



**SNM v RWK (In the Matter of BMM, MWM & INM Suing through their Mother and Next of Kin) (Civil Appeal 141 of 2024) [2024] KEHC 15677 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15677 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 141 OF 2024  
FN MUCHEMI, J  
DECEMBER 5, 2024  
IN THE MATTER OF BMM, MWM & INM**

**BETWEEN**

**SNM ..... APPELLANT**

**AND**

**RWK ..... RESPONDENT**

**IN THE MATTER OF BMM, MWM & INM SUING THROUGH THEIR  
MOTHER AND NEXT OF KIN**

**RULING**

1. The application for determination dated 3<sup>rd</sup> June 2024 seeks for orders of stay of the judgment in Ruiru Senior Principal Magistrates Court Children’s Case No. E051 of 2023 delivered on 15<sup>th</sup> May 2024 and in particular the order for the payment of Kshs. 20,000/- per month for the needs of the children with effect from June 2024 by the applicant pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 17<sup>th</sup> July 2024.

**Appellant’s/Applicant’s Case.**

3. The applicant states that the judgment in Ruiru Senior Principal Magistrates Court Children’s Case No. E051 of 2023 was delivered on 15<sup>th</sup> May 2024 which shared out all the parental responsibilities between the parties. The applicant further states that the trial court specifically held that he takes care of other miscellaneous expenses of the children and went further to add an additional Kshs. 20,000/- for other needs which were not specified to be paid by him. The applicant argues that the additional money to be paid by him does not state what needs it caters for the minors. As such, the applicant states that it amounts to overburdening him yet he is already shouldering the most responsibility in taking care of the minors.



4. The applicant argues that the stay orders will not prejudice the minors as all their other needs have been catered for in the judgment.

### **The Respondent's Case**

5. The respondent states that she sought orders for monthly maintenance of the minors for Kshs. 40,000/-. The trial court heard the suit and ordered the applicant to pay school fees for the children, take care of their medical needs and pay Kshs. 20,000/- monthly as upkeep.
6. The respondent states that when her relationship with the applicant irrevocably broke down on account of his violence she had to leave the matrimonial home with the children and she moved into a rental house. Further, she states that having full time custody of the children means that she has to pay rent, the house help, utilities, children's entertainment, food, clothing and their everyday needs taking into account that they are girls.
7. The respondent states that the issue before the court revolves around parental responsibility which is a statutory duty that cannot be avoided and the applicant cannot claim the award was not properly defined as the trial court addressed the issue of Kshs. 20,000/- as the applicant's contribution for the other needs of the children.
8. The respondent argues that it is not in the best interests of the children pursuant to Article 53(2) of [\*the Constitution\*](#) and the Children's Act to stay execution in a child's maintenance case.
9. The respondent states that the appeal does not raise triable issues as the orders of the court were precise and clear.
10. Parties disposed of the application by way of written submissions.

### **The Applicant's Submissions**

11. The applicant relies on Order 42 Rule 6 of the Civil Procedure Rules and the case of Bhutt vs Bhutt Mombasa HCCC No. 8 of 2014 (O.S) and submits that the best interests of the minors is paramount in determining an application of stay of execution in children's matters. The applicant submits that he is shouldering the heavy burden of school fees and thus the children will suffer if an additional burden is placed on him. The applicant states that he is struggling to pay school fees for the children who are in private schools, he takes care of the minors upon them visiting him over the half school holidays and alternate weekends.
12. The applicant submits that the respondent is not being truthful when she alleges that she is shouldering the bigger percentage of the responsibilities. The children have their meals in school with one in boarding school whereas weekends and school holidays are shared between them. The applicant argues that staying the payment of additional Kshs. 20,000/- will not in any way prejudice the minors who are catered for in all aspects.
13. The applicant submits that he has brought the application without undue delay and he has further demonstrated that he has an arguable appeal with high chances of success. The applicant relies on the case of F.C. vs L.R.(Suing as [\*mother and next friend of the minors\*](#)) ([\*Family Appeal E021 of 2023\*](#)) [2024] KEHC 4111 (KLR) (25 April 2024) and offers to pay security by continuing to pay school fees, providing for educational needs and medical cover pending the hearing and determination of the appeal.



## The Respondent's Submissions

14. The respondent relies on Order 42 Rule 6 of the Civil Procedure Rules, Article 53(2) of *the Constitution* and the case of Bhutt vs Bhutt Mombasa HCCC No. 8 of 2014 (O.S) and submits that in children's matters, the court considers the children's best interests in an application for stay of execution.
15. The respondent further relies on the cases of LDT vs PAO [2021] eKLR and HKM vs NJK (Children's Appeal Case 58 of 2023) [2023] KEHC 26887 (KLR) (15 December 2023) (Ruling) and submits that parents are responsible for their children's well being and thus when seeking for orders of stay, the parent should be focused on seeking orders that protect the said well being and not orders that are prejudicial to the children. The respondent argues that the children are 14 years, 11 years and 9 years respectively and they exclusively rely on their parents to meet all their needs which include educational, medical, housing, food and clothing which were specifically provided for during the trial but they also have other needs not provided for including sanitary provisions, engaging in extracurricular, developmental and entertainment activities.
16. The respondent submits that she was forced to leave the matrimonial home she shared with the applicant to a rental house where she takes care of all the household bills in addition to all other miscellaneous needs of growing children. The respondent further submits that the children were accustomed to a certain lifestyle that both their parents ought to strive to maintain for them as she is not in a position to provide for all those needs. The respondent further submits that she initially prayed for monthly maintenance in the sum of Kshs. 40,000/- out of which the court awarded Kshs. 20,000/- as upkeep.
17. The respondent argues that the applicant's non-remittance of the monthly upkeep payments has greatly prejudiced the children as they are forced to forego things they had been accustomed to, their nutrition, shelter and clothing has downgraded. Further, the children have been forced to forego extracurricular activities they have been introduced to and their quality of life has been greatly impacted negatively. Thus, the respondent submits that it is not in the best interests of the children that some of their needs are not met simply because their parents are not living together. To support her contentions, the respondent relies on the case of SAJ vs AOG & Another [2019] eKLR.
18. The respondent argues that the applicant has not clearly spelt out what nature of substantial loss he stands to suffer if the orders sought are not granted. Instead the applicant only complains that he shall be overburdened and that the trial court did not put a label on the Kshs. 20,000/- awarded despite it clearly being defined to be for the other needs of the children. The respondent relies on the cases of Kinyunjuri vs Wotoku Muguta (2018) eKLR and ZM vs EIM [2013] eKLR and submits that stay of execution should not be granted as the applicant has failed to establish what loss he stands to suffer and how the grant of stay is in the best interests of the children. The respondent further relies on the case of JMR vs RNM [2022] eKLR and submits that the issues raised by the applicant that the order for payment of monthly upkeep overburdens him are issues that can only be determined at the hearing of the substantive appeal as they are the substratum of the appeal.



## The Law

### Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

19. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-
1. “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 orders set aside.
  2. 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 1<sup>st</sup> Applicant unless the order is made and that the application has been made without unreasonable delay; and
    - 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.
20. Beyond the requirements of Order 42, this being a matter concerning children, this Honourable Court is enjoined by the Constitution of Kenya 2010 and the Children Act to consider the best interests of the children. The Constitution of Kenya 2010 provides at Article 53(2) that:-
- A child’s best interests are of paramount importance in every matter concerning the child.
21. The Children Act on the other hand provides at Section 8(1) that:
- In all actions concerning the children, whether undertaken by public or private or social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
22. As was observed in *Bhutt vs Bhutt Mombasa HCCC No.8 of 2014 (OS)*, 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 an overriding consideration of the best interests of the child in accordance with Article 53 (2) of the Constitution which provides:-
- In exercising its jurisdiction to grant stay of execution, the High Court is required by Order 42 Rule 6(2) of the Civil Procedure Rules to be satisfied that:-
- a. The applicant will suffer substantial loss if stay is not granted;
  - b. The application for stay has not been brought without undue delay; and
  - c. The applicant has provided security for the due performance of the decree.
23. Similarly in *Z.M.O vs E.I.M. [2013] eKLR Musyoka J.* stated:-
- 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.

24. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

25. The applicant argues that he stands to suffer substantial loss as he is shouldering the heavy burden of paying school fees and thus the minors shall suffer if an additional burden is placed on him. The applicant further argues that the minors shall not suffer if the orders sought are granted as their needs have all been catered for and the payment of Kshs. 20,000/- is an additional payment.

26. Notably, the applicant has stated what substantial loss may occur to him if the stay orders are not granted. However as noted earlier, the best interests of the child are more paramount than that of the parties. The children’s interests supersede those of the parties. This principle was enunciated in the case of C.K.K vs C.M.M. [2016] eKLR where the Judge stated:

“In the circumstances of this case it is Baby CMM and not the two protagonists who stands to suffer loss since we are not dealing with a material claim.”

27. Likewise, in the instant case, it is the children and not the applicant who stands to suffer substantial loss if the orders sought are not granted. The rights of the children override the rights of the applicant and the applicant has not demonstrated to this court that he is likely to suffer substantial loss in the event that the orders are not granted.

28. On the issue of whether this application was filed promptly the record shows that judgment was delivered on 15<sup>th</sup> May 2024 and application filed on 5<sup>th</sup> June 2024. Thus it is my considered view that the application has been filed timeously.

29. On the issue of security, the applicant states that he has offered to tender his security by continuing to pay the minors’ school fees, providing for their educational needs and medical cover pending the hearing and determination of the appeal. In my view, this is not security for the judgment. However, this is an issue at the discretion of the court.

30. The provisions of Section 95(3) of the Children’s Act, speaks against the court delaying determination of children matters. As such a court in granting stay of execution would militate against the best interests of the children herein. Section 95(3) provides:-

In any proceedings in which an issue on the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child.



31. I am also persuaded by the decision of Z.M.O. vs E.I.M [2013] eKLR where the court held:-

“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 the arguments are heard from both sides on the merits of the same.”

32. With that back ground in mind, I am of the considered view that in the best interests of the children the orders for the provision of the children by any of the parties, ought to be maintained pending determination of the appeal.

### **Conclusion**

33. I have analysed the requirements of Order 42 Rule 6 and I am of the considered view that this application has not passed the test set out therein.

34. It is in the interests of both parties that his appeal be fast tracked.

35. Consequently, I find no merit in this application and it is hereby dismissed with costs to the respondent.

36. The costs shall abide in the appeal.

37. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 5TH DAY OF DECEMBER 2024.**

**F. MUCHEMI**

**JUDGE**

