



CRN v MMN (Sued as the Mother and Next Friend of TGM - Minor) (Miscellaneous Application E026 of 2023) [2023] KEHC 21053 (KLR) (2 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21053 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS APPLICATION E026 OF 2023
LM NJUGUNA, J
AUGUST 2, 2023**

BETWEEN

CRN APPLICANT

AND

**MMN (SUED AS THE MOTHER AND NEXT FRIEND OF TGM - MINOR) AND
NEXT FRIEND OF TGM (MINOR RESPONDENT**

RULING

1. A Notice of motion dated June 21, 2023 was filed by the applicant herein seeking orders that:
 - i. Spent;
 - ii. The honourable court do issue a temporary stay of execution in Embu Children Case No 28 of 2019 pending hearing and determination of this application;
 - iii. The honourable court do issue a stay of execution in Embu Children Case No 28 of 2019 pending the hearing and determination of the intended appeal;
 - iv. The applicant be granted leave to appeal out of time, the judgment delivered on October 19, 2022 and the consequential orders emanating therefrom; and
 - v. The costs of this application be provided for.
2. The application is premised on the grounds on the face of the application and the supporting affidavit thereof. In the said affidavit, the applicant averred that the lower court's decision subjected him to 100% parental liability which he disputes on appeal. That the delay in appealing was occasioned by the applicant's mistaken belief that the mediation agreement between him and the respondent had been upheld by the trial court. He also stated that the delay was due to the lower court failing to provide typed proceedings in good time.



3. The respondent filed a replying affidavit in response to this application, wherein she stated that she has been the sole provider of all the basic needs of the minor. That the minor is a child with special needs which will be denied if this court grants the orders sought by the applicant. That the applicant is not right in claiming that he ought to be allowed to choose the school where the minor will attend considering that the minor is already attending a special school due to the disability. That the applicant ought to have complied with the judgment of the lower court as he had time to comply with the requirements for appeal but failed to do so. The respondent invited the court to prioritize the interests of the minor.
4. The court directed that the application be canvassed by way of written submissions and both parties complied.
5. The applicant relied on the case of *BRO Vs WJNWM* (2022) eKLR where the court held that apportionment of parental liability is to be done in equal measure for each parent on a continuum until the minor attains the age of majority. He argued that the court ought to be free to exercise its discretion in granting stay of execution pending appeal and leave to appeal out of time and that the applicant should not be locked out. For this, he cited the case of *Stecol Corporation Limited v Susan Awuor Mudemb* (2021)eKLR.
6. The respondent submitted that the minor in question is a child with special needs and the judgment of the lower court already prioritized these needs. She urged the court not to allow the applicant to deny the child the fruits of the judgment by granting the orders sought. She referred to the averments of the applicant's supporting affidavit where he claimed that the maintenance of the child's condition should be a shared responsibility, which averments she disagrees with, stating that she has been supporting the child single-handedly for 8 years on a small income. It is her case that the court should not grant the orders prayed for by the applicant because it has taken him 7 months after the judgment in question was given for him to bring the instant application and the delay has not been sufficiently explained. It is her case that the applicant is denying the child's rights by refusing to pay for education and medication. She urged the court to dismiss the application with costs.
7. I am faced with the question of whether the prayers for stay of execution pending appeal and leave to appeal out of time should be allowed.
8. It is undeniable that the center of focus in this application is the minor whose rights are enumerated under Article 53(1)(e) and (2) of *the Constitution of Kenya 2010* as follows:

“ Article 53(1)(e) 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

Article 53(2) A child's best interests are of paramount importance in every matter concerning the child.”
9. On the issue of stay pending appeal, Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* provides as follows:
 - (1) No appeal or second appeal shall operate as a stay of execution or proceeding 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. A factor to consider is the applicant’s delay in bringing this application following the judgment of the lower court. In this case, there is a 7 month delay between the time the judgment was delivered and the time of filing this application. The applicant’s reason for delay is that first, the lower court delayed in providing the typed proceedings and second, that, he mistakenly assumed that the court had upheld the mediation agreement between him and the respondent. In my view, the applicant has not provided sufficient reasons for the delay. In the case of *Mombasa County Government Vs Kenya Ferry Services & another* [2019] eKLR the court found this reason to be insufficient when the appeal was filed 2 months late, and held:

“...Further, in the case of *County Executive of Kisumu Vs County Government of Kisumu & 8 others*, SC. Civil Appl. No. 3 of 2016; [2017] eKLR, this Court emphasized the need for the Applicant, in an application for extension of time, to satisfactorily declare and explain the whole period of delay to the Court. On the issue of delay occasioned by typed proceedings, we stated as follows:

“a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered.”

10. As for the second reason for delay where the applicant stated that he assumed that the mediation agreement had been adopted by the court, I am also not convinced that the indolence on the part of the applicant ought to be visited on the respondent. In the case of *Amina Karama Vs Njagi Gachangua & 3 others* [2020] eKLR the court held:

“It has been held that equity aids the vigilant and not the indolent. It has also been held that delay defeats equity. In the case of *Ibrahim Mungara Mwangi Vs Francis Ndegwa Mwangi* [2014] eKLR the court quoted the following passage from Snell’s *Equity* by John MC Ghee Q.C. (31st Edition) at page 99:

“The Court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these want the court is passive, and does nothing.”

11. I do note with great importance that the minor in question has been and is still in constant need of treatment and a special care as demonstrated by the respondent. It is therefore very important that the issues in this suit be dispensed with, in a manner that prioritizes expedience at the earliest. That said, I shall fall back on Article 159 of *the Constitution* which bestows judicial authority on this court. I shall also be guided by Section 1A, 1B and 3A of *Civil Procedure Act* which provide for the overriding objective.



12. At the end of the day, the inadequacies on the part of the applicant have been considered. However, in my view, the subject of appeal is sound and presents a prima facie case. Only on this basis will the court grant the applicant leave to appeal out of time. Subsequently, the applicant is hereby granted leave to file the appeal out of time on the following conditions:

- a. The appeal to be filed within 14 days from today.
- b. That the record of appeal be filed and served within 21 days from the date of this ruling;
- c. That the appeal be prosecuted within 60 days failing which the appeal shall stand dismissed;
- d. In the best interest of the child, the applicant to comply with the orders that were issued by the trial court until the appeal is heard and determined.
- e. Each party to bear their own costs.

13. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF AUGUST, 2023.

L. NJUGUNA

JUDGE

.....**for the Applicant**

.....**for the Respondent**

