



REPUBLIC OF KENYA



EOG v PK (Civil Appeal E009 of 2022) [2023] KEHC 20261 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20261 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL E009 OF 2022
CM KARIUKI, J
JULY 13, 2023**

BETWEEN

EOG APPLICANT

AND

PK RESPONDENT

RULING

1. By the Notice of Motion application dated 24th January 2023, the Appellant/Applicant sought to secure the following orders: -
 - i. Spent
 - ii. Spent
 - iii. This honourable court be pleased to stay further proceedings in Nyahururu Children's Court Case No. 29 of 2021 pending the hearing and determination of Nyahururu High Court Children's Appeal No. 09 of 2022.
 - iv. Pending hearing and determination of Nyahururu High Court Children's Appeal No. 09 of 2022, the defendant be allowed maintenance of Kshs 5000/- monthly.
 - v. The costs of this application be provided for.
2. The application is premised on the grounds set out in the supporting affidavit of Eric Omondi Gari, sworn on 24th January 2023.
3. In summary, the Appellant deponed that he is apprehensive that the respondent is misleading the trial court into affording him unlawful and unfair treatment and that despite his inability to attend court physically, proceedings went on without notice resulting in his rest at the airport when traveling for a job interview and since then he has been unable to travel or get any job.



4. He averred that he currently does not have a job and is unable to raise kshs. 25,000/- per month in line with the trial court judgment, which is inordinately high. That he stands to suffer substantial loss and damage unless his proceedings before the trial court are stayed, given the history of unfair treatment I have undergone before the trial court. That he is readily and willing to pay kshs. 5,000/- monthly maintenance pending the hearing and determination of the appeal. Further, there has been no inordinate delay in bringing this application, and the delay was caused by the Respondent misleading him into believing that the matter was withdrawn.
5. On the other hand, the Respondent, through her replying affidavit dated 7th March 2023, deponed that: -
 - I. That vide the judgment delivered by Hon. Kiplagat on 04/03/2022, Defendant was ordered to remit the sum of Kshs. 21,000/- maintenance, enrol the subject on his medical cover and pay all education and education-related expenses for the subject.
 - II. That the Appellant defaulted in the remittance of the maintenance sum and in October 2022, the Appellant was arrested and committed to civil jail after which he paid Kshs. 250,000 being the accrued maintenance sum and costs of execution.
 - III. That since October 2022 till now, the Appellant has not complied with the judgment of the court and he is in arrears of five months amounting to Kshs. 105,000/-. The Appellant has also not taken out a medical insurance cover for the subject.
 - IV. That the proceedings of the lower court show that the Appellant has been a person who does not give regard to the best interest of the subject or respect the court in that: -
 - V. It took the court three instances to compel the Appellant to present himself to the Government Chemist for DNA and even a warrant of arrest was issued after he failed to turn up.
 - VI. The Appellant has never been concerned about the welfare of the subject leading to maintenance orders. The Appellant must always be compelled to pay each time.
 - VII. The Appellant has never taken insurance cover for the subject.
 - VIII. The Appellant has never shown any concern about the welfare of the subject. He has been referring to the subject as 'bastard'.
 - IX. The Appellant deserted his job where he was working as the security manager of a sugar company earning a very good salary of over Kshs. 150,000/- and attempted to flee the country in order to abdicate his parental obligations towards the subject but was arrested at the airport
 - X. That it is not true that the Appellant is currently unemployed. He works for Al Yelika Consultants' Tours and Travel Limited based in Nairobi Pioneer Building, a job recruitment and placement company.
 - XI. That the children's court after examining all factors arrived at the maintenance figure of Kshs. 21,000/- down from Kshs. 50,000/- and a further reduction of this amount will be tantamount to a direct violation of the subject's best interest as the subject will be deprived of basic needs.
 - XII. That the present application is an abuse of the appellate jurisdiction of this honourable court as the same application would have been made and determined at the Children's Court. This is not an appeal but a review of orders. That this honourable court lacks jurisdiction to review the orders of the trial court. It can only hear and determine appeals.



- XIII. That the memorandum of appeal was filed on 28.03.2022 and was never served since then, no action has been taken to prosecute the appeal or has the appeal been admitted in accordance with the rules and it is obvious that the Appellant is abusing the process of this honourable court.
- XIV. That the Appellant has not approached this honourable court with clean hands. He has outstanding maintenance arrears and he has not taken out an insurance cover for the subject. He should not be granted audience by the same court whose orders he is disobeying. Let him first comply with the maintenance orders before approaching the court for a review.
- XV. That the application for review before the honourable court lacks merit and the court lack jurisdiction to review the trial court orders and further, the application is an attempt at violating the subject's best interest and should be dismissed with costs.
6. None of the Parties' Written Submissions was found on the record/court file.

Analysis and Determination

8. Having considered the instant application, the supporting affidavit therein and the replying affidavit by the Respondent and all the evidence attached by the parties herein, the issues that arise for determination is whether the Applicant has made a case to warrant the stay of proceedings in Nyahururu Children's Court Case No. 29 of 2021 pending hearing and determination of Nyahururu High Court Children's Appeal No. 09 of 2022 and; the reduction of maintenance to kshs. 5,000/- monthly pending the hearing and determination of Nyahururu High Court Children's Appeal No. 09 of 2022.
9. First and foremost, I would like to clarify that this court is clothed with the jurisdiction to entertain appeals on maintenance and custody of children and, consequently, the subject matter in the application herein.
10. This court is guided by article 53 (2) of *the Constitution*, which provides as follows:-
- “Every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.”
11. This guiding principle is fortified in the *Children's Act* No. 8 of 2001, particularly section 4, which provides that in arriving at a decision concerning children, the paramount consideration should be the survival and best interest of the child.
12. The Applicant herein vide his application brought pursuant to sections 1A, 1B, and 3A of the *Civil Procedure Act*, Order 42 Rule 6, and order 51 rule 1 of the *Civil Procedure Rules*, sought orders for stay of proceedings in the trial court pending hearing and determination of the appeal.
13. The principles upon which the court may stay the execution of orders and/or proceedings appealed from are well settled. Order 42 rule 6 of the *Civil Procedure Rules* stipulates that: -
- “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 orders set aside.

No order for stay of execution shall be made under sub rule 1 unless:-

- a. The Court is satisfied that substantial loss may result to the 1st 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. Accordingly, under order 42 rule 6(2) of the *Civil Procedure Rules*, an Applicant should satisfy the court that: Substantial loss may result to him unless the order is made; That the application has been made without unreasonable delay; and The Applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

15. Accordingly, the application herein was brought without inordinate delay. The Appellant therefore has the burden of showing that if the proceedings are allowed to proceed, and the appeal eventually succeeds, he will suffer a substantial loss. Further, I note that the Appellant did not offer any security for the due performance of the decree that may ultimately be binding upon him.
16. Taking care to avoid venturing into the merits of the appeal herein, the dispute herein relates to the dispute of a minor child who is in need of parental responsibility and maintenance from both his father and mother. The mother has been tasked to maintain the child in her custody from the trial proceedings. It is evident that the father has been obstinate in taking up his pat to maintain the child. First, he began by denying that he is the child's father and was ordered to undergo DNA, a process which he frustrated. After the DNA results were out and he was proved to be the child's father, he has been uncooperative in remitting the maintenance ordered by the court to the extent that he was even committed to civil jail due to his own failure to send the ordered amounts to the Respondent. The Respondent stated that the Respondent is in arrears of five months, amounting to kshs. 105,000/- and he has also not taken out a medical insurance cover for the subject.
17. The Appellant asserted that he will suffer substantial loss if the stay of execution is not granted because he is currently unemployed and is not able to raise the amount of kshs. 21,000/- as ordered by the court. Nevertheless, it is clear that the Appellant's non-performance is an infringement of the child's right to maintenance. A party who is disobedient to court orders is not deserving of the court's discretion in his favour. I align myself with the holding in *Z.M.O. vs. E.I.M.* [2013] eKLR, where Justice Musyoka pointed out that:-

“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 child's best interests, 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 stating the matter before the children's court to wait 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.....”

18. Accordingly, courts are not generally persuaded to grant of stay of execution of maintenance orders in children’s cases should especially where paternity is not disputed as is the case herein. However, in the instant case, the Appellant averred that he is currently unemployed, a fact that the Respondent denied; stating that he works at Al Yelika Consultants Tours and Travel Limited. I have examined the evidence provided by the Respondent to prove the same and it is my opinion that at this stage and based on that evidence, the same is not satisfactory to prove that the Appellant is employed at that company.
19. As a general rule, the trial court was obligated to take into account the income or earning capacity and financial abilities of both parents before rendering a decision. Despite the Appellant’s unemployment, the financial needs and requirements of the subject still have to be catered to and this court must ensure that his life is not disrupted due to the appellant’s failures. Section 94 (1) of the Children’s Act provides guidelines in obtaining the rights and protection of the interests of children. In exercising my discretion to grant or refuse stay, I am tasked with balancing the competing interests of the parties while keeping in mind that the welfare and best interest of the child is prioritized.
20. In the premise, balancing all the interests present herein and in the interest of justice, I am persuaded that it is in the best interest of the child that the application herein succeeds only in part and make orders as follows:-
21. That the appellant is ordered to deposit 50,000/- to the Respondent out of the arrears of the kshs.105,000/- owed within the next thirty (30) days from the date of delivery this ruling.
22. That the appellant shall within the next thirty (30) days include the minor in his NHIF Medical Cover.
23. That the matter be mentioned after thirty (30) days to confirm compliance.
24. That there shall be a stay to execution of the trial courts proceedings against the appellant on the condition that:-
 - i. The appellant shall deposit kshs 10,500 /- to the respondent on the 5th of every month from july 2023 pending the hearing and determination of this appeal and;
 - ii. The appellant shall ensure that the appeal shall be heard within sixty (60) days since this matter is concerning a child.
 - iii. Each party shall bear its own costs.

DATED, SIGNED, AND DELIVERED AT NYAHURURU ON THIS 13TH DAY OF JULY 2023.

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CHARLES KARIUKI
JUDGE

