance of the three minors leading to the accumulated sums.

22. The Court shall preoccupy itself to the preconditions for granting stay of execution where there exists a judgment legally entered in favour of one party against the other. The Preoccupation by the Court is on pre-conditions for grant of leave and not on the grounds of Appeal.

23. In the case of *Gianfranco Manentbi & Another v Africa Merchant Assurance Company Ltd* [2019] eKLR, the Court thus held that: -

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower Court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a Court which has delivered the matter in his favour. This is therefore to provide a situation for the Court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree.



The Court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that Courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the Court to determine

24. The Court equally notes that the Applicants challenge on Appeal is on a ruling, and that the primary suit remains undetermined.
25. All the three pre-conditions for grant of stay have not been demonstrated, the Court finds that substantial loss may be occasioned with the execution against the Applicant who has offered security while craving for the relief.
26. In the upshot the Court in exercise of its discretion and in the best interests of children orders and directs as follows;
 - a. A conditional Order of Stay execution of the Ruling and decree issued in Nakuru CM Children's Cause No 183 of 2019 is hereby issued pending Determination and Hearing of the Appeal.
 - b. The Appellant shall pay the Respondents 50% of the Accumulated arrears of child maintenance of Kshs 273,675/- within Thirty (30) days from today.
 - c. The Appellant shall Deposit 50% of the Accumulated arrears of child maintenance of Kshs 273,675/- in an interest-bearing bank account in the names of the Advocate for the Respondent and Advocate for the Appellant, within Sixty (60) days from today
 - d. The Appellant to file and serves a record of appeal within Sixty (60) days of this ruling.
 - e. Failure to comply with any of the conditions herein shall automatically lead to the vacation of stay orders as granted in Order (a) above.
 - f. Costs shall be in the cause

It is so Ordered

DATED, SIGNED AND DELIVERED AT NAKURU THIS 4TH DAY OF JULY, 2024.

MOHOCHI S.M

JUDGE

