Mutuku v Koech (Appeal E173 of 2024)
[2025] KEHC 15337 (KLR) (Family) (31 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15337 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

APPEAL E173 OF 2024

H NAMISI, J

OCTOBER 31, 2025

BETWEEN

VALENTINA NGENYI MUTUKU ..... APPELLANT

AND

JAMES KIMUTAI KOECH ..... RESPONDENT

RULING

1. The Application before the Court arises from an Appeal from the Ruling of the Hon. B. Ochoi issued on 18 November 2024. The Notice of Motion dated 2 April 2025 seeks the following orders:

    i. Spent;

    ii. That an order of temporary stay of execution of the Ruling dated 18 November 2024 delivered by Hon. Ochoi in Milimani MCCHCC/E2088 of 2023 pending inter partes hearing and determination of this Application;

    iii. That an order of temporary stay of execution of the Ruling dated 18 November 2024 delivered by Hon. Ochoi in Milimani MCCHCC/E2088 of 2023 pending hearing and determination of this Application;

    iv. That an order of temporary stay of execution of the Ruling dated 18 November 2024 delivered by Hon. Ochoi in Milimani MCCHCC/E2088 of 2023 pending inter partes hearing and determination of this Appeal;

    v. That costs of the application be provided for.

2. The Application is premised on the grounds on the face thereof and supported by the Affidavit sworn by the Applicant. The Respondent filed a Replying Affidavit in opposition to the Application.

3. The Applicant and the Respondent were formerly married and are the biological parents of four children, the subject of the proceedings in the trial court. Following their divorce, the Respondent retained actual physical custody and control of the children. On 18 November 2024, the trial court, upon an interlocutory application by the Respondent, made interim order for maintenance, directing the Applicant to pay Kshs 15,000/= per child. This translates to a total of Kshs 60,000/= monthly. The Appellant/Applicant, being dissatisfied with this decision, filed a Memorandum of Appeal dated 9 December 2024, and has now moved this Court for the order of stay, arguing that the appeal will be rendered nugatory if the orders are not stayed.

4. The Application was canvassed by way of written submissions.

5. The Applicant's case is based on two main limbs: that she has an arguable appeal with a high probability of success, and that she stands to suffer irreparable loss if the stay is not granted. The Applicant submits that the trial court fell into several errors of law and fact. First, it is argued that the trial court granted a quantum of maintenance which was not only double the amount sought in the Respondent's Plaint, but was also a prayer that was never made in the interlocutory application itself. The Applicant contends that a court cannot grant a remedy that has not been sought by a party, and that interim orders ought not to conflict with the final prayers sought in the main suit.

6. Secondly, the Applicant faults the trial court for arriving at the figure of Kshs 15,000/= per child. This is because the order was made before the parties filed their respective Affidavits of Means and without the benefit of a Social Inquiry Report from the Children's Officer. The Applicant argues that such a report is a crucial prerequisite for determining the welfare of the children and the financial capacities of the parents, and its absence rendered the court's determination arbitrary and devoid of evidential basis.

7. Thirdly, the Applicant argues that the trial court failed to consider that one of the subjects of the maintenance order, B.K.M, is 21 years old and is, therefore, not a child within the meaning of the law. Consequently, the order compelling his maintenance as a minor was made in error.

8. On the question of substantial loss, the Applicant depones that she will be gravely prejudiced financially if compelled to pay Ksh 60,000/= monthly. She describes herself as an independent contractor working as a safety officer with an unpredictable and unstable income, having secured no work in 2025. She further states that upon divorce, she exited the marriage with nothing, leaving the matrimonial home and all assets with the Respondent. She has had to start her life afresh. The Applicant also bears the responsibility of caring for her terminally ill father. The Appellant submits that should she pay the sums and her appeal subsequently succeeds, the Respondent would not be in a position to refund the money, thus rendering her appellate victory purely academic. She relied on the case of Silverstein N. Chesoni [2002] 1KLR 867.

9. Finally, the Applicant assets that she has been supporting the children directly, having purchased clothing worth Kshs 58,000/- in December 2024 and paid for her son's driving school. She views the court order for direct monetary payment to the Respondent as a punitive measure amounting to double spending and a predatory act by the Respondent to secure a stream of income from her after the divorce.

10. On the other hand, the Respondent contends that the application is misguided, devoid of merit and is calculated, dilatory tactic designed to frustrate the course of justice and deny the children their right to maintenance.

11. The Respondent argues that the Applicant has failed to meet the mandatory threshold for the grant of a stay of execution. He submits that the Appellant has not demonstrated what substantial loss she would suffer. In the Respondent's view, parental responsibility is a statutory and constitutional duty,

not a commercial liability. The payments are for the children's upkeep, and any financial inconvenience to a parent is of secondary importance. The real and substantial loss would be suffered by the children, whose welfare and stability would be jeopardized if the maintenance order is suspended.

12. The Respondent submits that the application has been brought after an unreasonable and inordinate delay. The Ruling was delivered on 18 November 2024, yet the present application was filed nearly 6 months later, on 5 May 2025. The Respondent points out that no explanation has been proffered for this delay, and that the application was only filed as an afterthought after the trial court had scheduled the suit for hearing on 16 April 2025. The Respondent relies on the case of Z M O v E I M [2013] eKLR to argue that the Applicant is guilty of laches.

13. Further, the Respondent contends that the Applicant has approached the Court with unclean hands and is, therefore, undeserving of the equitable remedy of stay. It is the Respondent's case that the Applicant has been in open and continuous contempt of the trial court's order since it was issued in November 2024, having made no attempt whatsoever to comply with it. This defiance is compounded by the Appellant's own evidence, annexed to the Respondent's Affidavit as exhibit JKK-2. This evidence, a Replying Affidavit sworn by the Applicant in a separate commercial case, reveals that on the exact day the maintenance order was made, the Applicant made an RTGS payment of Kshs 600,000/- as part of a transaction to purchase a motor vehicle for a sum of Kshs 1.7 million. The Respondent submits that this conduct of making grand acquisition while simultaneously pleading financial inability and neglecting to provide for her children demonstrates bad faith and disentitles the Applicant to the Court's discretion.

14. The Respondent invokes the overriding constitutional principle of the best interest of the child under Article 53(2) of *The Constitution*. He submits that suspending an order for maintenance is fundamentally contrary to the children's welfare. He also notes that the Applicant has failed to offer any security for the due performance of the decree, a mandatory condition for the grant of stay.

Analysis & Determination

15. I have carefully considered the Application, the Affidavits and respective submissions filed. The singular issue for determination is whether the Applicant has made a case for the grant of an order of stay of execution pending appeal.

16. The power of this Court to grant stay of execution pending appeal is anchored in Order 42 Rule 6(2) Civil Procedure Rules. It provides:

> (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 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

17. The principles flowing from this provision are well settled. An applicant must satisfy the above tripartite test. It is a foundational tenet of civil procedure that these three conditions are not alternative to be selected form: they are conjunctive and cumulative. An applicant does not have the luxury of satisfying one or two of the conditions and hope for a favourable outcome. This principle was succinctly stated by Mutai, J in ENK v SAN (Family Appeal E018 of 2024) KEHC 7217 (KLR)

18. The first limb of the test requires the application to have been made without unreasonable delay. In this instance, the Ruling was delivered on 18 November 2024. The present application was filed on 5 May 2024, 6 months later. The Applicant has offered no explanation whatsoever for this lapse of time.

The Court is left to speculate as to why she waited for half a year before seeking stay orders that she claims are causing her substantial financial prejudice.

19. The timing of the Application is also telling. The Respondent avers that the matter was scheduled for hearing of the main suit on 16 April 2025. Teh Application for stay was filed shortly thereafter. This sequence of events lends credence to the Respondent's submission that the Application is a mere afterthought, deployed as a dilatory measure to stall the progress of the substantive suit. This Court finds that a delay of that a delay of nearly six months, entirely unexplained, is both unreasonable and inordinate. The Application, therefore, fails the first limb of the test.

20. On the second limb, the Applicant claims that she will suffer such loss due to her precarious financial situation. However, the concept of substantial loss is not static: its meaning and application must be interpreted within the specific context of the litigation. In ordinary commercial or civil disputes, substantial loss is typically assessed by considering whether the appeal, if successful, would be rendered nugatory. This involves an evaluation of whether the respondent would be able to refund the decretal amount if the appellant's appeal succeeds.

21. However, in children's matters, the interpretive lens is fundamentally altered by *The Constitution*. Article 53(2) elevates the best interests of the child to a position of paramount importance in every matter concerning the child. Consequently, when a court is called upon to determine substantial loss in the context of a child maintenance order, the focus must shift. The primary consideration is not the financial inconvenience or hardship of the parent, but the immediate, tangible, and potentially irreversible loss of welfare, stability and provision that the child would suffer if the maintenance order is stayed. The parent's inconvenience is secondary. This principle was aptly captured in ENK v SAN [2024] KEHC 7217 (KLR).

22. Viewed through this prism, the Applicant's argument collapses. While she pleads financial hardship, the evidence on record tells a different story. Her own Affidavit, sworn in a separate matter, shows that at the very time she was ordered to provide for her children, she engaged in a transaction to purchase a motor vehicle for Kshs 1.7 million and made a substantial payment of Kshs 600,000/= towards it. This action undermines her credibility and negates any claim of financial incapacity or potential substantial loss. The Application fails on the second limb.

23. Under Order 42 Rule 6(2)(b), a stay shall not be granted unless the applicant has given such security as the court orders for due performance of the decree. The Applicant herein has neither deposited any security for the accumulated arrears, nor has she made any proposal for the future payments pending appeal. This is a fatal omission. The requirement for security is a mandatory safeguard to ensure that the successful litigant is not left with a paper judgement while the appellate process unfolds. The Applicant's failure to address this mandatory requirement means that the application fails on the third and final limb.

24. Even if the Applicant had surmounted the procedural hurdles of Order 42 Rule 6, which she has not, her application would still fail when weighed against the supreme constitutional principle that governs the dispute, Article 53(2). In the specific context of staying maintenance orders, the judicial attitude is clear and consistent. In ZMO vs EIM [2013] eKLR, the Court pronounces what has become a guiding dictum:

> 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."

25. The welfare of the children cannot be held in abeyance pending the outcome of an appeal. The proper course for the Applicant is to comply with the orders of the trial court while diligently prosecuting her appeal.

26. In the premise, this Court finds that the Applicant's Notice of Motion dated 5 May 2025 is wholly devoid of merit. Accordingly, the following orders shall issue:

    i. The Notice of Motion dated 5 May 2025 is dismissed;

    ii. The costs of the Application shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 31 DAY OF OCTOBER 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For the Appellant/Applicant: N/A

For the Respondent: Ms. Muthie

Court Assistant: Lucy Mwangi