



REPUBLIC OF KENYA



**MOE v TA (Civil Appeal E126 of 2022)
[2023] KEHC 20054 (KLR) (Family) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 20054 (KLR)

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

FAMILY

CIVIL APPEAL E126 OF 2022

PM NYAUNDI, J

JUNE 2, 2023

**BEING AN APPEAL FROM THE JUDGMENT DELIVERED BY CHIEF MAGISTRATE
HON. C.C. OLUOCH ON 17TH NOVEMBER, 2022 IN THE CHILDREN'S
COURT CHILDREN'S CASE NO. 27 OF 2013 AT MILIMANI NAIROBI.**

BETWEEN

MOE APPLICANT

AND

TA RESPONDENT

(Being an appeal from the judgment delivered by Chief Magistrate Hon. C.C. Oluoch on 17th November, 2022 in the Children's Court Children's Case no. 27 of 2013 at Milimani Nairobi.)

RULING

Introduction

1. The Chamber Summons Application dated 8th December, 2022 is presented under Order 21 rule 1 (b) & 5 of the Civil Procedure Rules Articles 53 of the Constitution of Kenya 2010 and the Children Act Section 4 (2), Fair Administrative Action Act and any other provisions of Law. The Applicant seeks the following orders:
 - a. That Spent
 - b. That the Honourable Court be pleased to stay the execution of the Ruling and order's arising from the Ruling of the Chief Magistrate at Nairobi Children's Court Case No. 27 of 2013 delivered on 17th day of November, 2022.



- c. That this Honourable Court be pleased to stay further proceedings, in the children's Case No. 27 of 2013 pending the hearing and determination of his appeal.
 - d. Spent
 - e. That this Honourable Court be pleased to restrain the Respondent, her agent, servants and her legal representative from entering and/or in any way trespassing on land reference NRB/BLOCK xxx/x or in any way attempting to enter or purporting to appoint [Particulars Withheld] Auctioneers, of P.O Box xxxx-00100 NAIROBI Tel 0728xxxxxx or Mr. PN of H Realtors Ltd, H R Hse, 9th Floor, of P.O Box xxxx Nairobi, Tel 07562xxxxxx or any of their representatives.
 - f. That the costs be on cause.
2. The Application is supported by the Affidavit of the Applicant sworn on the 8th November 2022. The Respondent has opposed the Application vide Affidavit sworn on the 2nd March 2023. The Respondent has also filed a counter Notice of Motion dated 2nd March 2023 that is supported by her Affidavit sworn on even date. The parties are the parents of the minor subject of these proceedings.
 3. The matter proceeded by way of Oral submissions by the parties on 11th May 2023.
 4. The Appellant submits that unless the orders sought are granted his Appeal will be rendered nugatory. The Respondent counters the Application on the basis that the failure of the Appellant to provide for the minor has been prejudicial to the minor's best interests.

Analysis And Determination

5. Having considered the pleadings herein and the rival submissions of the parties, I discern the following as the issues for determination:
 - a. Whether the Preliminary Objection dated 2nd March 2023 is merited?
 - b. Whether the Appellant has met the threshold for grant of stay of execution pending appeal
 - c. Whether it is in the best interests of the minor to grant the orders sought

6. Whether the Preliminary Objection dated 2nd March 2023 is merited?

Vide Preliminary objection dated 2nd March 2023 the Respondent seeks that the Notice of Motion be struck out on the ground that

1. The Application is misconceived and incompetent because it improperly seeks to move this Honourable Court to exercise revisional jurisdiction.
2. The Application is an abuse of Court process
3. The issues raised in the Application are *res judicata* in view of the Honourable Magistrate's judgment (Hon. R.O. Mbogo/ magistrates court) delivered on 21st December 2018 whereat, after delivery of judgement (*sic*), the Applicant was issued with proceedings for purposes of Appeal but hitherto, had not appealed. section 7 of the [Civil Procedure Act](#) is offended.



7. The conditions that must be met for a preliminary objection to be upheld are well established as articulated in the *locus classicus* case of *Mukhisa Biscuit Manufacturing Co. Ltd v Westend Distributors Ltd* 1969 EA 696 which is that-

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

8. On the first ground the Preliminary objection must fail as contrary to the assertion that the Appellant seeks to invite the court to exercise its revisionary jurisdiction it is evident that what is sought is stay of execution pending appeal.
9. The same fate must befall the 2nd ground as the Respondent merely states the Application must be struck out as it is an abuse of the court process. The facts relied on are hotly contested. In particular in the Appellant disputes the sums owing and contends that in the impugned ruling the trial magistrate misdirected himself and therefore arrived at the wrong decision.
10. The final ground, where it is contended that the matter is *res judicata* must also fail. As articulated it would appear that the Respondents grievance is that the Appellant has delayed in presenting this Application. That may be so, but this does not amount to *res judicata*.

11. Whether the Appellant has met the threshold for grant of stay of execution pending appeal?

12. The Application is stated to be presented under Order 21 of the *Civil Procedure Rules*. As this is an application for stay of execution pending appeal the same ought to have been presented under Order 42 rule 6 of the *Civil Procedure rules* that provides-
- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) 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.



1. The Court of Appeal in *Butt V Rent Restriction Tribunal* (1982) KLR 417 held that

- “ 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 principle 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. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

2. Further the Court of Appeal in *RWW v EKW* (2019) eKLR addressed itself on this as hereunder: -

“Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

13. In the current appeal the Appellant has demonstrated that he has an arguable appeal. And that unless the stay is granted the appeal will be rendered nugatory. He therefore has met the criteria for grant of stay of execution pending appeal.
14. However as stated in the case of *RWW v EKW* (2019) eKLR cited above, the interests of the Appellant must be balanced against those of the Respondent.

15. Whether it is in the best interests of the minor to grant the orders sought

16. The Respondent who presented the matter in her capacity as next friend of the minor subject of this matter vehemently opposed the application on the basis that if the stay were granted the minor would be greatly prejudiced as the failure of the Appellant to comply with the orders of the Court have compromised her rights to parental support and provision.
17. 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.’

18. 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. 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”.

19. Guided by the cited precedents I am persuaded that even as I am inclined to grant the stay I must do so on terms that ensure that the interests of the minor are given prominence.

20. At the hearing of the Application the Appellant indicated that he was willing to pay Ksh 5000 towards the minor’s subsistence along with her school fees

21. In the light of the foregoing the Appellants application succeeds on the following terms

- a. Stay of execution pending appeal is granted on condition that
 - i. The Appellant provides Ksh 5000 per month towards the minor’s subsistence payable on or before the 5th day of each successive month effective 5th June 2023.
 - ii. The Appellant pays school fees of the minor in the school that she is currently in
- b. That there be a stay of further proceeding, in the children’s Case No. 27 of 2013 pending the hearing and determination of the appeal.
- c. That the Respondent, her agent, servants and her legal representative are restrained from entering and/or in any way trespassing on land reference NRB/BLOCK xxx/x or in any way attempting to enter or purporting to appoint [Particulars Withheld] Auctioneers, of P.O Box xxxx-00100 NAIROBI Tel 0728xxxxxx or Mr. PN of H R Ltd, HRC R Hse, 9th Floor, of P.O Box 37297 Nairobi, Tel 0756xxxxxx or any of their representatives as agents to collect rent or otherwise manage the property of the Appellant.
- d. The Appellant to prepare and serve record of Appeal within 60 days
- e. Mention on 29th September 2023 to confirm compliance
- f. Each party to bear their own costs

It is so ordered

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 2ND DAY OF JUNE, 2023.

P M NYAUNDI



HIGH COURT JUDGE

In the presence of

..... Advocate for Applicant

.....Respondent

D. Karanai Court Assistant

