



KR v PC (Civil Appeal E066 of 2024) [2024] KEHC 15352 (KLR) (5 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15352 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E066 OF 2024
JK SERGON, J
DECEMBER 5, 2024**

BETWEEN

KR APPELLANT

AND

PC RESPONDENT

RULING

1. The application coming up for hearing is a notice of motion dated 30th October, 2024 seeking the following orders;
 - (i) Spent
 - (ii) Spent
 - (iii) That there be a stay of execution of the judgment and decree of the subordinate court issued in Kericho CMCC Children Case No. E017 of 2023, pending hearing and determination of the applicant’s intended appeal.
 - (v) That the necessary directions do issue.
2. The application is supported by the grounds on the face of it and the supporting affidavit of Kipkoech Rotich the Applicant herein.
3. He avers that vide judgment in Kericho CMCC Children Case No. E017 of 2023 delivered on 29th October, 2024 the trial court gave custody of the minors to the Respondent.
4. He avers that being dissatisfied with the judgment and decree of the trial court he instructed the advocate on record to prepare and file an appeal against the said judgement and decree of the lower court and annexed a copy of the memorandum of appeal.
5. He avers that the advocates on record have informed him of the import of the said judgment and the consequences of failing to comply with court orders.



6. He avers that since 1st January, 2023 and during the hearing and determination of the suit at the lower court he has had custody of LK one of the minors herein who was abandoned by the Respondent whereas SC the other minor has been in the custody of the Respondent.
7. He avers that being the present and primary caregiver of the subject minor LK, it is therefore in the best interest of the minor that this Honourable Court uphold his current living conditions.
8. He avers that he has an arguable appeal with high chances of success as the trial court did not consider the report filed by the children's officer.
9. He avers that he is certain that the Respondent does not have a fixed place of abode to reside with the said minors as she abandoned parental obligation of the other minor SC to his parents-in-law. Therefore he is apprehensive that should physical and real custody of LK be granted to the Respondent as ordered, she is likely to abandon the said minor at her parents house.
10. He avers that the said minor stands to suffer irreparably due to the sudden and forceful removal from custody of the Applicant, who has been in actual custody of the minor only to be deposited with his maternal grandparents.
11. He avers that the application has been brought in the best interests of the said minor and that he is willing to deposit security for maintenance of the minors herein pending the hearing and determination of the appeal if so directed by this Court.
12. PC the Respondent herein filed a replying affidavit.
13. She avers that vide judgment in Kericho CMCC Children Case No. E017 of 2023 delivered on 29th October, 2024 the trial court gave custody of the minors to her.
14. She avers that the Applicant had temporary custody of the LK before judgment was entered and that she never abandoned the minor or relinquished his custody willingly as alleged by the Applicant rather she left the matrimonial home due to constant and persistent emotional, verbal and physical abuse by the Applicant.
15. She avers that she is the minor's biological mother and it would therefore be prudent that she be granted custody of her only son LK as per the terms of judgment delivered on 29th October, 2024 pending hearing and determination of the appeal. She avers that over the last two years, she had been denied total access to her biological son, by the Applicant, even on school holidays.
16. She avers that the trial court considered all evidence on record and delivered a fair and just judgement in her favour.
17. She avers that the Applicant failed to prove any unfitness as a mother which would warrant her being denied custody of her biological child.
18. She avers that the granting custody to her would not in any way destabilise the minor LK but would foster a sibling bond and friendship with his other sibling.
19. She avers that the Applicant had not proven how he or the minor would suffer any loss or anguish if the Respondent is allowed custody as per the terms of the judgment.
20. She avers that the application is mischievous, vexatious, frivolous and an abuse of court process made solely to deny the Respondent fruits of judgment after a tedious and emotional trial.



21. The court directed the parties to file their written submissions at the time of writing this ruling the Applicant had not uploaded submissions in the Case Tracking System, this court considered the record in order to arrive at a fair and just determination of the instant application.
22. The Respondent complied with the orders of this Court, it was submitted on her behalf that the Applicant had not demonstrated substantial loss thereby warranting a stay of execution pending appeal. It was submitted that it is imperative for the Respondent to have custody of the minor, which would afford the minor motherly love and affection and the opportunity to bond with his younger sibling, cousins and maternal grandparents as he has not had a chance to do so for almost three years. The Respondent cited the case of *Ltd v PAO (2021) KLR* where the court stated that; “While considering stay of execution in respect to children matters beside the above, the Court has to consider the best interest of the child. The Applicant is expected to demonstrate that the minors will suffer if a stay is not granted.”
23. I have considered the application, replying affidavit and submissions by the parties and I find that the sole issue for determination is whether to stay execution of judgment and/or decree in Kericho CMCC Children Case No. E017 of 2023 delivered on 29th October, 2024 whereby the trial court gave custody of the minors to the Respondent.
24. In *Bhutt v. Bhutt Mombasa HCCC No. 8 of 2014 (O.S.)* 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*.” It is the finding of this court that the application for stay does not meet the threshold set out in order 42 rule 6 thereby warranting a stay of execution pending appeal. When considering the issue of loss in a matter which concerns a child, the Court must look beyond the possible substantial loss to be suffered by the Appellant and consider the substantial loss to be suffered by the child. In *FGW v GWT* [2017] eKLR the Court noted that the best interests of the child are superior to the rights and wishes of the parents.
25. This court finds that the Respondent has put up a formidable response, to wit the fact that the trial court having considered all evidence on record, the Children Officers’ Report included, delivered a fair and just judgement in her favour. The Respondent stated the fact that she is the biological mother of the minor, notwithstanding, she had been denied access to the said minor for a period of over three years and that it was imperative to have the minor in her custody pending hearing and determination of the appeal, moreso during the festivities as it would afford him a chance to experience maternal affection and the opportunity to bond with his younger sibling, cousins and maternal grandparents.
26. Section 8 (1) of the *Children’s Act*, 2022 provides as follows; “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies— (a) the best interests of the child shall be the primary consideration...”
27. Having considered the material placed before this Court, I find therefore that there aren’t valid grounds to stay the orders made on 29th October, 2024. The welfare of the child is a paramount consideration and cannot be stayed, as this would be detrimental to the welfare of the said child.
28. Based on the foregoing, I find no merit in the present application. The same is dismissed in its entirety.
29. For avoidance of doubt the orders of 29th October, 2024 made by the Childrens Court in Kericho CMCC Children Case No. E017 of 2023 remains valid and enforceable.
30. This being a family matter I make no orders on costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 5TH DAY OF DECEMBER, 2024.



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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Langat

Morata for the Appellant/Applicant

No Appearance for the Respondent

