



**NS v FAM (Children's Appeal Case E016 of 2023)
[2023] KEHC 20002 (KLR) (Family) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 20002 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CHILDREN'S APPEAL CASE E016 OF 2023
PM NYAUNDI, J
JUNE 15, 2023**

BETWEEN

NS APPLICANT

AND

FAM RESPONDENT

RULING

1. The Applicant presents Notice of Motion Application dated February 23, 2023 under Article 50(1) of the Constitution of Kenya, 2010 and Section 1A and 3A of the Civil Procedure Act and all other enabling provisions. The Application seeks the following orders
 1. Spent
 2. Spent
 3. That the Defendant/ Applicant be allocated the Responsibility of paying Ksh 3000 per month as opposed to the *ex parte* orders of Kshs 15000 per month pending the hearing and determination of this application.
 4. That this Honorable court be pleased to lift the Trial Court's warrants of arrests issues November 30, 2022 pending the Chamber Summons Application dated July 28, 2022 is pending the hearing and determination of this Application.
 5. That the Appellant be allocated the Responsibility of paying Kshs 3000 per month as opposed to the *ex parte* orders of Kshs 15000 per month pending the hearing and determination of this Appeal.
 6. That the costs of the Application be in the cause.



2. The Application is supported by the Affidavit of the Applicant sworn on February 23, 2023. The Application is opposed and the Respondent has sworn an affidavit on May 10, 2023. The Applicant has in addition filed a Supplementary Affidavit on May 16, 2023.
3. The matter proceeded by way of oral submissions on May 18, 2023

Summary Of The Applicants Case

4. The Applicant avers that the orders giving rise to the Notice to Show Cause were issued *ex parte* as his advocate then on record failed to attend court. He has filed a memorandum of appeal challenging the orders of the Court as he was not given an opportunity to be heard.
5. He contends that in any event the sum of Kshs 15000 as monthly maintenance is too high and he does not have the means to enable him to raise this amount.
6. He has submitted screen shot messages showing that his wife has been forwarding to the Respondent money.
7. He is only able to raise Kshs 3000 per month.
8. He seeks that paternity of the minor should be established before he is required to pay maintenance for her.

Summary Of Respondent's Submissions

9. The Respondent avers that the Applicant is the father of the minor subject of the proceedings and that the Orders properly issued against the Applicant after he failed to prosecute his defence.
10. That the sum of Kshs 3000 per month proposed by the Applicant is made in bad faith. The amount is negligible when weighed against the needs of the child.
11. The Respondent avers that the Applicant is a man of means and that he should therefore take up parental responsibility and provide adequately for the minor.
12. The Respondent urges that the lower court was guided by the need to safeguard the interests of the minor and that in making a determination the Court should be guided by the best interests of the child principle.

Analysis And Determination

13. Upon carefully reading the pleadings filed herein and considering the rival submissions herein I frame the following as the issues for determination-
 1. Whether this Court should grant stay of proceedings and stay of execution pending the hearing and determination of the Appeal?
 2. Who should pay the Costs of this Application



Whether this Court should grant stay of proceedings and stay of execution pending the hearing and determination of the Appeal?

14. The Application as presented is an application for stay pending appeal. The principles guiding the Court in granting stay are well articulated in the locus classicus case of *Butt V Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal 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.”

15. Further in In *Bhutt v Bhutt* HCCC No 8 of 2014, 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*.”

16. 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.’

17. The Appellant presents this Application under Article 50 of the *Constitution* seeking to safeguard his rights to a fair hearing. Just a few clauses following is Article 53 of the same *constitution* which requires that the best interests of a child must be the paramount consideration in any matter touching on the child.



18. My reading of the situation is that the Applicant is opposing the quantum not the allocation of parental responsibility. The Appellant contends that the Notice to Show Cause emanates from orders that were granted ex parte and which he should be allowed to challenge.
19. In determining the conditions under which the court will grant the stay I have had to put the interests of the child at the fore. For this reason, I do not consider the offer to pay kshs 3000 per month as being reasonable in the circumstances when weighed against the needs of the child in the interim and what the share of the Appellant should be.
20. It is not disputed that the Applicant had in July 2022 offered to provide a daily maintenance of kshs 300 per day, which works out to Kshs 9000 per month. I think that at this stage of the proceedings this is a reasonable amount for the Applicant to contribute towards the maintenance of the minor.

On who should pay costs of the suit?

21. Having regard to the nature of the Application and the relationship between the parties, each party will bear their own costs.
22. In concluding I allow the Application on the following terms;
 1. There be a stay of proceedings and execution of the orders of the lower court pending the hearing and determination of the appeal herein. Specifically, that there be a stay of execution of warrants of arrest issued on the 30th of November 2022 on condition that-
 - a. the Appellant/Applicant pays Kshs 9000 per month to the Respondent for the maintenance of the minor, payable on the 30th day of each successive month effective June 30, 2023.
 2. The matter to be mentioned on 6th July to confirm compliance
 3. The Appellant to file and serve record of appeal within 60 days
 4. Each party to bear their own costs

SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 15th DAY OF JUNE, 2023.

P M NYAUNDI

HIGH COURT JUDGE

