



**In re ILO & MA (Children) (Civil Appeal E099 of 2022)
[2023] KEHC 17918 (KLR) (15 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17918 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E099 OF 2022
MA ODERO, J
MAY 15, 2023**

BETWEEN

WOO APPELLANT

AND

MAA DEFENDANT

(Being an Appeal from the Ruling and decree of the Honourable Jackie Kibosia Principal Magistrate Nairobi delivered on the 14th September, 2022)

RULING

1. Before this Court for determination is the Notice of Motion dated October 3, 2022 by which the Applicant WOO seeks the following orders:-
 - “1. Spent.
 2. That the court be pleased to grant leave to the Appellant to file the Appeal and the said Appeal dated October 3, 2022 be allowed as prayed.
 3. That pending the hearing and determination of the Appeal this honourable court be pleased to set aside the orders of the Honourable Jackie Kibosia Principal Magistrate Nairobi delivered on September 14, 2022 pending the determination of this Application.
 4. That an order be issued directing that.
 5. Any other Orders and relief that this honourable court may deem fit.”



2. The Application which was premised upon order 10 Rule and 11 of the *Civil Procedure Rules*, Section 1A and 3A of the *Civil Procedure Act* and all other enabling provisions of the law was supported by the Affidavit of even date sworn by the Applicant.
3. The Respondent MAA opposed the Application through her Replying Affidavit dated November 21, 2022. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated December 7, 2022 whilst the respondent relied upon her written submissions dated December 19, 2022.

Background

4. This Appeal/Application arises from the Ruling delivered by Hon Jackie Kibosia Principal Magistrate on September 14, 2022 in Nairobi Children's Case No. 1240 of 2016. In that Ruling the trial court made the following orders:-
 - “ 1. That the Defendant (the Applicant herein) to pay Kshs.59,029 every 5th day of the month beginning October 5, 2022 till payment is full.
 2. That in default Warrant of Arrest to automatically issue without further notice.
5. Being aggrieved by that Ruling the Applicant decided to file an Appeal. He also filed this present application seeking to stay the orders of the trial court pending the hearing and determination of the Appeal.
6. As stated earlier the application was opposed.

Analysis and Determination

7. 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 issue for determination is whether the prayer seeking to stay the trial court's orders ought to be allowed.
8. Vide prayer 2 of the application the Applicant seeks to be granted leave to file an Appeal against the ruling of the lower court. In this regard Section 79G of the *Civil Procedure Act* Cap 21, Laws of Kenya provides as follows:-

“79G. 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 admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
9. The learned trial Magistrate delivered the ruling in this matter on September 14, 2022. The Applicant had thirty (30) days from the date of that Ruling to file his appeal.
10. The Draft Memorandum of the Appeal annexed by the Applicant to this supporting Affidavit is dated October 3, 2022 which was within the thirty (30) days statutory period to file an Appeal. I fail to understand why the Applicant did not just proceed to file his substantive Appeal. He did not require the leave of this court to do so. Since this application was filed within the time allowed by statute to file an appeal. I find that the Memorandum of Appeal is properly on record.



11. In any event I do grant the Applicant leave to file his Appeal. The same to be filed and served within fourteen (14) days of the date of this Ruling.
12. Vide prayer (3) of the Application the Applicant sought to have the orders made by the trial court “set aside”. Setting aside is a final order that cannot be granted on an interlocutory basis. I am of the view that what the Applicant was really seeking was to have the orders made by the trial court ‘stayed’ pending the hearing of the Appeal.
13. Order 42 Rule 6 (2) of the Civil Procedure 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 order as may ultimately be binding on him has been given by the applicant.”
14. It is appreciated that grant of a stay of execution is a discretionary power, however the court in setting out the guidelines for granting a stay, stated in the case of Butt v Restriction Tribunal [1979] eKLR as follows:-

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. 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.
4. 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.” (own emphasis

15. In the case of Loice Khachendi Onyango v Alex Inyangi & another [2017] eKLR it was stated:-

“The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the Court should be guided by the three pre-requisites provided under Order 42 Rule 6 of the Civil Procedure Rules. Firstly, the Application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted; and thirdly 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.....” [own emphasis]



16. In this case the impugned judgment was delivered on September 14, 2022. The application for stay was filed on October 3, 2022 barely two (2) weeks after the Ruling was delivered. Accordingly, I find that the application for stay was indeed filed in a timely manner.
17. The learned trial Magistrate directed that the Applicant pay a sum of Kshs 59,029/= monthly as maintenance with effect from October 5, 2022 in default Warrant of Arrest to issue. The Applicant states that this ruling was oppressive towards himself as he only earns a net income of Kshs.32,139/= and is unable to meet the monthly payment ordered by the court.
18. The Applicant further deponed that the minors are beneficiaries of his employers medical scheme and that he also provides for their education. He submits that if the orders made by the trial court are not stayed then he could be exposed to punishment for contempt of court causing him substantial loss.
19. The Respondent however counters that the pay advice annexed by the Applicant is fake. She asserts that the Applicant actually earns a net monthly income of Kshs 97,937/=. She states that the Applicant is in arrears of the orders for payment for maintenance of the minors yet he has taken out millions of shilling as loans. She urges the court to dismiss this application.
20. In determining this application this court must be careful not to pre-judge the pending appeal. The only issue for determination is whether the application for stay of execution has merit.
21. This court is mindful of the fact that this a matter which concerns the welfare of a child. It is trite law that in all matters concerning the welfare of children, courts have an obligation to give priority to the best interest of the child.
22. *The Constitution of Kenya 2010* provides at Article 53 (2) as follows:-
 - “(2) A child's best interest are of paramount importance in every matter concerning the child.” [own emphasis]
23. Section 8(1) of the *Childrens Act* of 2022 provides as follows:-“8(1) In all actions concerning children, whether undertaken by public or 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)
24. In the case of *Bhutt v 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]
25. The question of how much the Applicant actually receive as his net salary is not one which can be canvassed and/or determined under the auspices of this application. That is a matter which can only be dealt with in the main appeal.
26. Further I note that the learned trial Magistrate did allow parties time to hold discussions and asked the Applicant to advance proposals on how he wished to settle the outstanding arrears. The Applicant made no proposal at all.
27. As stated earlier the court in this matter must be guided by the best interest of the child.



28. In the case of *MNN v MOK & Another* [2017] eKLR the court stated that:-

“... in determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution under 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 Article 53 (2) of *the Constitution*.”

29. Similarly, in *ZMO v EIM* [2013] e KLR 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 it. 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. [own emphasis]

30. To stay a ruling requiring payment of arrears of maintenance cannot be in the best interest of the child.

31. The question of the financial capability of the Applicant is not one which can be determined under the auspices of this application.

32. The Applicant claims that he is likely to suffer substantial loss of if the stay requested is not granted. However my own view is that it is the children who stand to suffer greater loss if the stay is granted. The interests of the minors supersede the interests of the Applicant.

33. In the case of *ZMO v E.I.M* [2013] eKLR the court in considering the issue of stay in children’s cases held as follows:-

“The solution ideally lies in expediting the disposal of the appeal and staying the matter before the children’s court to wait for the outcome of the appeal. Tinkering with the quantum at this stage would amount to determining the appeal before the arguments are heard from both sides on the merits of the same.” [own emphasis]

34. Finally I note that the Applicant has not yet complied with the orders made by the trial court regarding offsetting the arrears of maintenance. There is no evidence of any attempts made by the Applicant to pay of the arrears due. As such the Applicant is a contemnor. The Applicant cannot come to this court seeking that the court exercise its discretion in his favour when he is in effect a contemnor.

35. For the reasons above I find no merit in this application for stay. The Notice of Motion dated October 3, 2022 is therefore dismissed in its entirety. This being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 15TH DAY OF MAY, 2023.

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MAUREEN A. ODERO

JUDGE

