



**SAR v ROH (Civil Appeal E038 of 2024)  
[2024] KEHC 15490 (KLR) (Civ) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15490 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ISIOLO  
CIVIL  
CIVIL APPEAL E038 OF 2024  
EM MURIITHI, J  
DECEMBER 5, 2024**

**BETWEEN**

**SAR ..... APPELLANT**

**AND**

**ROH ..... RESPONDENT**

**RULING**

1. By a Notice of Motion under certificate of urgency dated 25/9/2024 pursuant to Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 22 Rule 22 and Order 42 Rule 6 of the Civil Procedure Rules, Articles 50 and 159 (2) (a), (d) and (e) of the Constitution and all enabling provisions of the law, the Applicant seeks that:
  1. Spent
  2. Spent
  3. Spent
  4. This Honorable Court be pleased to stay execution of the decree in Merti Kadhi’s Court Matrimonial Cause No. E029 of 2024 and the order issued on 28<sup>th</sup> August, 2024 committing the Appellant/Applicant to civil jail and all other consequential orders thereof including the Orders of 18<sup>th</sup> September, 2024 pending the hearing and determination of this Appeal.
  5. Cost of this application be borne by the Respondent.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of the Applicant herein sworn on even date. He avers that the Kadhi’s Court at Merti in Matrimonial Cause No. E029/2024 delivered its judgment on 15/8/2024 in favour of the



Respondent. The matter had proceeded *ex parte* without his involvement because he was not served with the pleadings therein. He was therefore not aware of the matter until 28/8/2024 when he was committed to civil jail for a period of 6 months. Upon perusal of the court file, his advocates learnt that judgment had been entered on 15/8/2024 without his knowledge. The trial court *inter alia* decreed that he pays the Respondent Ksh. 12,000 for the upkeep of the 2 children and surrenders the shop with the assistance of the OCS Sericho Police Station. Barely 13 days after the delivery of the said judgment, he was committed to civil jail for payment of an alleged amount of Ksh. 150,800. He immediately instructed his advocates to apply for stay of execution of the judgment/decreed and committal orders but he was on 18/9/2024 ordered to deposit in court Ksh. 150,000, without any explanation, to secure his release. He was committed to civil jail for 6 months for payment of Ksh. 150,000 which amount was excessive in nature and thus the committal to civil jail was unlawful, has caused him mental anguish and irreparable loss and damage since he was condemned unheard. The Respondent broke into his shop with the assistance of police officers and carted away with the entire stock which was his only livelihood and therefore he cannot raise the Ksh. 150,000 ordered by the trial court. He applied for setting aside of the impugned judgment to enable him present his defence which application is still pending hearing and determination despite having been filed under certificate of urgency on 3/9/2024. According to Islamic law, matters between a wife and husband should first be heard before elders, which was not the case here. He believes that the conditions imposed by the trial court are unlawful, irregular, discriminatory and totally unfair since the amount required to be paid is excessive in nature and he was denied an opportunity to be heard. He has been counseled by his advocates that it is a cardinal rule of natural justice that no one should be condemned unheard and his right to fair trial under Article 50 of the [Constitution](#) will not be achieved. The appeal will be rendered nugatory and an academic exercise if the application, which was brought without unreasonable delay, is denied. The court's discretion to endeavor to do complete justice is unfettered and it is in the best interests of justice that the orders sought are granted.

3. The Respondent has opposed the application vide her replying affidavit sworn on 31/10/2024. She terms the application to be misconceived, based on half-truths, mischievously filed to arm twist the court into granting unwarranted reliefs as such the same should be dismissed with costs. Their marriage with the Applicant irretrievably broke down as a result of the Applicant's violence and abuse. The elders, Imam and Sheikhs tried to intervene and advise them to no avail. The Applicant abandoned his fatherly responsibility to their children and engaged in khat chewing and cattle rustling activities at night while he slept throughout the day. In the interest of the family affairs and wellbeing of their children, he approached their former area Member of Parliament Hon. Mumina Gollo now Isiolo Women Representative, who gave her capital of Ksh. 35,000 to start a small business which grew tremendously save for constant interferences by the Applicant who has been sneaking in and stealing sales money for his own use. The Applicant forcefully took over her business, chased her away from their matrimonial home which necessitated the institution of the case before the Kadhi's Court. The Applicant was served with summons to enter appearance and pleadings by the Chief of Sericho location on 21/7/2024 and a return of service was filed to that effect but he blatantly ignored them and the matter proceeded in his absence. Upon hearing, the Applicant was ordered to return the keys to the shop and cater for the upkeep of the children by paying Ksh. 12,000 per month from 15/8/2024. Instead of complying with the court orders, the Applicant proceeded to loot all the stock from the shop leaving only a few items behind which he was unable to dispose of urgently. She reported the matter to the Kadhi's court and Imam where she was advised to move the court for contempt and that is when the Applicant was committed to civil jail for disobedience of court orders. The Applicant subsequently moved the Kadhi's court for stay of execution of the judgment of 16/8/2024 where he was ordered to deposit Ksh. 150,000 as security for costs, an amount she considers very reasonable owing to the Appellant's conduct throughout the trial before the Kadhi's court. She is advised by her advocates that



the orders made by the Kadhi's court are well within the purview of the law and the same should be maintained pending the outcome of the appeal. She urges the court to find that the application has been filed mischievously to frustrate her and her children whereas the impugned judgment was made in the best interests of the children.

4. The application was urged orally in court and ruling reserved.

### **Analysis and Determination**

5. The law concerning applications for stay of execution of a Judgment and/or Ruling is well espoused in the provisions of Order 42 Rule 6 of the Civil Procedure Rules, as follows: -

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

No order for stay of execution shall be made under sub rule (1) unless: -

- a. The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay.
  - b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”
6. This court notes that the application was filed on 25/9/2024 while the decision sought to be appealed against was made on 15/8/2024. That delay of less than a month cannot be termed as inordinate and inexcusable.
  7. Whereas the Applicant contends that his appeal will be rendered nugatory and an academic exercise if stay is denied, the Respondent maintains that the judgment of the Kadhi's court was made in the best interests of the children.
  8. The court notes from the grounds of appeal as raised in the Applicant's memorandum of appeal, faulting the Kadhi's court for inter alia refusing to stay execution of the judgment of 15/8/2024, despite the fact that he had not been served with summons and pleadings and ordering him to deposit in court the excessive sum of Ksh. 150,000 yet he was only required to pay Ksh. 12,000 for the upkeep of the children, that the appeal is indeed arguable, which is not one which must necessarily succeed and neither is it for the court to go into the merits of the intended appeal.
  9. The court deciphers from the order of 20/9/2024 that the Applicant was committed to civil jail on 28/8/2024 for contempt of court and he was granted conditional stay of execution upon deposit of Ksh. 150,000 in court.
  10. This court has considered the implication of granting stay as against the best interests of the minors herein, who need provision in terms of education, medical care, clothing, shelter, food and so on. In this court's considered view, granting a blanket order for stay of execution of the trial court's decision would be tantamount to denying the minors herein their aforementioned basic needs.



11. There are good reasons for withholding orders for the stay of execution of orders in children matters, based on the judicial acknowledgement that the welfare of the children is of paramount consideration and the daily needs for the livelihood and upkeep of the children cannot be stayed without detriment to the best interests of the children, which the court is enjoined to observe, promote and uphold under Article 53 of the Constitution.
12. This court respectfully notes the decision of the court (William Musyoka J.) in ZM v EIM [2013] eKLR as follows:-

“As a matter of principle, grant of stay of execution of maintenance orders in children's cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute. To my mind once a maintenance order is made where parentage is undisputed it should not be suspended pending appeal, where the appeal is on the quantum payable. The solution ideally lies in expediting the disposal of the appeal and staying the matter before the Children's Court to wait the outcome of the appeal. Tinkering with the quantum at this stage would amount to determining the appeal before arguments are heard from both sides on the merits of the same.”
13. This court finds that it is in the best interests of the minors that the Applicant continues to remit the decreed monthly sum of Ksh.12,000 for their upkeep pending the hearing and determination of the appeal.
14. The court wishes to remind the Applicant that he must obey the maintenance orders of the trial court until further orders of the court.

### Orders

15. Accordingly, for the reasons set out above, this court allows the Applicant's application dated 25/9/2024 strictly on the following terms:
  1. An order for stay of execution of the decree in Merti Kadhi's Court Matrimonial Cause No. E029 of 2024 and the order issued on 28<sup>th</sup> August, 2024 committing the Appellant/Applicant to civil jail and all other consequential orders thereof including the Orders of 18<sup>th</sup> September, 2024 is hereby issued pending the hearing and determination of this Appeal.
  2. The Applicant shall continue to remit to the Respondent the monthly sum of Ksh. 12,000 for upkeep of the 2 minors pending the hearing and determination of the appeal.
  3. The Record of Appeal to be filed within sixty (60) days from the date hereof.
  4. In the event of default of the aforementioned conditions, the stay of execution shall lapse and be of no effect.
  5. As usual in children matters, the appeal shall be heard on priority basis on a date to be fixed in consultation with counsel.
  6. The costs of the application shall abide the outcome of the Appeal.

Order accordingly.

**DATED AND DELIVERED ON THIS 5<sup>TH</sup> DAY OF DECEMBER 2024.**



**EDWARD M. MURIITHI**

**JUDGE**

**Appearances**

Ms. Y. K. Riungu for Applicant

Abdullahi Halkano for Respondent

