



**In re RWW(Minor) (Civil Appeal E227 & 229 of 2021
(Consolidated)) [2023] KEHC 23339 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23339 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E227 & 229 OF 2021 (CONSOLIDATED)
A MSHILA, J
OCTOBER 6, 2023
IN THE MATTER OF RWW (A MINOR)**

BETWEEN

PNK 1ST APPELLANT

RWW 2ND APPELLANT

AND

AWW RESPONDENT

RULING

1. Before court are two applications by way of notice of motion dated January 25, 2022 and February 15, 2022 filed by the 1st and the 2nd appellants respectively.
2. In the 1st application, the 1st appellant sought for orders that;-
 - a. There be stay of execution of the ruling and orders of the trial court made on November 16, 2021 pending hearing of this application inter-partes.
 - b. There be stay of execution of the orders of the trial court made on November 16, 2021 until this appeal is heard and determined.
 - c. That in the meantime the defendant be allowed to continue to remit the monthly sum of Kes 7,000/= for the maintenance of the maintenance of the child as he has been doing before.
3. The application is based on the grounds that the applicant is required to pay the lump sum of Kes 560,000/= and in default the same be recovered by way of execution and to further pay a monthly sum of Kes 20,000/= which will cripple the applicant's finances. That his application for stay was dismissed at the trial court as such his salary has been attached.



4. PNK swore the supporting affidavit herein. He deposed that he is required to pay Kes 560,000/= to the respondent and a monthly contribution of Kes 20,000/= towards the upkeep of the child. That the 2nd appellant is also required to make a similar payment. In default of payment the sum is to be recovered from his salary of Kshs, 42,552/= which about half his pay while he has two other children. He deposed that he has filed an appeal which has high chances of success. That he continues to make his monthly contribution of Kes 7,000/=. He contended that his salary has been attached and that the respondent has denied them the child's access. Lastly, that he stands to suffer substantial loss and that the appeal herein will be rendered nugatory.
5. AWW filed her replying affidavit on 15/02/2022 in opposition to the applicant's application. She deposed that *vide* the ruling delivered on 16/11/2021, the appellant was ordered to pay Kes 20,000/= as monthly upkeep plus arrears amounting to Kes 560,000/=. That the appellant filed an application dated 23/11/2021 seeking similar orders at the trial court and the same was dismissed and the appellant has not appealed against the said ruling as such the same is still valid. She contended that the applicant herein refused to obey the orders of the court issued on 16/04/2013 directing the appellant to pay Kes 7,000/= as such she filed the application dated 18/12/2019 to compel the appellants to carry out their parental responsibilities by that time the appellants were in arrears of Kes 560,000/=. She denied the allegations that she was using the child as a "milk cow" indicating that she has single handedly cared for the minor and his best interest at heart. She contended that the monthly contribution of Kes 40,000/= from both appellants is barely enough. She urged the court to dismiss the prayer for stay of execution as the same is not in the best interest of the minor.
6. PNK filed a further affidavit. He contended that the fact that he had applied for stay orders at the lower court does not bar him from filing the instant application. That the orders of 16/4/2013 were between the appellants and that the orders of 24/6/2020 obtained by the respondent were vacated on 15/12/2020. That he has continued to pay the monthly upkeep and has taken out a medical cover for the minor. He contended that he has two other children whom he takes care of and that he is also servicing a bank loan which is deducted from his salary. He contended that he has been denied access to the child. He contended that contribution of Kes 7,000/= by each of the appellants would be sufficient of the minor pending appeal.
7. Subsequently, the applicant filed a supplementary affidavit on 17/5/2023. He contended that his employer is already deducting a 3rd of his salary despite his protests. That he earns gross pay of Kes 106,777/= and the deduction amounts to Kes 44,000/=. That he is also servicing a loan as such he is unable to support his family. He contended that the appeal will be rendered a nugatory if the deductions are not stopped as so far the respondent has received Kes 360,000/=.
8. The 2nd application was filed in Civil Appeal No E229 of 2021 by the 2nd appellant herein. She sought for orders;-
 - a. That pending the hearing and final determination of this application, this honourable court be pleased to issue a stay of the orders made in a ruling in Children Case No 15 of 2012 on 16/11/2021.
 - b. That pending the hearing and determination of this appeal, this honourable court be pleased to issue a stay of the orders made in the court's ruling of 16/11/2021.
 - c. That the court does allow the applicant to pay maintenance as she was previously paying.
9. The application is based on the grounds that the judgment entered in 2013 was entered against the 1st appellant herein. That the applicant moved to Germany but sends money for the minor's maintenance.



That the respondent was appointed as the legal custodian of the minor in 2019 and the appellants were directed to pay monies that has caused an impossible financial obligation on the applicant. That the minor will not be prejudiced as the applicant will continue to pay the amount previously directed.

10. RWW swore the supporting affidavit. She deposed that the 1st appellant was ordered to pay Kes 7,000/= as monthly upkeep, educational expenses and medical. That the minor was enrolled in the 1st appellant's medical cover. That she left for Germany in 2014 and continues to make monthly contribution but in 2019 the respondent went to court and she was directed to pay Kes 40,000/= and a 1/3rd of the 1st appellant's salary was attached. That the 1st appellant sought to have custody of the child in vain. That the involvement of the foreign embassy will greatly prejudice her. That it's the respondent who is benefitting from the orders. That there is need to stay the said orders and a reasonable amount be provided.
11. AWW filed her replying affidavit on 10/5/2022. She deposed that the appellants have never had interest with the minor. That the court issued a ruling that the 1st appellant pays Kes 7,000/= while the 2nd appellant was ordered to take care of the minors' shelter, clothing and food. She denied the claims that the appellants sought for the minor's custody as they have never been interested with the same. She contended that she has single handedly brought up the minor and that the Kes 20,000/= ordered as monthly upkeep is not even enough as she is forced to top up. The appeal was said to have no chance of success. The applicant was said to have failed to satisfy the grounds for granting the orders sought as no security has been provided neither has substantial loss been demonstrated. The court was urged to dismiss the application as the same is not in the best interest of the minor.
12. Parties recorded a consent consolidating Civil Appeal No E227 of 2021 and Civil Appeal No E229 of 2021 with Civil Appeal No E227 of 2021 being the lead file. PN and RW were designated as the 1st and 2nd appellants while AW was designated as the respondent.
13. The applications were canvassed by way of written submissions.

Written Submissions

14. The 2nd appellant submitted that she stands to suffer substantial financial loss if stay is not granted as she is required to pay Kes 560,000/= and a monthly contribution of Kes 20,000/= which orders had also been directed at the 1st appellant. She submitted that she has been providing and continues to remit money to meet the needs of the minor. She contended that the application herein was filed without undue delay as the ruling was delivered on 16/11/2021. She submitted that she is ready and willing to pay Kes 7,000/= monthly towards the maintenance of the child pending the hearing and determination of the appeal. Reliance was placed in the case of *Focin Motorcycle Co Ltd v Ann Wambui Wangui & another* (2018) eKLR.
15. The respondent submitted that the two applications by the appellants are similar and amount to forum shopping and that they are trying to bypass the ruling delivered by the trial court on 21/1/2022. The respondent submits that the minor herein also needs to be taken care by the 1st applicant who alleges to have other children. The money deducted by the 1st appellant's employer was said to go towards the child upkeep plus arrears. The 2nd appellant was said to be remitting only Kes 7,000/= which is not enough for the minor's upkeep. She denied the claims that the contributions goes to her and not for the upkeep of the minor. The appellants were accused of coming to court with unclean hands. In any case the appeal was said to have no chance of success. The orders herein were not made in a non-existent suit as alleged by the appellants. The minors best interest was said to be paramount as such stay of execution will affect the minor's welfare as he will suffer loss. Reliance was placed on among other cases the case of *MKS v PJK* (2017) eKLR.



Issues for Determination.

16. Having considered the two applications by the appellants, the main issue arising for determination is whether the order for stay of execution should be granted pending appeal.

Analysis

17. The principles for granting stay of execution in children matters was well settled in the case of *Bhutt v Bhutt* Mombasa HCCC No 8 of 2014 (OS) where the court stated as follows: -

“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 overriding consideration of the best interest of the child in accordance with article 53 (2) of the *Constitution*.”

18. Order 42 rule 6(2) of the *Civil Procedure Rules* provides that in exercising discretion in respect of stay of execution the Court should be satisfied that:-
- a. The applicant will suffer substantial loss if a stay is not granted;
 - b. The application for stay has been brought without undue delay; and
 - c. The applicant has provided security for the due performance of the decree.
19. In the case herein, the minor is in the custody of the respondent herein being the grandmother as the mother, the 2nd appellant relocated to Germany while the father the 1st appellant has moved on with another family.
20. The respondent avers that she single handedly takes care of the minor and that the lower court ordered the appellants to each be contributing Kes 20,000/= towards the child’s upkeep plus Kes 560,000/= being arrears from the orders of the lower court issued on April 16, 2013. The respondent contends that the appellants had neglected their role in providing for the minor causing her to approach the lower court for assistance and the impugned orders were issued.
21. The appellants are aggrieved with the decision of the lower court hence have filed the instant appeal. However, the ruling and the lower court record are yet to be availed to this court as such it would be premature to decide whether or not the appellants should have the monthly contribution reverted back to Kes 7,000/= as initially ordered.
22. As much as the application herein was filed without undue delay, this court is not satisfied that substantial loss that may be suffered by the appellants if the orders sought are not granted overrides that of the best interest of the welfare of the minor.
23. This court therefore, finds that it is in the best interest of the welfare of the minor that the appellants comply with the orders of the lower court awaiting the hearing and determination of the appeal herein.

Findings and Determination

24. In the circumstances this court hereby strikes out the two (2) applications with no orders as to costs.
Orders Accordingly.

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 6TH DAY OF OCTOBER, 2023.



A. MSHILA

JUDGE

In the presence of:

Mourice – Court Assistant

Njuguna – for Appellant/Applicant

Kihika – for Appellant (229/2021)

For IP (227/2021)

