



**Mutiso v Kiriimi (Civil Appeal E087 of 2022)  
[2023] KEHC 27323 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 27323 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CIVIL APPEAL E087 OF 2022  
SN MUTUKU, J  
OCTOBER 19, 2023**

**BETWEEN**

**JAPHETH MUTISYA MUTISO ..... APPLICANT**

**AND**

**DOREEN NKATHA KIRIMI ..... RESPONDENT**

**RULING**

1. The Applicant, Japheth Mutisya Mutiso, has brought this Notice of Motion (the Application) dated 7<sup>th</sup> November 2022 seeking stay of execution of the orders of the court issued in the Ruling of 18<sup>th</sup> May 2022 in Kajiado Children’s Case No. 1 of 2018 Doreen Nkatha Kirimi v Japheth Mutisya Mutiso and enlargement of time within which the Applicant may file an appeal against that Ruling.
2. The grounds in support of the Application are found on the face of it and in the Supporting Affidavit by the Applicant. He has stated that he was ordered by the lower court to pay a monthly maintenance of Kshs 35,000 on the 5<sup>th</sup> of each month which order he did not have any problems with at the time because he was in employment; that after the Covid 19 pandemic his employment was affected and he was forced to take early retirement resulting in his inability to pay the said maintenance and other related expenses as ordered by the court; that he made an application to have the orders reviewed or set aside which application was dismissed by the court and that his advocate on record was suffering from ill health and was in and out of his office most of the time as result of which he did not file an appeal within time.
3. The Applicant further stated that his advocate has applied for typed proceedings and judgment for purposes of lodging an appeal. He stated that he has an arguable appeal with high chances of success; that the Respondent does not stand to suffer any harm if the time within which to file the appeal is enlarged and that he is willing to furnish security and abide by the orders of the court.



4. The application is opposed by the Respondent through her Replying Affidavit sworn on 20<sup>th</sup> January 2023. She has termed the application an afterthought and an abuse of the court process filed with the sole purpose of denying the minors justice and an attempt to subject them to suffering against their best interest. She has stated that the reasons advanced for filing the appeal are not satisfactory to warrant grant of the prayers sought; that there is no certificate of delay issued by the court to show that the delay in obtaining the proceedings was caused by the court and that the Applicant does not have difficulties in satisfying the orders of the lower court since he has assets. She urged the court to find the application unmerited and dismiss it with costs.
5. The Applicant filed a Further Affidavit filed on 20<sup>th</sup> July 2023. I have read and understood the contents of the said affidavit. Most of the issues in that affidavit are response to the issues raised by the Respondent and to which in my view amount to arguing the appeal.

### **Submissions**

6. Parties have filed submissions in respect of this application. The Applicant's submissions are dated 2<sup>nd</sup> August 2023. He has raised two issues: whether stay of execution should issue, and whether time within which to file the appeal should be enlarged. While citing Order 42 Rule 6(2) of the *Civil Procedure Rules*, the Applicant submitted that the delay in filing the appeal was not intentional but was occasionally by his ailing counsel. He submitted that he will suffer substantial loss if stay is not granted because he is struggling financially to pay Kshs 52,000 maintenance ordered for the court after the same was increased; that he has no source of income and relies only on monthly pension and savings and that he is apprehensive that he may not be able to pay maintenance in future.
7. He submitted that the appeal has high chances of success, is arguable and meritorious and ought to be heard. He submitted that he is willing to pay two months and continue paying maintenance pending the hearing and determination of this appeal. He submitted that power to grant stay of execution is discretionary and that the court in granting stay should balance the interests of both parties. He relied on *Machira T/A Machira & Co. Advocates v East Africa Standard* [2002] eKLR and *RWW v EKW* [2019] eKLR, among other authorities to support his case.
8. On the second issue, he submitted that there are good and sufficient reasons for this court to exercise its discretion and grant stay since delay was due to unavoidable circumstances.
9. The Respondent's submissions were filed on 5<sup>th</sup> September 2023. On whether stay should be granted, the Respondent emphasized on the best interest of the child as of paramount consideration and that granting the order of stay will prejudice the minors.
10. On whether this court should enlarge time within which to file the appeal, the Respondent submitted that the Applicant's application is an afterthought, an abuse of this court's process and that the Respondent will suffer prejudice if the order is granted. She submitted that the intention of the appeal is solely for the purpose of delaying the execution proceedings. The Respondent submitted that the matter involves the wellbeing of the minors in terms of education, medical care and stability and grant of stay would jeopardize them.

### **Analysis and Determination**

11. I have considered the application, the grounds in support, the Replying Affidavit in opposition and the arguments of both parties contained in their respective submissions. I am guided by the paramount consideration of the best interest of the child in my determination of this matter. It is not the



Respondent who will be seriously affected by the actions of the Applicant if he fails to pay maintenance as ordered by the court. It is the minor children who look upon both parents for their upkeep.

12. It is not clear to me about the amount of unpaid maintenance if any. The Respondent has not come out. She concentrated more in arguing on the assets she claims belong to the Applicant. The Rules governing granting of stay of execution pending an appeal are clear. This issue needs to be brought out clearly to enable the court to issue orders that will be beneficial to all the parties and more so to the children who stand to suffer harm if maintenance is not paid.
13. I wish to give the Applicant the benefit of doubt and grant him prayer 3 of the application to the effect that he is allowed to file his appeal out of time. This is subject to payment of any arrears of maintenance he may have defaulted in payment. To this end, the Respondent is called upon to inform this court of any unpaid maintenance to be entered in the records of the court.
14. I decline to grant stay of execution of the orders of the lower court. The Applicant shall continue to pay maintenance as ordered by the court until the intended appeal is heard and determined on merit.
15. In addition, the Applicant shall pay an equivalent of three months maintenance to be deposited in an interest earning account in both names of counsel for both parties within the next 45 days. If the Respondent does not have legal representation, then this amount shall be held by the court.
16. The Applicant shall file and serve a record of appeal within 60 days from today. This matter shall be mentioned on 17<sup>th</sup> January 2024 to confirm compliance and give further directions.
17. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 19TH OCTOBER 2023.**

**S. N. MUTUKU**

**JUDGE**

