



**CS v NK (Civil Appeal (Application) E045 of 2022)  
[2023] KEHC 18678 (KLR) (Family) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18678 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPEAL (APPLICATION) E045 OF 2022  
PM NYAUNDI, J  
MAY 12, 2023**

**BETWEEN**

**CS ..... APPELLANT**

**AND**

**NK ..... RESPONDENT**

**RULING**

**Background**

1. The applicant and respondent herein are the Parents of JS, the minor herein, who at the time of the Judgement was aged 5 years 8 months. The appellant being aggrieved by the decision of the trial court delivered on April 11, 2022 in Children’s Court at Nairobi, Children’s Case No. E504 of 2021 has filed a Memorandum of Appeal and by notice of motion application dated April 25, 2022 seeks the following orders-
  1. Spent
  2. Spent
  3. That pending the hearing and determination of this appeal or further orders of the court; this court do grant the applicant an order of stay of execution of the judgement and order of the Court made on April 11, 2022 in Nairobi Children’s Court Children’s Case No. E054 of 2021 CS v NK
  4. That pending the hearing and determination of this Appeal, an order does issue that a children’s officers report be filed in court including were the minor attends school, where the Respondent resides and the means of the parents to take care of the minor.
  5. That the costs of this Application be provided for



2. The Application is supported by affidavit of the appellant sworn on the 25<sup>th</sup> of April 2022. The applicant contends that in its judgement the court failed to recognise the importance of his role in the child's tender age and immediate life. Further that the court failed to appreciate that it is the applicant who had actual custody of the child during the pendency of the matter before the trial court.
3. the applicant submitted that the Child was staying with him and that granting custody to the respondent was not in the best interests of the child as it would interfere with the child's psychological well-being.
4. Further the applicant avers that he had already enrolled the child in a school that was nearer his residence and granting the custody to the respondent would subject the child to an unnecessary long commute.
5. It is the applicants position that the child's interests favour the child being with him as he has the financial means to provide for the child's needs unlike the respondent. He further alleges that the respondent has not demonstrated that she is of fixed abode.
6. The applicant further contends given the current questionable lifestyle of the respondent where she is dating different men it is not in the interest of the minor to be in the custody of the respondent. Further he contends that the respondent is inclined to deny him access to the child and that therefore it is no in the child's interest for custody to be granted to the respondent. The applicant submits that the Appeal will be rendered nugatory if the stay is not granted.
7. The respondent opposes the Application and has filed an affidavit sworn on the February 25, 2023. The Respondent submits that the Application is a blatant abuse of the court process and that the applicant does not deserve any orders of relief that he is seeking.
8. The respondent submits that the Judgement of the court is well reasoned and correctly interpreted the evidence that was submitted before it in awarding the actual custody to the respondent.
9. The respondent contends that in arriving at its decision the court made reference to a report of a social worker who visited both homes. Further the respondent submits that she is complying with the orders of the court as relates to access by the applicant to the minor.
10. The respondent avers that it is not in the Child's best interests to stay the orders of the trial court and further that the appeal will not be rendered nugatory.
11. The parties having agreed to canvass the Application by written submissions, both parties filed written Submissions.

### **Applicant's Submissions**

12. The Applicant identifies the issue for determination as Whether Stay of Execution should be granted. He reiterates the averments in the supporting affidavit highlighting that he moved the lower court for actual custody after the respondent abandoned him and the child for several months. That in granting custody to the respondent, the court failed to consider this fact.
13. The Applicant identifies the applicable law as the *Constitution of Kenya* and the *Children Act*. The applicant relies on the decisions in
  - a. *Bhutt v Bhutt* Mombasa HCCC No 8 of 2014 and
  - b. *MNN v MOK & anor* (2017) eKLR



14. Both cases made reference to article 53(2) of the [Constitution of Kenya](#) and section 4(3) of the [Children Act](#), 2001(now repealed). The applicant avers that the child was taken away from him and if stay orders are not granted the minor will suffer a substantial loss, and will be denied affordable quality education, the right to parental care and protection which includes equal parental responsibilities and failure to provide security if stay is not granted.

### Respondents Submissions

15. The respondent submits that it is now well established that in applications of this nature the Child's best interest are the primary consideration. The respondent relies on the decision id [LDT V PAO](#) [2021] eKLR in which the decision in [Bhutt v Bhutt](#) (*supra*) was cited with approval.

### Analysis And Determination

16. The jurisdiction of the court to grant stay of execution is set out in Order 2 rule 6 (2) of the [Civil Procedure Rules](#) which states-

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 the application has been made without unreasonable delay. and
  - b. Such security as the court order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

17. In [Bhutt v Bhutt](#), the court stated

“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 the overriding consideration of the best interest of the child in accordance with article 53(2) of the [Constitution](#).”

18. As was stated by Thande J. in [HOO v MGO](#) [2021] eKLR ,

‘[7] As the court considers the matter and makes its decision that will impact the child herein all circumstances affecting the child must be taken into account. The overriding focus must be a solution that will be in the child's interest.

- (9) On the issue of loss, the court must look beyond the possible substantial loss to be suffered by the Applicant and consider the substantial loss to be suffered by the child. The interests of the Child supersede those of the parties and must at all times be upheld.’

19. I am also guided by the decision of Musyoka J. in [ZM v EIM](#) [2013] eKLR where he held-

“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 (sic). 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”.

20. Having regard to the order of the trial court, if I were to grant stay it would mean that pending the hearing and determination of the Appeal,
  - a. The minor will once again have to shift residence and possibly school.
  - b. The applicant will not cater for the minor’s school fees and school related expenses.
  - c. The applicant will not cater for the minor’s food at the rate of Kshs 15000 per month.
  - d. The applicant will not contribute towards the minor’s medical expenses
  - e. The parties will travel with the minor out of the court’s jurisdiction without consulting each other and absent consent of either parent.
21. That state of affairs cannot be in the child’s interests as dictated by section 8 of the *Children Act, 2022* which provides;
  1. In all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies-
    - a. The best interests of the Child shall be the primary consideration; ...
  2. All judicial, an administrative institution, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that it is consistent with adopting a course of action calculated to-
    - a. Safeguard and promote the rights and welfare of the child;
    - b. Conserve and promote the welfare of the child; and
    - c. Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.
22. Guided by the foregoing it is in the interest of the child that the status quo be maintained.
23. I have considered the request to call for a children’s officers report and consider that this goes to the substantive appeal and will only serve to delay the hearing of the main appeal. I therefore decline that request.
24. Finally, and in conclusion I make the following orders: \_
  1. The prayer seeking Stay of Execution of judgment and order of the Court made on April 11, 2022 is declined.
  2. For avoidance of doubt, pending the hearing and determination of the Appeal, the orders of the court requiring the applicant to cater for the minor’s school fees and school related expenses, along with providing for the minor’s food at the rate of Kshs. 15000 per month remain valid and enforceable.
  3. Further the parties when travelling with the minor out of the court’s jurisdiction are required to consult with each other and obtain the consent of either party depending on who is travelling with the minor.



4. The respondent shall maintain actual custody care and control of the minor pending the determination of the Appeal.
5. The parties shall have joint legal custody and shall share custody of the minor equally during school holidays.
6. The applicant shall have custody of the minor every weekend from Saturday at 10 am to Sunday at 3 pm. Parties shall agree on the pick-up and drop off points and whenever the applicant is not available he shall notify the respondent prior to the day of access.
7. This being a family matter there shall be no order as to costs

It is so ordered

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12<sup>TH</sup> DAY OF MAY, 2023.**

**P M NYAUNDI**

**JUDGE**

In the presence of:

.....Advocates for the Appellant/ Applicant

.....Advocates for the Respondent

Karani Court Assistant

