



**In re YAAA, AAAA & MAA (Minors) (Civil Appeal E082 of 2022)  
[2023] KEHC 19890 (KLR) (Family) (23 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19890 (KLR)

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

**CIVIL APPEAL E082 OF 2022**

**MA ODERO, J**

**JUNE 23, 2023**

**BETWEEN**

**NAM ..... APPELLANT**

**AND**

**NAO ..... RESPONDENT**

*(Being an Appeal from the Judgement and Decree of the Children’s Court of Kenya at Nairobi  
(Hon. Charity Oluoch) dated and delivered on 29th July 2022 in Children’s Case E079 of 2021)*

**RULING**

1. Before this Court for determination is the Notice of Motion application dated 1<sup>st</sup> December 2022 by which the Appellant NMA seeks the following orders:-

- “1. Spent.
- 2. Spent.
- 3. Spent.
- 4. Spent.
- 5. Spent.
- 6. Spent.
- 7. Spent.



8. That pending the hearing and determination of the present Appeal this honourable court do order that the minors Y.A.A.A and A.A.A.A be immediately removed from the custody of the father, the Respondent herein.
  9. That pending the hearing and determination of the present Appeal an order for stay of execution of judgement dated 29<sup>th</sup> July 2022 and all subsequent orders given therein be and is hereby made.
  10. That pending the hearing and determination of the present Appeal the court does order that the physical custody of the minors namely Y.A.A.A and A.A.A.A and M.A.A. be vested to the mother, the Appellant herein.
  11. That pending the hearing and determination of the present Appeal this Honourable Court do order that any access given to the Respondent herein be at the Appellant's residence and that the same be supervised.
  12. That leave be and is hereby granted to the Appellant herein to file and serve additional evidence in support of the present child case.
  13. That the costs of this application be in the cause Application.
2. The Application was premised upon Article 53(1) of *the Constitution* of Kenya, Sections 8, 11, 16, 22, 29, 31, 95, 97, 99, 101, 102, 103, 107, 108, 134, 135, 16, 137, 144 (g), 144(h), 145, 146, 148, 150 and 152 of the Children's Act 2022, Section 1A, 1B, 3, 3A and 78 (1) of the *Civil Procedure Act*, Order 51 of the Civil Procedure Rules, and all other enabling provisions of the law and was supported by the Affidavit of even date sworn by the Applicant.
  3. The Respondent NAO opposed the application through his Replying Affidavit dated 20<sup>th</sup> December 2022. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 3<sup>rd</sup> February 2023, whilst the Respondent relied upon his written submissions dated 9<sup>th</sup> February 2023.

## Background

4. The parties herein are the parents of the three (3) subject minors a girl aged ten (10) years and twin girls aged four (4) years old. The Applicant herein had filed Nairobi Children Case No. 079 of 2021 seeking orders of custody and maintenance. The case was duly heard and on 29<sup>th</sup> July 2022 the learned Chief Magistrate Hon. C.C. Oluoch delivered a ruling in which she made the following orders in respect of the custody and access of the three minors:-
  - “(a) The Plaintiff and the Defendant shall have joint legal custody of the children; the three (3) minors.
  - (b) The Defendant shall have actual custody, care and control the minors.
  - (c) The Defendant shall have access to all the three minors on alternate weekends from 10.00 a.m. on Saturday to 4.00p.m. on Sunday, with effect from 20<sup>th</sup> August 2022.
  - (d) The Defendant shall have access to the minors the first half of the school holidays. The parties shall agree on picking up and dropping off points through their advocates on record.



- (e) The first child M.A.A. shall first undergo counselling/therapy sessions, at the Defendant's cost, before released for access. The court shall give the nod once a counsellor's report, certifying her readiness to bond with the step-father, has been presented.
- (f) The Defendant shall pay school fees and cater for school related expenses for the minors at schools to be mutually agreed on by the parties.
- (g) The Defendant shall pay a sum of Kshs.20,000 by the fifth day of every month towards upkeep of the minors.
- (h) The Defendant shall cater for the medical needs of the minors by maintain a medical cover.
- (i) The Plaintiff shall cater for all the other needs of the minors including clothing, accommodation and part of food as well as household shopping.
- (j) The party in need of the minor's birth certificates and passports is at liberty to move the court for release on appropriate terms.
- (k) Each party shall bear its own costs."

5. Being aggrieved by the orders made by the trial court the Appellant filed a Memorandum of Appeal dated 22<sup>nd</sup> August 2022. Contemporaneously with that Memorandum of Appeal the Appellant filed the present application seeking a stay of the orders made by the trial court pending the hearing and determination of the appeal.

6. As stated earlier the appeal 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.

8. At this stage the court is not required to delve into the merits or demerits of the intended appeal. All the court is required to determine is whether the prayer for stay of execution is merited.

9. 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.”



10. 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)

11. In the case of *Loice Khachendi Onyango v Alex Inyangu & 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]

12. In this case the impugned judgment was delivered on 29<sup>th</sup> July 2022. The present application for stay was filed in December 2022 roughly five (5) months after the judgement had been delivered. No explanation has been tendered for this delay in bringing the application for stay. Suffice to say five (5) months though amounting to some delay cannot be deemed to be inordinate delay. I therefore find that the application for stay was filed within an acceptable time span.

13. The Applicant alleges that she has received information that the Respondent travelled to Mombasa for work abandoning the children with an unknown person(s). She further alleges that the children have been admitted to hospital by some unknown persons in the absence of herself or the father and without informing her of their admission to hospital. She alleges that the three (3) minors are not receiving proper care while in the custody of the Respondent.

14. The Applicant therefore prays that the orders made by the trial Court granting actual custody of the minors to the Respondent be stayed and that the court direct that the Respondent only be allowed supervised access in the Applicant’s house.

15. The Respondent strenuously opposes the allegations made against him by the Applicant. He explains that he has two (2) homes one in Nyali, in Mombasa County where he is employed and a second home in Nairobi. The Respondent asserts that both homes have excellent facilities for the care of the minors and that he has employed competent Nanny’s to assist in caring for the minors.



16. The Respondent denies that the children are being cared for by unknown persons and denies that they were admitted into hospital by unknown persons. He explains that the minors were merely taken to Nairobi Hospital upon his instruction for nebulization due to their suffering from frequent colds.
17. The Respondent states that the Applicant is allowed regular access to the minors when they are in his custody and states that he always keeps the mother informed of all developments involving the children. The Respondent denies that he has failed to provide proper care for the minors and denies that he has endangered them in any way. He prays that this application for stay be dismissed in its entirety.
18. 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.
19. 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.
20. *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]
21. 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]
22. 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]
23. I find there is no real or tangible evidence to support the allegation that the Respondent is not a fit custodial parent, who should be stripped off custody of the minors. Further I do not feel it is in the best interests of the minors to keep moving them from one parent to the other. Children require stability and predictability in their lives in order to thrive. Therefore, the order of stay is declined.
24. The Applicant has sought leave to adduce additional evidence during the hearing of the Appeal. She alleges that one of the Children's Caregivers named Abscondita Andiatsi who testified for the Respondent during the trial has now recanted her evidence and is ready to give a true account regarding the welfare of the minors.
25. Section 78 of the *Civil Procedure Act* and Order 42 Rules 27, 28 and 29 of the Civil Procedure Rules, 2010 is the legal foundational basis of leave of the court to adduce additional evidence on appeal. The section states as follows:-
  - “(1) Subject to conditions and limitations as may be prescribed, a appellate court shall have power-
    - a.to determine a case finally;



- b. to remand a case;
- c. to frame issues and refer them for trial;
- d. to take additional evidence or to require the evidence to be taken;
- e. to order a new trial.

2. Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

26. Order 42 Rules 27, 28 and 29 of the Civil procedure Rules, 2010 provide as follows:-

27. (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if

a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgement, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admissions.

28. Wherever additional evidence is allowed to be produced, the court to which the appeal is preferred may either take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to take such evidence and to send it when taken to the court to which the appeal is preferred.

29. Where additional evidence is directed or allowed to be taken the court to which the appeal is preferred shall specify the limits to which the evidence is to be confined and record on its proceedings the points so specified.

27. The caregiver in questions is not a new witness. She did testify during the trial in support the Respondent. It now appears this witness has had a change of mind and wishes to recant her evidence. An affidavit sworn by the said Abscondita Andiatsi has been annexed.

28. Given that this was a witness who was available and testified during trial it cannot be argued that she was unavailable to give evidence at the initial trial. Moreover, it is curious and indeed suspicious as to why it took this caregiver over five (5) months to realise that the evidence she had given in the trial court was not correct – this realization apparently only came upon her after she had been sacked by the Respondent.

29. In my view this is not an independent and objective witness. She clearly has some issue with the Respondent following his sacking of her from her job. I find no valid basis upon which to admit new evidence in this matter. Accordingly, I decline the Applicant’s prayer to admit new evidence during the Appeal.

30. Finally, and in conclusion this court dismisses in its entirety the Notice of Motion dated 1<sup>st</sup> December 2022. This being a family matter each side shall bear their own costs.

**DATED IN NAIROBI THIS 23RD DAY OF JUNE, 2023.**



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**MAUREEN A. ODERO**

**JUDGE**

