



**DC v SMN (Children's Appeal Case E002 of 2024)
[2025] KEHC 13560 (KLR) (30 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13560 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CHILDREN'S APPEAL CASE E002 OF 2024
HI ONG'UDI, J
SEPTEMBER 30, 2025**

BETWEEN

DC APPLICANT

AND

SMN RESPONDENT

RULING

1. In the Notice of motion application dated 1st February 2025 by the respondent/applicant herein prays for the following orders;
 - i. Spent.
 - ii. That pending the hearing and determination of this application inter parties, this honourable court be pleased to hereby stay execution of the directions given on 1st February 2024.
 - iii. That pending the hearing and determination of this application this honourable court be pleased to stay the court proceedings of 1st February 2024 and further proceedings in the trial court with respect to this matter.
 - iv. That this court be pleased to quash the impugned proceedings and set aside the said directions and consider the appellant's review application on merit.
 - v. That costs of the application be in the cause.
2. The application is based on the grounds on its face and the lengthy affidavit by the appellant/applicant's advocate sworn on even date. He deponed that the impugned proceedings were taken out without a fair participation of the advocates for the appellant and in disregard of some of their submissions occasioning a miscarriage of justice to the appellant. He stated that even after tendering medical evidence of the appellant's indisposition, the court still went ahead and issued adverse orders without



proffering her an opportunity to heal and appear to shed more light on any issue. He further stated that the appellant had a viable case with triable issues and was desirous of ventilating his claim.

3. He further deponed that the minor stood to suffer if the impugned proceedings and directions are not set aside as they are not in the minor's best interest. He stated that the court ought to have seized the opportunity to determine the matter judiciously upon hearing the entire case for both parties so as to administer justice. He added that the right to fair hearing and an opportunity to be heard are very cardinal.
4. The respondent in response filed a replying affidavit sworn on 20th February, 2023 and averred that the appellant/applicant's application is a nonstarter, frivolous, vexatious, and incompetent and an abuse of court process, and the orders sought therein are not capable of being granted. He stated that the instant appeal and the application sought for stay of the directions and/or order of the trial court, without seeking a stay of the decree that gave rise to the directions issued by the trial court on 1st February 2024 is baseless. He stated further that through the judgment delivered on 11th October 2022, the trial court awarded joint custody of the minor to both parents, such that the respondent herein is to have custody during school going days and the applicant to have custody during holidays.
5. He further averred that upon schools opening in January 2024, the appellant/applicant herein, failed, refused and/or neglected to hand over and/or return the minor to the respondent's custody for the purpose of going to school. He stated that the applicant without notice to the respondent transferred the child to another school and by so doing, she varied the trial court's decree without formerly applying to do so. He stated further that the appellant /applicant had come to court with unclean hands seeking equitable remedies, without doing equity. He added that no stay of execution orders had been sought or issued against the decree and judgment of the trial court in case No; E043 of 2021.
6. In response to the replying affidavit the appellant/applicant filed a further affidavit dated 2nd May 2024 where she reiterated the contents of her supporting affidavit.
7. The respondent filed a supplementary affidavit sworn on 18th January 2025 where he reiterated the contents of his replying affidavit.
8. The application was canvassed by way of written submissions.

Appellant/applicant's submissions

9. These were by filed by Kipkoech Terer & Associate Advocates and are dated 6th August, 2024. Counsel identified one issue for determination which is whether the appellant/applicant was entitled to the orders sought.
10. He cited Order 42 rule 6 (2) of the *Civil Procedure Rules* and submitted that this court has powers to order for stay of execution if it was satisfied that substantial loss may result to the applicant unless the said order is made. He further submitted that Article 53 (2) of the *Constitution* stipulates that a child's best interests are of paramount importance in every matter concerning the child. He stated that the appellant/applicant has had custody of the minor offering her motherly love and care for a considerable period now and she would suffer substantial loss should the execution proceed. He placed reliance on the decision in *Bhutt v Bhutt*, Mombasa HCCC No. 8 of 2014, the court held as follows,

“In determining an application for stay of execution in cases involving children, the general principles for stay of execution under Order 42 Rule 6 of the *CPR*, must be complemented by overriding consideration of the best interest of the child in accordance with Article 53(Z) of the *Constitution*.”



11. Counsel submitted that the appellant/applicant had an arguable appeal as detailed under Paragraphs 126 & 1-12 of both her affidavits and raised 16 cogent grounds of appeal in her memorandum of appeal. He placed reliance on the decisions in *Reliance Bank Limited v Norlake Investments Limited* [2001] quoted in *Permanent Secretary Ministry of Roads & Another v Fleur Investments Limited* [2014] eKLR, *Equity Bank Limited v West Link Mbo Limited* Nairobi Civil Application No. 78 of 2011 and *Dennis Mogambi Mangare Mangare v Attorney General & 3 Others* Civil Application No. 265 of 2011.
12. He concluded by urging the court to grant stay orders since the appellant/applicant had met the expected threshold for issuance of the said orders.

Respondent's submissions

13. These were by filed by Mongeri & Company Advocates and are dated 6th August, 2024. Counsel gave a brief summary of the case and submitted that the child in question is a minor of tender years and the court ought to approach this issue with great caution. She stated that the trial court before giving its directions on 1st February 2024, verified the evidence before it. She stated that the trial court had the opportunity to look into the character, demeanour and attitude of the parties herein. Thus, the appellant/applicant was trying to have the court vary its terms without having to go through the process of an appeal. He placed reliance on the decision in *Bore v Spire Bank Limited & another* (Civil Case 8 of 2020) [2024 (KLR) (8 February 2024) (Ruling), where Justice A.C Mrima dismissed a similar application for being an abuse of the court process. She urged the court to dismiss the appellant/applicant's application on this ground.

Analysis and Determination

14. I have considered the application together with the affidavits and the submissions by the respective parties. I opine that the issues for determination are as follows:
15. In addressing issue one on stay of proceedings, this court is guided by the decision in *Re Global Tours & Travel Ltd* HCWC No.43 of 2000 where Ringera, J (as he then was) held that:

“...As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”

16. The instant application has been brought as a result of the orders issued by the children's court on 1st February 2024. Upon perusal of the lower court file, I note that the trial court delivered its judgment on 11th October 2022. Thereafter, the respondent filed two applications and the court issued orders in respect to the said applications. The last proceedings in the lower court file are dated 8th February 2024 and since then there have been no ongoing proceedings in form of mentions or hearings in that matter.



17. The appellant/applicant has asked this court to quash the proceedings of 1st February 2024 and set aside the said directions and consider her review application on merit. It is this court's humble view that dealing with the said prayer is akin to dealing with the appeal at a preliminary stage.
18. Secondly, there is a Judgment delivered by the trial court on 11th October, 2022 which has not been challenged. Whatever directions and/or orders that were issued by the trial court emanate from that Judgment. The appellant/applicant cannot therefore cherry pick what she wants for her own good and benefit. The best cause of action would have been to seek for review of those orders before the trial court. The above being the position I find no merit in the application dated 1st February, 2025 and I dismiss it with no order as to costs.
19. Orders according.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF SEPTEMBER, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

