



**MMW v AWM (Civil Appeal E118 of 2022)  
[2023] KEHC 3048 (KLR) (Civ) (21 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3048 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E118 OF 2022**

**EKO OGOLA, J**

**MARCH 21, 2023**

**BETWEEN**

**MMW ..... APPELLANT**

**AND**

**AWM ..... RESPONDENT**

**RULING**

1. Before this court for determination is the Notice of motion application dated november 22, 2022 brought vide a certificate of urgency where the appellant/applicant seeks the following orders: -
  1. Spent
  2. That this Honorable Court be pleased to order stay of execution of the judgment and subsequent decree arising from the judgment delivered on October 31, 2022 in Nairobi Children Case No. E838 of 2021 pending the hearing and determination of this Application.
  3. That this Honorable Court be pleased to order stay of execution of the judgment and subsequent decree arising from the judgment delivered on October 31, 2022 in Nairobi Children Case No. E838 of 2021 pending the hearing and determination of the Appeal
  4. That the costs of this application abide by the outcome of the appeal.
2. The Application is based on the grounds on the face of it and is premised upon article 53(2) of *the Constitution*, section 1A, 1B and 63(e) of the *Civil Procedure Act*, order 22 rule 22, order 42 rule 6(1) (2) and (6), order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provisions of law. The application is supported by the affidavit of Moses Mwaniki wahome.



3. This Application relates to the judgment delivered by Hon. G. Opakasi on October 31, 2022. The applicant was aggrieved by the said judgment in Nairobi Children Case No. E838 of 2021. The applicant is apprehensive that the respondent will apply for execution of the decree against him to his detriment and prejudice of the minors. The applicant deposes that he has a cogent appeal with high chances of success and if stay of execution is not granted he will suffer irreparable loss and damage rendering the appeal a nugatory.
4. The Applicant has expressed his willingness to deposit security through continuous payment of Kshs. 15,000/- interim maintenance ordered by the lower court pending determination of the appeal. The applicant states that the application is made without unreasonable and inordinate delay.
5. The respondent A WM filed a replying affidavit dated February 16, 2022. The Respondent deposes that the applicant is pursuing a well calculated tact to avoid payment of the school fees and related items yet the respondent was also tasked with the responsibility of handling monthly shelter, medical care, domestic help and provision of daily care and attention also supporting the child's upbringing. The Respondent prays that the Application be dismissed for lack of merit and in the best interest of the child.
6. The applicant then filed a supplementary affidavit dated January 3, 2023 in response to the Replying affidavit. The parties filed submissions. The applicant's submissions are dated January 6, 2023 whilst the Respondent's submissions are dated January 20, 2023.

#### **Determination**

7. I have carefully considered the application, the affidavits as well as the written submissions by both parties. The issue arising for determination is whether this court should grant the stay orders sought for.
8. Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides as follows:
  - 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 applicants.
9. In [Butt vs. Rent Restriction Tribunal](#) [1979], the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is that, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion. Thirdly, 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. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

#### **Substantial Loss**



10. It was observed in *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. The orders of the trial court read in part as follows: -

The defendant (applicant) shall provide for the minor’s school fees and all school related expenses

Both parties shall provide for the minor’s medical expenses equally

The defendant shall provide for the minor’s food at the rate of Kshs. 15,000 per month payable to the plaintiff on or before 5<sup>th</sup> of every month.

12. The applicant has argued that he earns a net pay of Kshs. 69,440/- and has another family with two other children besides the minor herein. The applicant’s argument is that if he gives Kshs. 15,000/- per month and cater for school fees and related expenses, he will suffer substantial loss as he will not be able to afford provision for his other two children.

13. Sections 98 and 99 of the *Children Act* cap provide:

98 “a court shall have the power to make and order and to give directions regarding any aspect of the maintenance of a child, including but not limited to, matters relating to the provision of education, medical care, housing and clothing for the child; and in this behalf may make an order for financial provisions for the child.”

99 “the court shall have power to impose such conditions as it thinks fit to an order made under this section and shall have power to vary, modify or discharge any order made under section 98 with respect to the making of any financial provision, by altering the times of payment, or by increasing or diminishing the amount payable or may temporarily suspend the order as to the whole amount or any part of the money paid and subsequently revive it wholly, or in parts as the court thinks fit.”

14. In *Z.M.O vs E.I.M.* [2013] eKLR Musyoka J. 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.”

15. In the instant case the person likely to suffer if the maintenance orders are stayed is the child. This court at this moment considers the best interests of the child. The Applicant is tasked with paying school fees for the child and if such an order is stayed, it means the child will not be able to attend school, which is detrimental not to the parties herein but to the child. I do not see how the Applicant is going to suffer substantial loss by providing for his child. He has failed to demonstrate substantial loss.

### **Unreasonable delay in making the Application**

16. In this matter, the judgment was delivered on October 31, 2022. The Memorandum of appeal was filed on November 21, 2022 while the instant application was filed on 22<sup>nd</sup> November 2022 which was within the timeline.

### **Security for costs**

17. With regard to security for costs, in issues involving children, the suit revolves around provision of basic necessities for the children and hence do not warrant deposit of security. In this case, the applicant has prayed to be allowed to furnish security for costs by paying Kshs. 15,000/-. In *Focin Motorcycle C. Ltd vs Ann Wambui Wangui* [2018] eKLR it was stated that: -

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground of stay.”

18. The lower court ordered the applicant to pay Kshs. 15,000/- per month to the respondent. Since the applicant is willing to furnish same amount as security for costs each month, then the applicant should continue paying the Kshs. 15,000/- per month to the respondent and also continue paying school fees and related expenses when they fall due, pending the determination of the appeal.
19. From the foregoing, granting an Order for stay of execution would militate against the best interest of the child. It is my considered view that this application is not merited and is accordingly dismissed.
20. Parties to bear own costs.

**Dated, Signed and Delivered at Nairobi this 21<sup>st</sup> day of March 2023.**

**E.K. OGOLA**

**JUDGE**

Ruling read and delivered in open court online in the presence of:

Mr. Mugwe for the Appellant/Applicant

N/A for the Respondent

**Ms. Gisiele Court Assistant**

