



**AOO v NO (Appeal E014 of 2023) [2023] KEHC 23252 (KLR)
(Family) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23252 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
APPEAL E014 OF 2023
PM NYAUNDI, J
SEPTEMBER 22, 2023**

BETWEEN

AOO APPELLANT

AND

NO RESPONDENT

RULING

Introduction

1. The Notice of Motion dated February 27, 2023 is presented under sections 1A, 1B, 3A and 63 of the [Civil Procedure Act](#) and Order 40 rules 1,2 and 4 and order 51 Rule 1 of the [Civil procedure Rules](#); section 99 of the [Children Act](#), No. 29 of 2022; rule 20 of the *Children (Practice and Procedure Parental Responsibility) Regulations 2002*; article 159 of the Constitution. The Applicant seeks the following orders-
 1. Spent
 2. Spent
 3. That pending the hearing and determination of the Appeal inter partes or until further Orders, this Honourable Court be pleased to issue an Order of Stay of execution of the Ruling and all consequential orders made on January 20, 2023 by the learned trial Magistrate Honourable Jackie Kibosia (PM) as well as an order of stay of proceedings of the suit of Nairobi Children’s Court No. E1230 of 2022
 4. That the Appellant/ Applicant be at liberty to apply for, and the Honourable Court be pleased to grant, such other Orders or reliefs as the circumstances of this case may permit as just and appropriate to meet the ends of justice.



5. That the costs of and incidental to this Application be borne by the Respondent.
2. The Application is opposed by the Respondent and the parties agreed to canvass the Application by way of written submissions.

Summary Of Applicants Submissions

3. The Applicant identifies the following as the issues for determination-
 - i. Whether there are pending applications in the Trial Court
 - ii. Whether orders should be granted for stay of execution and stay of proceedings of the suit of Nairobi Children's Court Cause No. 1230 of 2022?
 - iii. Whether the Appellant/ Applicant should be granted all the orders sought in the Application
 - iv. Who should bear the costs?
4. The Appellant challenges the orders of the Children's Court that were issued on 20th January 2023 as the same were granted ex parte and on a date when the matter was not listed for hearing or any other activity.
5. The Applicant contends that the same are prejudicial against him and further the Court would have arrived at a different decision had it disposed of all the Applications before proceeding to list the matter for hearing of the main suit.
6. The Appellant relies on the decision of the Supreme Court in *Bia Tosba Distributors Limited v Kenya Breweries Limited & 6 others* (Petition 15 of 2020) [2023] KESC 14 (KLR) (Constitutional and Judicial Review) (17 February 2023) (Judgment) in support of the argument that the Magistrate erred in setting the matter for hearing of the main suit when the pending Applications had not been disposed of.
7. The Appellant states that the decision on 20th January was a violation of his right to access to justice and a fair hearing as he was condemned unheard.

Summary Of The Respondent's Submissions

8. The Respondent identifies the following as the issues for determination-
 - i. Whether the appellants' rights to a hearing override the best interests of his children as enshrined in article 53(2) of the *Constitution* of Kenya, 2010 and section 4 of the *Children Act* No. 29 of 2022
 - ii. What is the effect of the grant of stay orders on article 53 of the *Constitution* of Kenya 2010 and sections 31 and 32 of the *Children Act* No 29 of 2022 Laws of Kenya on the appellants' parental responsibility, and whether the orders of stay are available to the appellant in the circumstances of the case herein.
9. The Respondent submits that the Applicants right to be heard is pitted in sharp conflict with the best interest of his children and that the best interests of the Child should be the primary consideration as the court makes its decision. The Respondent cites the decision on the case of *L A O v O K Arap M* [2018] eKLR.



10. Further the Appellant cites the decision in *Bhutt v Bhutt* – Mombasa HCCC No. 8 of 2014 on necessity of considering best interests of a child in determining an application for stay of execution especially where parentage is not in dispute.

Analysis And Determination

11. I find the following not to be disputed facts.
- i. The parties are the parents to the minor children currently aged 6 and 5 years
 - ii. Both the minors are school going
 - iii. The relationship between the parents has hit the headwinds and consequently they are living separately
 - iv. When the matter came up for hearing on 19th January 2023, the Court was not sitting. The matter was mentioned on 20th January 2023 in the absence of the Applicant.
 - v. The Appeal was triggered by the process leading to the grant of orders on 20th January 2023.
12. Having considered the pleadings herein, the Affidavits, submissions, authorities cited and relevant law I discern the following as the issues for determination
1. Whether and on what conditions this Court should grant stay of execution and stay of proceedings pending Appeal
 2. Who should pay the costs of this Application
13. The locus classicus on principles to guide the Court in determining an application for stay of execution is the celebrated case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 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.”



14. 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.”
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. From the record of the lower court, it is not evident how the matter was placed before the Court on 20th January 2023 as the matter was to have been mentioned on 19th January 2023. On that date the Appellant was not present. The averments of the Respondent in her affidavit that the date was taken with the consent of the Counsel for the Applicant, is not borne out by the Court record.
18. I am persuaded therefore that the Appeal does raise arguable issues.
19. The 2nd Issue is whether the Appeal would be rendered nugatory if stay were not granted. I think this a critical question especially as it touches on the welfare of the subject minors. Eventually when the Court sits to decide it will have to decide on the contribution of each parent towards the maintenance of the Children. The Appeal turns on whether the Appellate Court should disturb the orders of the Trial Magistrate issued on 20th January 2023.
20. I am of the view that any orders I give in relation to this Application must respond to the children’s right to parental care and protection as enumerated under article 53 (e).
21. It is in the best interests of the Children that the matter in the Children’s Court be determined expeditiously without further delay and that pending its determination provision is made for the maintenance of the minors. It is not possible that we put on hold these rights of the Children while the parents litigate.
22. Cognisant of the fact that the eventual outcome of the matter is a determination of the allocation of parental responsibility with respect to the Children, it is not in the interests of justice to grant a stay of proceedings.
23. Observing that the Appellant has not submitted a proposal on how the intended Appeal is in the interests of the child and observing that paternity is not denied I am of the view that the Appellant can pursue the Appeal but even as he does so he must meet his parental responsibility obligations.



24. I am obligated to make orders as to the wellbeing of the minors pending the hearing and determination of the suit by dint of article 53 of the Constitution and by section 8 of the Children Act, 2022 which provides;
1. In all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies-
 - a. The best interests of the Child shall be the primary consideration; ...
 2. All judicial an administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that it is consistent with adopting a course of action calculated to-
 - a. Safeguard and promote the rights and welfare of the child;
 - b. Conserve and promote the welfare of the child; and
 - c. Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.
25. I observe that the pending applications in the trial court all relate to the maintenance and custody of the minor children on an interim basis, and therefore no prejudice will be occasioned if we prioritise the hearing of the main suit
26. I have had opportunity to review the Report of the Directorate of Children’s Services dated December 14, 2022 along with interview notes by the trial Magistrate of the minor children on 8th December 2022. It is critical that there be stability in the children’s routine pending determination of the main suit.
27. Convinced that the Children’s interests are the primary consideration, I make the following orders
1. Stay of proceedings is denied, the matter be remitted to the Children’s Court for hearing and determination of the main suit on a priority basis
 2. There shall be stay of execution of the orders of the Court issued on 20th January 2023 pending the determination of the Appeal.
 3. Pending the hearing and determination of the main suit, the following orders are made regarding the custody of the minors
 4. The mother/ Respondent to have physical custody of the children.
 5. The father to have unlimited access via video and phone while they are with the mother.
 6. This being a family matter, each party will bear their costs.

It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2023.

P M NYAUNDI

JUDGE

In the presence of:

Advocate Arika for the Appellant



Sylvia Court Assistant

