



REPUBLIC OF KENYA



KENYA LAW
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**MNM v CWW (Civil Appeal E105 of 2024)
[2025] KEHC 13653 (KLR) (1 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 13653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E105 OF 2024
RM MWONGO, J
OCTOBER 1, 2025**

BETWEEN

MNM APPELLANT

AND

CWW RESPONDENT

RULING

The Application

1. The applicant's application dated 04th February 2025, seeks the following orders:
 1. Spent:
 2. That the honourable court be pleased to issue orders of stay of execution of the court order/decree delivered on 26th July 2023 and 26th September 2024 in Embu MC Children Case No. E012 of 2023; and
 3. That the costs of this application be provided for.
2. The application is supported by the grounds set out on its face and in the supporting affidavit thereof. The applicant deposed that following the impugned orders, he moved the trial court for stay of execution orders but he was committed to civil jail. The High Court granted him leave to appeal out of time and he appealed but execution was not stayed. He stated that the amounts that he owes are unclear and he would like to understand why. He expressed discontentment with the proceedings, and hence wrote a complaint to the Office of the Chief Justice concerning the trial court's conduct of the matter.

Replying Affidavit

3. The respondent filed a replying affidavit stating that the application is frivolous and is targeted to delay execution. She stated that execution is being levied following the orders of the court as a result



of default on the appellant's part. She deposed that the welfare of the child involved is of paramount importance, which is why the appellant's salary has been attached a measure of last resort, all other efforts having failed. According to the respondent, the appellant remained unresponsive regarding his parental responsibility even after he was committed to civil jail. She stated that the child is at risk of being sent away from school for lack of school fees. That the needs of the child cannot be put on hold awaiting the outcome of the appeal yet the appellant is the proven father of the child through a DNA test.

Submissions on the application

4. The court directed that the application be canvassed by way of written submissions.
5. Through his submissions, the applicant contested the findings of the DNA test which he suspected were doctored. He relied on the cases of Rosemary Wanja Mwangiru & 2 others v Attorney General & 3 others [2013] KEHC 6800 (KLR) and George Joshua Okungu & another v Chief Magistrate's Court Anti-Corruption Court at Nairobi & another [2014] KEHC 7181 (KLR). He argued that the money that he has already paid towards satisfying the decree is too much and unaccounted for in light of the court's order.
6. Through her submissions, the respondent denied having facilitated doctoring of the DNA results as alleged by the appellant. She stated that the appellant had been supporting the child even before the respondent sued him for maintenance. The appellant did not bother to serve summons upon the institutions that conducted the DNA test and he also did not attend the reading of the impugned judgment. She stated that the appellant is a difficult parent and he forced the hand of the court to commit him to committed to civil jail. She urged the court to dismiss the application with costs.

Issue for Determination

7. The issue for determination is whether an order of stay of execution should be made.

Analysis and Determination

8. Stay of execution is governed by Order 42 Rule 6(2) of the Civil Procedure Rules as follows:

- “(2) No order for stay of execution shall be made under subrule (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; 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.” [Emphasis added]

9. The applicant refers to the decrees of the court issued on 26th July 2024 and 26th September 2024. Through both decrees, the applicant was ordered to provide to the respondent Kshs.8,000/= monthly before the 10th of every month. This was to cater for the shortfall in the child's expenses and ensure that he participates in raising the child. From a perusal of the trial proceedings, the applicant did not seek stay before the trial court. Thus, the respondent took necessary steps towards execution, including attachment of his salary.
10. The applicant must demonstrate three things for stay orders to be issued: That the application was filed timeously; That substantial loss will result if the order is denied; and that there is security offered



for performance of the decree. In this case, it is even more important to consider that the subject of the suit and appeal is a child, a minor. In such a case, the overriding consideration is the best interest of the child. This is as provided for under Article 53(1) (e) and (2) of the Constitution which reads:

“ Article 53(1)(e) Every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not;

Article 53(2) A child’s best interests are of paramount importance in every matter concerning the child.” [Emphasis added]

11. In the case of MNN v MOK & Another (2017) eKLR the court stated that:

“in determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution under order 42 Rule 6 of the Civil Procedure Rules must be complemented by an overriding consideration of the best interest of the child in accordance with Article 53 (2) of the Constitution.”

12. While arguing this application, the parties did not address the court on the contents of the application. Instead, they mostly delved into issues arising on appeal. These issues cannot be considered herein because this is an application for stay. That being said, the court should nevertheless consider whether it is in the best interest of the child to issue an order of stay of execution.

13. Considering that the last impugned order was made in September 2024, the applicant seriously delayed in bringing this application keeping in mind that the impugned order was for maintenance of a minor. Due to this long delay, the respondent proceeded to execute and used all available means to her, including moving the court to commit the appellant to civil jail. Further, the applicant has failed to demonstrate what if any, substantial loss he would suffer if the order of stay is denied. Rather, he has stated that the amount owing should be tabulated so that he can understand why he is still owing more money than he anticipated.

14. When it comes to cases of maintenance of children, courts have held that stay of execution is not to be granted haphazardly, given the fact that children are in constant need of support, regardless of the situation. Therefore, it is never in a child’s best interest to stay execution of maintenance. In Z.MO v 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 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.”

15. Here, an appeal has been filed and it is pending hearing and determination. In the intervening period, the needs of the child are constant and accruing daily. As these needs accrue daily, the maintenance money should be paid at least monthly to cater for those needs as it is in the best interest of the child to secure those needs. It is noted that if the applicant fails to pay such maintenance, the respondent bears this burden even as she awaits the outcome of the appeal too. The child’s parents should enjoy their rights to litigation while the child enjoys his or her rights to maintenance by both parents as provided under the Constitution.



Conclusion and Disposition

16. Ultimately, the applicant contests the child's paternity, an issue that has arisen through this application but which can only be determined during hearing of the appeal. If that issue is settled and the applicant is released from his responsibility as a parent, at that point, no loss will have been suffered because he can claim the money he has paid to the respondent as maintenance through a civil suit. This means that first, no substantial loss will result if the stay order is denied, and second that the best interests of the child will have been elevated.
17. Therefore, it is in the best interest of the child that the stay order sought herein be denied and the applicant continues paying maintenance. If this maintenance is not paid, the respondent remains at liberty to levy for execution of the maintenance.
18. In the result, I hereby dismiss the application with no order as to costs.
19. It is ordered that the appeal be prosecuted with expedition.
20. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 1ST DAY OF OCTOBER, 2025.

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R. MWONGO

JUDGE

Delivered in the presence of:

1. Moses Nganga - Applicant in person
2. Caroline Wambui - Respondent in person
3. Francis Munyao - Court Assistant

