



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**FAMILY DIVISION**  
**CIVIL APPEAL NO. E056 OF 2020**  
**IN THE MATTER OF AN APPLICATION UNDER CHILDRENS ACT, 2001**  
**IN THE MATTER OF MWO (MINOR)**

RON.....APPELLANT/APPLICANT

VERSUS

EWW.....RESPONDENT

*(Being an Appeal from the Ruling and Order of Ms. Mary Otindo Senior Resident Magistrate*

*at Nairobi CM Children's Case No. 591 of 2019 delivered on 17<sup>th</sup> November, 2020)*

**RULING**

(1) Before this court is the Notice of Motion Application dated 25<sup>th</sup> November 2020 by which the Appellant / Applicant RON sought the following orders:-

1. SPENT

2. SPENT

3. SPENT

4. SPENT

5. THAT this Honourable Court be pleased to stay orders issued by Honourable M. Murage on 17<sup>th</sup> June 2019 and all consequential orders be stayed pending the hearing and determination of the Appeal.

6. THAT the Honourable Court be pleased to issue a reasonable order for maintenance pending the hearing of this Appeal.

7. THAT this Honourable Court be pleased to stay proceedings in Children's Case Number 591 of 2019 filed at the Children's Court at Milimani pending the hearing and determination of this instant appeal.

8. THAT costs of this application be provided for.

(2) The Application was premised upon Sections 80, 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Articles 50, 53(1) (e) and 159 of the Constitution of Kenya 2020, Orders 42 Rule 6, Order 45 Rules, 1, 2 and 3 of the Civil Procedure Rules, Sections 4, 6 and 22 of the Children Act, Rule 4 of the Childrens Rules 2002 and all other enabling provisions of law and was supported by the Applicants Supporting Affidavit of even date as well as the Supplementary Affidavit dated 16<sup>th</sup> February 2021.

(3) The Respondent EWW opposed the application relying on her Replying Affidavit dated 22<sup>nd</sup> September 2020.

## **BACKGROUND**

(4) The genesis of this application is the Ruling dated **17<sup>th</sup> June 2019** in which **Hon. M. Murage Chief Magistrate, Children's Court, Nairobi** directed that the Appellant provide maintenance for the subject child as follow – **Kshs. 36,000/-** as rent and **Kshs. 20,000/-** to supplement household needs.

(5) The Applicant claims that he was not served with the Respondents Application dated **2<sup>nd</sup> May 2019**, seeking interim orders of maintenance and that he was not served with Notice of the date for inter partes hearing of the Application. The Applicant claims that he only became aware of the suit against him and the orders of maintenance which had been made against him on **15<sup>th</sup> November 2019**, when he was notified of the Notice for the attachment of his salary.

(6) The Applicant then filed an Application dated **3<sup>rd</sup> December 2019**, seeking to stay the Ruling on maintenance as well as the order for attachment of his salary and all consequential orders. The Applicant also sought orders that the subject child be submitted for a **DNA** test to determine paternity and also sought leave to file a Defence out of time. That Application was heard by **Hon. M.A. Otindo** Senior Resident Magistrate who in a Ruling dated **11<sup>th</sup> November 2020** dismissed the application in its entirety and declined to stay the orders of maintenance and also declined to stay the orders of attachment.

(7) The Applicant then filed a Memorandum of Appeal dated **20<sup>th</sup> November 2020** seeking to appeal against the Ruling of **17<sup>th</sup> November 2020**. The Applicant also filed this present application seeking to stay the orders of maintenance and seeking a stay of the proceedings in the lower Court pending the outcome of his Appeal. The application was canvassed by way of written submissions. The Appellant / Applicant filed his written submissions dated **22<sup>nd</sup> February 2021** whilst the Respondent relied on her submissions dated **28<sup>th</sup> March 2020**.

## **ANALYSIS AND DETERMINATION**

(8) I have considered the application before this Court, the Affidavit in Reply as well as the written submissions filed by both parties. The issue for determination is whether this Court should grant a stay of the execution of the orders of maintenance and all consequential orders pending the hearing and determination of his Appeal. Grant of stay of execution is discretionary and **Order 42 Rule 6** of the **Civil Procedure Rules 2010**, provides for the conditions upon which a stay of execution may be granted.

(9) In **BHUTT –VS- RENT RESTRICTION TRIBUNAL (1982)KLR** the Court in discussing stay of execution held as follows:-

**“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-**

- (i) The Applicant will suffer substantial loss if stay is not granted;**
- (ii) The application or stay has been brought without undue delay; and**
- (iii) The Applicant has provided security for the due performance of the Decree or**

(10) The Court of Appeal in the case of **CHRIS MUNGA N. BICHAGE –VS- RICHARD NYAGAKA TONGS & 2 OTHERS [2013]eKLR** set out the principles to be applied in granting a stay of execution as follows:-

**“The law as regards applications for stay of execution, stay of proceedings or injunctions is now well settled. The Applicant who would succeed upon such an application must persuade the Court on two limbs; which are first, that his appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory.”**

(11) The Applicant submits that he has an arguable appeal which will be rendered nugatory if the stay orders sought are not granted. The Applicants appeal revolves around the question of whether or not he was properly served with the Summons to enter appearance and the Hearing Notice. The Applicant challenges the Affidavit of Service dated **14<sup>th</sup> June 2019** sworn by one **Francis Xavier Kubasu** a Licensed Process-Server.

(12) Whilst it is not the duty of this Court at this stage to determine the merits or otherwise of the intended Appeal, from my perusal of the Ruling of **17<sup>th</sup> November 2020** I am satisfied that the learned Trial Magistrate gave due consideration to the regularity or otherwise of this Affidavit of Service and pronounced herself on the same. The Applicant has not explained to the Court exactly **how** his appeal will be rendered nugatory if the stay orders are not granted.

(13) The Applicant submits that he is likely to suffer irreparable harm if the orders of stay are not granted. That the lower Court ordered him to pay maintenance of **Kshs. 36,000/-** for rent and **Kshs. 20,000/-** to supplement household needs. The Applicant submits that he is not financially in a position to pay this sum of **Kshs. 56,000/-** per month as he has a wife and **five (5)** other children he is providing for.

(14) On **2<sup>nd</sup> February 2021** this Court granted a stay of the interim maintenance orders issued by the Children Court subject to the Applicant making good all the arrears due and owing as at that date. The Court also directed that the Applicant pay a monthly maintenance of **Kshs. 30,000/-** pending the determination of this present application.

(15) The Respondent has submitted that the Applicant has failed to comply with the orders made by this Court on **2<sup>nd</sup> February 2020**. The Applicant did not in his Supplementary Affidavit deny the allegation that he has failed to comply with the orders of Court made on **2<sup>nd</sup> February 2020**. At this juncture I wish to remind the Applicant that Court orders once made **must** be obeyed. The Applicant does not have the discretion to obey the orders of maintenance.

(16) In **ECONET WIRELESS KENYA LTD –VS- MINISTER FOR INFORMATION & COMMUNICATION OF KENYA & ANOTHER [2005]I KLR**, the Court stated as follows:-

**“It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of, who an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”**

(17) The Applicant cannot ask the Court to exercise its discretion in his favour when he himself has failed to comply with orders made by the same Court. In any event the Court in its directions of **2<sup>nd</sup> February 2021** was very clear that in the event of default the stay order would be lifted automatically.

(18) This Court cannot lose sight of the fact that this is a matter involving a minor. The **Constitution of Kenya 2010** provides that **both** parents are equally responsible for the upkeep of the child. The Respondent avers that a **DNA** test has proved that the Applicant is the father of the subject child. There is evidence that the Applicant had previously been sending funds to the Respondent for the child's upkeep (Annexure **'EWW'2** to the Replying Affidavit dated **22<sup>nd</sup> September 2020**). This amounts to a tacit admission on the Applicant's of the recognition of his duty to provide for the child.

(19) The Respondent has averred that she earns **Kshs. 18,993/-** per month as per her payslip filed in the Children Court. The Applicant claims that the Respondent earns **Kshs. 80,000/-** monthly but he has tendered no evidence to back his claim that the Respondent earns close to **Kshs. 80,000/-** per month.

(20) **Section 4(2)** of the **Children Act** 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, the best interests of the child shall be a primary consideration.”** [own emphasis]

(21) The welfare and maintenance of the child cannot be stayed pending the outcome of the Appeal. I am guided by the decision of my learned brother **Hon. Justice William Musyoka** in **ZMO –VS- EIM [2013]eKLR** where he held 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 it. 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.”** [own emphasis]

(22) In the premises, I find no merit in the present application and I decline to grant prayers (5), (6) and (7) of the Application. For avoidance of doubt the interim orders made by this Court on **2<sup>nd</sup> February 2021** have also lapsed. No orders on costs.

Dated in **Nairobi** this **18<sup>TH</sup>** day of **JUNE, 2021**.

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**MAUREEN A. ODERO**

**JUDGE**