



**ZCN v FB (Civil Appeal E077 of 2024)
[2024] KEHC 13841 (KLR) (Family) (1 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13841 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E077 OF 2024
PM NYAUNDI, J
NOVEMBER 1, 2024**

BETWEEN

ZCN APPELLANT

AND

FB RESPONDENT

(Being an appeal from part of the Order emanating from the Ruling of the Honourable Kibosia, Dated and Delivered at Nairobi on 9th July 2024 in Milimanai Children’s Case No. 2016 of 2019)

RULING

1. Vide Notice of Motion dated 11th July 2024 and presented under Order 42 rule 6 and Order 51 rule 1 of the *Civil Procedure Rules, 2010* the Applicant seeks the following orders-
 - i. Spent
 - ii. Spent
 - iii. Pending the hearing and determination of this application and appeal the Honourable Court be pleased to stay the Ruling of Hon. Kibosia delivered on 9th July 2024 specifically the order which requires the Appellant and Respondent to attend a mandatory co-parenting coaching and the minors to attend transitional counselling within 30 days from 9th July 2024.
 - iv. Costs of this Application be provided for
2. The Application is supported by the Affidavit of the Applicant ZCN sworn on the same date. The Respondent has on 17th September 2024 sworn an affidavit in opposition.



3. Both parties have complied with directions of the Court to file written submissions. The Applicants submissions are dated 5th September 2024, those of the Respondent are dated 17th September 2024.

Summary of the Appellant's Submissions.

4. The Appellant frames the following as the issues for determination;
 - i. Whether the Appellant/ Applicant has met the conditions of stay pending appeal; and
 - ii. Whether it is in the best interests of the minors to allow the application for stay
5. The Applicant relies on the decision in *PSA v PNG* (Civil Appeal E099 of 2023) [20124] KEHC 2463 (KLR) (Civ) (8March 2024) Ruling on principles to guide the Court in considering an application for stay of execution in matters affecting children. It is submitted that the an order of stay is a discretionary order and the facts to be considered are whether absent the stay the appeal will be rendered nugatory. Further the Court should balance the Applicant's right to appeal against the interests of the Respondent who has an equal right to enjoy the fruits of the judgment in their favour. And then of course the court must be guided by the best interests of the Child as required by Article 53(2) of the *Constitution* of Kenya, 2010.
6. The Appellant submits that the trial court erred in issuing orders relating to children who are outside the jurisdiction of the Court and further that the impugned order had not been sought by either party. It is further submitted that the Respondent will not suffer any prejudice if the stay is granted and on the other hand the Applicant will likely meet the expenses of complying with this order. It is her submission that the Respondent enjoys unlimited access to the minors.

Respondent's Submissions.

7. The Respondent agrees with the Applicant on the issues for determination. It is the Respondent's submission that the Applicant is in contempt of the orders that she seeks to stay. He states that on his part he is willing to comply with the orders and has identified options both in Kenya and in Washington. It is his submission that the Applicant is a contemnor and in addition to this order has also failed to comply with the order requiring that he have access to the children.
8. The Respondent cites the decision in *Bhutt v Bhutt* Mombasa HCCC No 8 of 2004 (OS) on the necessity of the Court to consider the best interests of the Child when the considering an application for stay of execution.
9. He denies that the Applicant will be prejudiced if the orders are enforced. It is submitted that the Court exercised its discretionary powers in issuing the impugned orders and the same were issued in the best interests of the child and the court gave reasons for the order after having observed the parties.
10. It is submitted that the Applicant's conduct estops here from the benefit of the court exercising its discretion in her favour. The Respondent cites the decision in *MN v TAN & another* [2015] eKLR.

Analysis and Determination.

11. As a preliminary issue I am obligated to determine whether or not the Applicant is in contempt of the orders of the Court dated 9th July 2024. In her affidavit she contends that the Respondent is able to access the children when he travels to the USA and on two occasions when they have travelled to Kenya. On the information placed before me, I am unable to determine with certainty that she is in contempt. Under the circumstances I will give her benefit of doubt and find that she is complying with the orders of the Court requiring that the Respondent have access to the minors.



12. The parties have correctly cited the law on principles to guide the Court in granting stay of execution pending appeal. I have considered the memorandum of appeal and I find that the Applicant has an arguable appeal. 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.
13. At this stage it has not been demonstrated to my satisfaction counselling as recommended by the trial court is critical and necessary that it cannot await the outcome of the Appeal. The orders as issued compelling the parties to attend mandated counselling touch on the Applicant’s constitutional right to privacy. I believe it is within her rights to have her appeal heard and issue determined as to whether the impugned orders are sustainable.
14. Having said that I will grant the stay of execution pending Appeal on condition that the Applicant prepares and serves the record of Appeal within 60 days.
15. The matter will be mentioned on 5th February 2025 to confirm compliance.
16. This being a family matter there shall be no order as to costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 1ST DAY OF NOVEMBER 2024.

P M NYAUNDI

JUDGE

In the Presence of

Fardosa Court Assistant

