



**In re AK, EO AND AO (Civil Appeal E116 of 2022)  
[2023] KEHC 18203 (KLR) (Civ) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18203 (KLR)

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

**CIVIL**

**CIVIL APPEAL E116 OF 2022**

**EKO OGOLA, J**

**MAY 4, 2023**

**IN THE MATTER OF AK, EO, AND AO (CHILDREN)**

**BETWEEN**

**COO ..... APPELLANT**

**AND**

**ITO ..... RESPONDENT**

**RULING**

1. The subject of this ruling is the notice of motion application dated November 16, 2022. The appellant prays for the following:-
  - a. Spent;
  - b. That pending the hearing and determination of this application and intended appeal, the respondent, her agents, representatives and/or servants be restrained from seeking and effecting warrants of arrest against the applicant pending the hearing and determination of this application and appeal.
  - c. That pending the hearing and determination of this application, this honorable court be pleased to stay execution of the ruling and/or all consequential orders thereto of Hon G. Opakasi delivered on October 17, 2022 in Children Case No 1309 of 2019.
  - d. That this honorable court be pleased to stay execution of the ruling and/or all consequential orders thereto of Hon G. Opakasi on October 17, 2022 in Children Case No 1309 of 2019 pending the hearing and determination of the appeal.



- e. That the honorable court does issue an order compelling the respondent to produce crucial documentary evidence in her possession to enable this honorable court reach a fair and just determination in the intended appeal in this matter.
  - f. That this honorable court be pleased to grant such other and further orders as it deems fit.
  - g. That the costs of this application be provided for.
2. The application is based on the grounds set forth therein and the appellant's supporting affidavit sworn on even dates. The appellant stated that he is apprehensive that if the orders sought are not granted, he will be committed to civil jail to the detriment of the minors since he is the core contributor towards their care and maintenance. According to the appellant, the trial court declined to issue a crucial discovery order for documentary evidence in the sole custody of the respondent. Therefore, the trial court arrived at a faulty decision which the appellant seeks to appeal. He averred that the appeal has a high probability of success and the same shall be rendered moot if the orders sought are not granted.
  3. Further to this, the appellant contended that he was not given a fair hearing and substantive justice was not done hence, he was prejudiced, and the end of justice was not achieved. The appellant further averred that he has been burdened with the sole responsibility of financially caring for the children despite the respondent being employed. Hence, committal to civil jail would be unfair and against the rules of natural justice as he is going to lose the business that he solely runs and also it will separate the children from their father.
  4. In response, the respondent in her replying affidavit sworn on February 15, 2023 deposed that an applicant seeking orders of stay of execution should provide security as provided under *order* 42 rule 6(2). She deposed that the appellant has continuously defaulted against the maintenance provisions of the consent recorded and adopted as a decree of the trial court. She added that it is the default of his maintenance obligation that has resulted in execution proceedings against him. According to the respondent, what is being sought in the memorandum of appeal is a stay of execution and setting aside of the ruling of the trial court. The respondent deposed that at the time of swearing this affidavit, the amount to be paid by the appellant as maintenance had accrued to Kshs 528,000. Therefore, if stay of execution is to be granted, the appellant should pay that amount as security.

### **Determination**

5. I have considered the pleadings filed and the evidence on record.
6. The background of the case that led to the filing of this application is that the appellant instituted a matter in the Children's Court Children's Case No 1309 of 2019. The parties then filed a consent agreement which was adopted as the order of the court on January 28, 2020. The consent stated *inter alia* that the appellant is to pay for the school fees and school-related expenses of the children and further contribute Kshs 22,000/= for maintenance of the children.
7. On June 10, 2022, the respondent filed an application of notice to show cause why the appellant should not be committed to civil jail for lack of honouring the consent order. According to the respondent, the appellant had not paid maintenance from April 2021 to June 2022, an amount that had accrued to Kshs 352,000. On October 17, 2022, the trial court gave its ruling. In the said ruling, the learned Magistrate Hon Opakasi held as follows:-

“From the evidence before the court, I find that the plaintiff has not tendered any evidence to show that indeed he made any payment to the defendant in respect to the arrears in question thus in contempt of court orders...I therefore allow the defendant's notice to show cause



and hereby issue warrants of arrest against the plaintiff which shall be executed through the OCS Langata Police Station.”

8. Now the appellant prays for stay of execution of the said ruling. The principles for granting stay of execution in children’s matters was well settled in the case of *Bhutt v Bhutt* Mombasa HCCC No 8 of 2014 (OS) where the court stated 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*.”

9. In exercising discretion with respect to stay of execution, order 42 rule 6(2) of the *Civil Procedure Rules* provides that the court should be satisfied that:-
- a. The applicant will suffer substantial loss if a stay is not granted;
  - b. The application for stay has been brought without undue delay; and
  - c. The applicant has provided security for the due performance of the decree.
10. While considering stay of execution with respect to children matters, besides the above, the court must consider the best interest of the child. The applicant is expected to demonstrate that the minors will suffer if a stay is not granted. According to the appellant, substantial loss will be suffered by the children because the children will be away from their father and also since he is a sole proprietor, his business will fail if he is committed to civil jail and consequently, he will be unable to provide for maintenance to the minor.
11. Since this application was filed without undue delay and the children might suffer substantial loss if the appellant is committed to civil jail, I hereby grant stay of execution of the ruling dated October 17, 2022 on condition that the appellant deposits the outstanding maintenance amount with the respondent within 45 days. in default, the stay of execution orders lapses.
12. No orders as to costs

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF MAY 2023**

**E.K. OGOLA**

**JUDGE**

**In the presence of:**

Ms. Mwende for the Appellant

Ms. Nafula h/b for Mr. Guthurifor the Respondent

Gisiele Muthoni Court Assistant.

