Lungu v Mbithi (Civil Appeal E197 of 2024)
[2025] KEHC 15138 (KLR) (23 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15138 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E197 OF 2024

RC RUTTO, J

OCTOBER 23, 2025

BETWEEN

DANIEL MUTUA LUNGU ..... APPELLANT

AND

ROSAITA NDUKU MBITHI ..... RESPONDENT

RULING

1. Before this court for determination is a Notice of Motion Application filed under Certificate of Urgency all dated 18th March 2025. The Applicant seeks the following orders: -

    a. Spent

    b. The interim orders issued on 1/10/2024 be set aside forthwith for having been obtained in contravention of the Respondent's/Applicant's right to a fair hearing.

    c. The Application dated 26/07/2024 filed by the Appellant/Respondent be set down for inter-partes hearing at the earliest opportunity.

    d. The Honourable court be pleased to make any other orders it deems fit in the interest of justice.

    e. Costs of this application be provided for.

2. The grounds in support of the application are that the Appellant/Respondent filed an application dated 26th July 2024 seeking interim orders pending the determination of the appeal. This application was initially scheduled for inter partes hearing on 25th September 2024 as per the court order served. However, on that date, the court did not sit and directed that new hearing dates would be communicated to the parties. The Respondent/Applicant avers that no such communication was received, nor was a hearing notice served by the Appellant's/Respondent's counsel. Consequently, the application was heard on 1st October 2024 in the absence of the Respondent/Applicant, who was unaware of the new hearing date, and interim orders were issued.

3. The Respondent/Applicant further contends that the Appellant's/Respondent's conduct amounted to an abuse of the court process, as the orders were obtained ex parte and without full disclosure of material facts, particularly the involvement of the minors whose welfare ought to be paramount. She notes that the lower court had directed the Appellant/Respondent to provide school fees and monthly maintenance for the minors. The setting aside of those obligations exposes the minors to undue hardship, as their immediate and essential needs cannot be postponed.

4. The Respondent/Applicant also states that she is unable to meet the minors' basic needs on her own, a situation worsened by the impugned interim orders. She fears the minors may be sent away from school for non-payment of fees, a responsibility previously borne by the Appellant/Respondent. She further states that she has since filed a Replying Affidavit opposing the application dated 26th July 2024, and urges that it is in the interest of justice, and the best interests of the minors, that the orders sought herein be granted so that the application may be heard and determined on its merits with both parties present.

5. In response, the Appellant/Respondent filed a Replying Affidavit sworn on 8th April 2025. He deposes that the application was scheduled for hearing on 25th September 2024, but the Court did not sit on that date as the Judge was away. He avers that the Judge's absence was communicated to advocates through the Machakos Law Courts WhatsApp group, of which Advocate Yvonne Jeruto is a member. The communication indicated that matters scheduled for 25th September 2024 would instead be heard on 1st October 2024. The Respondent contends that the Applicant's counsel was therefore aware of the new hearing date of 1st October 2024 but chose not to attend court for reasons best known to them.

6. He further deposes that as at 1st October 2024, the Replying Affidavit sworn on 26th August 2024 had not been placed on record. Upon satisfying itself that there was no response to the application dated 26th July 2024, the court proceeded to grant the orders sought. The Respondent asserts that the Applicant is misleading the Court by alleging that the minors were prejudiced by the order issued on 1st October 2024, and instead accuses the Applicant of non-disclosure. He points out that the Applicant receives Kshs. 30,917 every month for the maintenance of Angel Shiro pursuant to the Court Order issued on 3rd October 2012 in Children's Case No. 393 of 2012 at Tononoka Children's Court, Mombasa. Regarding the Applicant's Replying Affidavit, the Respondent avers that he only became aware of it when he was served on 16th December 2024, by which time the stay application had already been heard and determined.

7. In a Further Affidavit sworn on 9th April 2025, the Applicant avers that no evidence of the alleged WhatsApp communication has been annexed to the Respondent's Replying Affidavit. She contends that it is absurd for the Respondent to claim knowledge of such communication when he is not a member of the WhatsApp group and therefore cannot competently speak to its contents. She adds that even if such WhatsApp communication existed, it would not absolve the Respondent's counsel from the legal obligation to properly effect service of the hearing date upon her counsel. She reiterates that the best interests of the minors require that the ex parte orders issued on 1st October 2024 be set aside.

8. The present application was canvassed by way of written submissions pursuant to the directions of this Court issued on 19th May 2025. The Applicant expressly indicated reliance on her supporting affidavit and further affidavit while the Respondent filed submissions dated 9th June 2025.

Respondent's Submissions

9. The Respondent commenced his submissions by asserting that the provisions under which the present application is brought do not confer upon the Court the authority to grant the orders sought. He submitted that on 1st October 2024, the court then granted the Appellant stay of execution of the

judgment delivered on 12th July 2024 in Children's Case No. 4 of 2018, R N M (suing as mother and next friend of the minors) v. D M L. Referring to Order 42 of the Civil Procedure Rules, the Respondent argued that the provision does not contemplate an application to set aside an order of stay of execution pending appeal. In his view, the Applicant's application is fatally defective as it fails to cite any provision of the Civil Procedure Rules that empowers the Court to grant the relief sought.

10. The Respondent further submitted that the Applicant's right to a fair hearing was not violated as alleged. He pointed out that the court record indicates that as at 25th September 2024 the Applicant's Replying Affidavit sworn on 26th August 2024 had not been placed on record. He added that its existence was not brought to his attention on 16th December 2024 when it was served upon his counsel.

11. The Respondent contended that the Applicant's counsel was aware of the application for stay of execution but deliberately chose not to attend court. He noted that although the court did not sit on 25th September 2024, the court's automated system reflected 1st October 2024 as the date when it would handle matters listed for 25th September 2024. He argued that the Applicant has not sworn an affidavit explaining why she failed to appear in court on 1st October 2024 nor has Advocate Yvonne Jeruto sworn an affidavit to rebut the Appellant's claim that she is an active member of the Machakos Law Courts WhatsApp group, through which advocates are routinely notified of changes to court sessions.

12. The Respondent submitted that the Applicant has approached this Court with unclean hands. He argued that her claim regarding prejudice to the best interests of the children is misleading and made in bad faith, given that she already receives Kshs. 30,917 per month from one Josephat Kariuki, whom she sued in Children's Case No. 393 of 2012 at Tononoka, in respect to A.S. (minor). Orders in that case were granted on 3rd October 2012. He added that the court duly considered this fact when directing the Appellant to file a supplementary affidavit annexing the proceedings in Tononoka Case No. 393 of 2012.

13. In conclusion, the Respondent urged the Court to dismiss the application with costs.

14. I have carefully considered the parties affidavits and submissions filed; The central issue for determination is, whether the orders issued by this Court on 1st October 2024, staying the judgment of the trial court, should be set aside or varied.

15. It is not in dispute that the application dated 26th July 2024 was duly served on the Respondent's advocates via email, and all parties were aware that the matter was scheduled for hearing on 25th September 2024. Unfortunately, the court did not sit on that day and the matter did not proceed. The Appellant contends that a further notice was circulated via the Machakos Law Courts WhatsApp group, indicating that matters listed for 25th September 2024 would be mentioned on 1st October 2024. It is alleged that Ms. Yvonne Jeruto, counsel for the Respondent's being a member of that group, was thus aware of the new date but choose not to attend.

16. The Appellant does not claim to have served a formal hearing notice on the respondent for the 1st October 2024 date. Instead, reliance is placed on the WhatsApp group communication. However, no screenshot of the message, affidavit from the group administrator, or return of service has been produced to confirm that the notice was sent and received. In the absence of corroborative evidence, the Court cannot treat such communication as conclusive proof of service for purposes of compliance with the Civil Procedure Rules. At any rate, notifications on channels such as WhatsApp, particularly to a general group as opposed to a specific individual, cannot substitute the requirements of formal service unless properly authenticated.

17. Furthermore, the orders issued on 1st October 2024 were not interim but final stay orders. These had the effect of suspending the trial court's judgment and, in essence, determined the appeal at the interlocutory stage without a full hearing on the merits.

18. While the Respondent was served with the initial application, the lack of formal notice for the rescheduled hearing date undermines the fairness of the proceedings. Article 53(2) of *the Constitution* of Kenya and Section 8 of the *Children Act* mandate that the best interests of the child be the paramount consideration in all matters concerning children. To this end, it is only just that both parties are allowed to ventilate their respective positions.

19. In light of the foregoing, this Court finds that justice requires the variation of the orders issued on 1st October 2024. The Respondent's procedural default cannot override the constitutional imperative to protect the child's right to education.

20. Accordingly, the Court orders as follows:

    a. The stay orders issued on 1st October 2024 are hereby set aside.

    b. Pending the inter partes hearing and determination of the application dated 26th July 2024 the Appellant, Daniel Mutua Lungu, shall continue to pay the minor's school fees, as ordered by the trial court.

    c. Costs shall be in the cause.

    Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 23RD DAY OF OCTOBER, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant