



REPUBLIC OF KENYA



KENYA LAW
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**Leshore v Namunyaki (Civil Appeal E065 of 2023) [2024] KEHC 12169 (KLR)
(Environment and Planning) (8 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12169 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ENVIRONMENT AND PLANNING
CIVIL APPEAL E065 OF 2023
MA OTIENO, J
OCTOBER 8, 2024**

BETWEEN

LEO LENA LESHORE APPLICANT

AND

CAROL NAMUNYAKI RESPONDENT

*(Being an Appeal from the Judgement of Hon. E. Muiru – PM delivered on
31st July 2023 in the Milimani Children 's Court, Cause No. E1314 of 2021)*

RULING

Introduction

1. This Ruling determines the Appellant's Notice of Motion Application dated 4th August 2023 in which the Appellant/Applicant seeks the following: -
 - i. An order of stay of execution against the lower court's Judgment of 31st July, 2023, pending hearing and determination of this Application.
 - ii. An order of stay of execution against the lower court's Judgment of 31st July, 2023, pending hearing and determination of the appeal;
 - iii. That pending hearing and determination this application, both the Appellant and the Respondent be directed to pay for the minors' school fees and related expenses on a fifty-fifty basis;
 - iv. That pending hearing and determination of the main appeal, both the Appellant and the Respondent be directed to pay for the subject minors' school fees and related expenses on a fifty-fifty basis.



2. The application is premised on the grounds set out therein and is supported by affidavit of LLL sworn on the 4th day of August 2023.

Submissions

3. The Applicant's case is that while he has filed a Memorandum of Appeal in this matter, he is yet to file the Record of Appeal in the High Court due to the delay caused by the court's registry staff in availing the certified copies of the decree and proceedings. That he is apprehensive that the Respondent is likely to commence execution proceedings against him.
4. The Applicant avers that he is currently financially constrained and is unable to comply with the judgment of the trial court that ordered him to pay for the minors' education fees and related expenses which according to him, amounts to over Kshs 100,000 per term, and at the same time also pay an upkeep in the sum of Kshs 12,500 as directed by the trial court. According to the Appellant/Applicant, his total monthly net income being a sum of Kshs 71,999/-, comprising of a sum of Kshs 44,999 in salaries and another Kshs 27,000/= from rent cannot meet the amounts ordered by the court.
5. It is further the Appellant's case that he is aggrieved by the judgment of the trial court and has commenced the appeal process. In the meantime, and pending the hearing and final determination of the intended appeal, it is the Applicant's/Appellant's prayer that the minors' school fees and related expenses be shared between him and the Respondent on a fifty-fifty basis. It is his case that the Respondent is employed and earns a monthly salary of Kshs 166,885/= and therefore is capable of meeting half of the children's school fees and related expenses.
6. The Applicant asserts that an order of stay of execution pending appeal should be in the best interest of the children. Citing Article 53 of the *Constitution* and Section 110(a) of the *Children's Act, 2022*, the Applicant submits that both parents have a joint responsibility to maintain the child whether or not the parents are married to each other.
7. The Appellant relied on among others the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 other* [2003] eKLR and that of *Kipkoech v Barnaba Tuitoek Bargoria & another* in support of his arguments that he has a *prima facie* case which a chance of success on appeal and that if the stay sought is not granted, there is likely to be irreparable harm on the children in question. That in any event, the balance of convenience tilts in favour of the stay being granted.
8. The application is opposed by the Respondent vide a replying affidavit dated and filed on 8th September 2023.
9. The Respondent submitted that the Appellant/Applicant is a man of means with multiple streams of income and is well capable of meeting the minors' needs as directed by the trial court. According to the Respondent, the instant application by the Applicant is merely intended to aid him abscond his constitutional and ethical obligations as the father of the minors.
10. The Respondent submitted that the Applicant earns gross monthly income of Kshs 246,870/- which only comes to a net of Kshs 44,999/- after being subjected to among others, a deduction of Kshs 133,727/- in respect of a loan from Equity Bank. It is therefore the Respondent's position that the Applicant should not base his ability to take care of his children on the sum of Kshs 44,999/- but that what should be relevant in determining the Appellant/Applicant true ability is his gross monthly salary of Kshs 246,870/-, the rent income of Kshs 27,000/- as well as the Applicant's other streams of income.
11. The Respondent wondered why the Appellant seeks to have the school fees and related expenses of the minors shared between them, yet the Applicant/Appellant has not offered to also share the other



expenses of the minors such as food, shelter, clothing and other needs, which the Respondent solely meets from her monthly income of Kshs 166,000/-. The Respondent submitted that the application if allowed, is likely to impose a greater responsibility on her.

12. Citing the decision in the case of *BRO WINWM* [2012] eKLR, the Respondent submitted that parental responsibility is a joint effort and should therefore not be relegated to one parent alone.
13. Referring to the case of *Gerald Nyaga Njue v Mary Wangare Kirumba* [2022] eKLR, the Respondent submitted that suspension or stay of a maintenance order is not the best interest of the child and therefore the orders sought in the instant application are not merited.
14. Accordingly, the Respondent prayed that the instant application be dismissed with costs in her favour.

Analysis and determination

15. Having considered the parties' respective submissions, I note that the issue for determination in this application is whether the Applicant has satisfied the requirements set out in Order 42 Rule 6 of the *Civil Procedure Rules* in regards to application for stay pending appeal.
16. It is not the duty of this court at this stage to go into the merits of the issues raised which are likely to be for determination in the main appeal, when it is eventually filed.
17. It is trite law that an appeal does not operate as an automatic stay of execution. That an applicant for an order of stay pending appeal must meet the requirements of Order 42 Rule 6(2) *Civil Procedure Rules* which stipulates that:-

“(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 orders set aside.

(2). No order for stay of execution shall be made under sub rule 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.
18. It therefore follows that under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant must satisfy the court of the following three conditions:-
 - i. Substantial loss may result to him/her unless the order is made;
 - ii. That the application has been made without unreasonable delay; and
 - iii. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
 19. With regard to substantial loss, the Applicant submitted that there is likely to be irreparable harm to the children the subject of these proceedings if the order of stay is not granted. He argued that the minors



are innocent and the dispute between their parents should not scratch them and that they should be properly cushioned, even during the pendency of the appeal.

20. It was the Applicant's case that irreparable damage can occur to him, which may include, at worst, the possibility of succumbing to depression and that in that event, the children may as a result drop out of school. It was his submissions that this is obviously not in the best interest of the children, even to the community at large.
21. The Respondent on the other hand argued that the applicant has not demonstrated the substantial loss he stands to suffer.
22. To establish substantial loss, the applicant must show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is the cornerstone of a stay application. See [*James Wangalwa & another v Agnes Naliaka Cheseto* \[2012\] eKLR](#).
23. On perusal of the Applicant's affidavit in support of the application, I have noted that the Applicant has not sufficiently demonstrated how he stands to suffer substantial loss if the orders sought in the application are not granted. The Applicant merely states in his application that he is unable to meet the children's school fees and other related expenses as directed by the trial court due to his depressed income. All the Applicant wants is that the children's school fees and related expenses be shared on a fifty-fifty basis between him and the Respondent without demonstrating how he is to participate in the children's other needs, currently being shouldered by the Respondent pursuant to the judgment of the trial court.
24. Admittedly, it may be hard and it may be difficult for the Applicant to provide for the children in the manner that the trial court ordered, but that is the nature of parenting. The hardship or difficulty alone is not of itself, a basis enough for suspending the maintenance order. This court agrees and endorses the judgment of Musyoka J. in [*RWW v EKW*](#), Civil Appeal No 13 of 2013 [2019] eKLR, where the court stated that suspension of maintenance orders should be made in the rarest of the circumstances. The judge stated that: -

“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 -Constitutional 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. The solution ideally lies in expediting the disposal of the appeal and staying the matter before the Children's Court to wait the outcome of the appeal. Tinkering with the quantum at this stage would amount to determining the appeal before arguments are heard from both sides on the merits of the same.”
25. The primary purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the intended appeal, if successful, is not rendered nugatory. From my review of the instant application and the supporting affidavit, I see not material pointing to the fact that the appeal, if successful may be rendered nugatory.
26. Further in my view, there is no irreparable loss that will have been suffered by the appellant if he continues to pay his own children's school fees as directed by the trial court even as he prosecutes his appeal on the quantum of maintenance and upkeep of the children.



27. Accordingly, although, the application was filed without undue delay, I am not persuaded that substantial loss will be suffered by the Applicant unless the orders sought are given.
28. The discretion to grant or refuse stay must take into account the competing rights of the parties as well as the circumstances of the case, and in this case, the best interest of the children. The fundamental principle on the welfare and best interest of the child provided for under Article 53 of the *Constitution* dictates that the children should continue to receive education and related services, even as the Appellant pursues his appeal on the quantum.
29. In my view, what the Appellant/Applicant needs to do in this case is to expedite the filing and hearing of the main appeal so that his challenge on trial court's order on the payment of the minors' school fees and related expenses can be heard and decided substantively.
30. In the premises, and looking at the Applicant's application dated 4th August 2023 as presented, I am not persuaded that it is in the best interests of the children herein to allow the same.
31. The Application is therefore found without merit is hereby dismissed.
32. Given that this is a matter involving children, I direct that each party is to bear their own costs.
33. It so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 8TH DAY OF OCTOBER 2024

ADO MOSES

JUDGE

In the presence of: -

C/A – Moses

...N/A.....for Applicant

.....N./A.....for Respondent

