



REPUBLIC OF KENYA



**WL v PGM (Children's Appeal Case E112 of 2022)
[2023] KEHC 22529 (KLR) (Family) (14 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 22529 (KLR)

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

FAMILY

CHILDREN'S APPEAL CASE E112 OF 2022

MA ODERO, J

APRIL 14, 2023

IN RE MMG & BGL AKA MMG (MINORS)

BETWEEN

WL APPELLANT

AND

PGM RESPONDENT

(Being an Appeal against the Judgement and subsequent Decree of HON H.M. MBATI Senior Resident Magistrate delivered at Nairobi on April 7, 2021 in Children's Case No 1479 of 2018)

RULING

1. Before this court for determination is the Notice of Motion dated November 8, 2022 by which the Applicant WL seeks the following orders:-
 - “1. Spent.
 2. That pending the hearing and determination of this application, there be a stay of execution of the Judgment delivered by Hon H M Mbatl on April 7, 2021 in Children Case no 1497 of 2018 and the subsequent decree.
 3. That this Honourable Court be pleased to grant the Applicant leave to lodge an Appeal out of time against the decision delivered by Hon H M Mbatl on April 7, 2021 in Children Case No 1497 of 2018.
 4. That upon grant of leave the Memorandum of Appeal lodged herein be deemed as duly filed.



5. That this Honourable Court issue any order it deems fit and just to grant in the circumstances.
 6. That the costs of and incidental to this Application be costs in the intended Appeal.”
2. The Application was premised upon Article 53 (2) of the Constitution of Kenya 2010, Section 79 G, Section 3A of the Civil Procedure Act, Section 80, Section 83 (1) of the Civil Procedure Act and all enabling provisions of the Law and was supported by the Affidavit of even date sworn by the Applicant.
 3. The Respondent PGM opposed the application through the Replying Affidavit dated November 15, 2022. The Application was canvassed by way of written submissions. The Applicant filed the written submissions dated December 20, 2022 whilst the Respondent relied upon his written submissions dated January 13, 2023.

Background

4. This application arises from a judgement which was delivered in Nairobi Children’s Case No. 1479 of 2018 by Hon H M Mbatia Senior Resident Magistrate on April 7, 2021. In that matter in which the Respondent herein had filed a suit seeking full custody, care and control of the two (2) minors the court in its judgement made the following orders:-
 - “ 1. The status quo on custody shall obtain until BL aka MM attains the age of 4 years old.
 2. Thereafter, actual custody of the minors shall be awarded to the Plaintiff during the school term.
 3. The parties shall have joint custody of the minors and the Defendant is ordered to hand over B.L’s certificate to the Plaintiff so he can include his name as the father and reflect the minor’s original name.
 4. The Defendant is granted access to the minors on alternate weekends and half of all school holidays.
 5. The Plaintiff shall provide school fees and related expenses, medical care, clothing and all other needs when the minors are in his custody. Likewise, the Defendant shall provide for the minors needs during her access period.
 6. Each party shall bear its own costs and shall be at liberty to apply.”
5. Being aggrieved by the decision of the trial court, the Appellant (who is acting in person) filed an undated Memorandum of Appeal. Contemporaneously with the said Memorandum of Appeal the Appellant filed the present application seeking a stay of execution of the judgement as well as leave to file appeal out of time. The application was opposed by the Respondent.

Analysis and Determination

6. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions filed by both parties. The only issues for determination are:-
 - (1) Whether leave to appeal out of time ought to be granted.
 - (2) Whether prayer for stay of execution has merit.



(1) Leave to Appeal out of time

7. The Applicant has prayed for an extension of time within which to file her appeal. Section 79G of the [Civil Procedure Act](#) set out the timelines for filing an appeal as follows:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty (30) days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order provided that an appeal may be filed out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.” [own emphasis]

8. In this case the learned trial Magistrate delivered judgement on April 7, 2021. This application seeking leave to file appeal out time was filed on November 8, 2022 almost one and a half (1½) years after the judgement had been delivered.
9. The court has unfettered direction to grant the leave prayed for however the Applicant must satisfy the court that cogent and sufficient reasons exist for her failure to file appeal within the prescribed time.
10. The Applicant averred that she had no funds to enable her mount an appeal within the specified time. She also gave a rambling tale about having been duped by certain officers at Children’s Office in Umoja where she was led to believe that the appeal had already been filed.
11. Whilst the court is not entirely convinced by the reasons advanced by the Applicant I do note that the Applicant is not been represented by legal counsel and is acting in person. It is a fact that navigating legal intricacies remain a tall order for many lay persons.
12. Given that the matter involves the custody of the Applicants children and in order not to shut the doors of justice to the Applicant I will grant her leave to file her appeal out of time SUBJECT to the said appeal being filed and served within thirty (30) days of the date of this judgement.

(2) Stay of Execution

13. Order 42 Rule 6 (2) of the [Civil Procedures Rules](#) provides for guiding principles that one must satisfy before the court can grant a stay of execution, it provides as follows:-

“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 orders as may ultimately be binding on him has been given by the applicant.”

14. The impugned orders were made on April 7, 2021. This application for stay was filed in November 2022.



15. As stated earlier this Application for stay having been brought more than one year after the impugned orders were made was certainly not filed in a timely manner. The application appears to be more of an after thought.
16. The impugned orders were made in relation to the custody and maintenance of the minors. It is trite law that in matters concerning the welfare of children courts are required to give priority to the best interest of the child.
17. The *Constitution* of Kenya 2010 provides at Article 53 (2) that:-
(2) A child's best interest are of paramount importance in every matter concerning the child.”
18. Likewise *Children Act 2022* at Section 8(1) provides as follows:-
“ (8) In all actions concerning children, whether undertaken by public or
(1) private social welfare institutions, courts of law, administrative authorities or legislative bodies-
(a) The best interests of the child shall be the primary consideration;” [own emphasis]
19. In the case of *Bhutt vs 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.” [own emphasis]
20. The court is mindful of the fact that it is not required at this point to determine the merit or otherwise of the intended appeal. I have perused the judgement of the lower court. I note that legal custody of the minors was vested in both parents. The Respondent (Father) was only awarded actual custody of the minors during the school term in order to ensure stability of their education which the Respondent was catering for. The Applicant has not shown how the Respondent having custody of the minors during the school term is likely to cause her substantial loss.
21. The trial Magistrate considered the fact that the Applicant had shown signs of mental distress and was not self reliant financially. This was a factor in the granting of the orders made by the trial court.
22. The Applicant was granted access of the minors on alternate weekends and for half of the school holidays.
23. In my view a stay of execution would not at the present time serve the best interest of the minors. Accordingly I find no merit in the application for stay and the same is dismissed in its entirety.

Conclusion

24. Finally this court makes the following orders:-
- (i) The Applicant is granted leave to file an appeal out of time.
 - (ii) The Appeal to be filed and served within thirty (30) days.
 - (iii) Failure to comply with (ii) above means the leave will automatically elapse with no further reference to the Applicant.



- (iv) The prayer for stay of Execution of the orders made in the judgement delivered on 7th April 2021 is hereby denied.
- (v) Each party to bear its own costs.

DATED IN NAIROBI THIS 14TH DAY OF APRIL 2023.

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MAUREEN A. ODERO

JUDGE

