



**MMS v ZAM (Family Appeal E038 of 2025)
[2025] KEHC 18248 (KLR) (3 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E038 OF 2025**

G MUTAI, J

DECEMBER 3, 2025

BETWEEN

MMS APPELLANT

AND

ZAM RESPONDENT

RULING

1. The Hon A M Mohamed delivered a ruling on 28th May 2025. The appellant/applicant was aggrieved by the said decision and sought a stay of execution of the resultant orders and also a stay of proceedings on the grounds that the decision of the Kadhi ran contrary to Islamic law and, in particular, the doctrine of *nashiza*.
2. The application for stay of execution was opposed by the Respondent, who filed a replying affidavit sworn on 16th July 2025 in which she deposed that a judgment was delivered on 7th November 2024. The learned Kadhi ordered that the appellant pay Kes.80,000/- as dowry, Kes.30,000/- as eddat maintenance for 3 months; and Kes.10,000/-, being the monthly maintenance for the minor child. She averred that since the judgment was entered, the applicant had not shown any intention of complying with the orders of the Court.
3. The applicant filed a review application in the lower Court. The application was dated 18th March 2025, a time she deemed as inordinate, with the intention of bringing the issue of “*nashiza*” (disobedient wife). The same was dismissed. It is the review ruling that the applicant seeks to challenge. She averred that, contrary to what was alleged, it was the applicant who caused her to leave the home through his cruelty.
4. The application was canvassed by way of written submissions. The applicant's submissions are dated 8th August 2025. Those of the respondent are dated 12th October 2025. I have considered the said submissions.



5. The conditions that an applicant for a stay of execution pending appeal are set out in Order 42 Rule 6(2) of the *Civil Procedure Rules*. To succeed, an applicant must show that
 - i. He will suffer substantial loss unless a stay is granted;
 - ii. The application was filed without undue delay; and
 - iii. Provide security for the due performance of the decree.
6. Has the applicant satisfied the conditions?
7. I note in respect of the 1st condition that there was a considerable effluxion of time between the date of the delivery of the judgment and the filing of the review application. The judgment ordered the applicant to pay for the child's maintenance.
8. Since the stay of execution will affect maintenance orders, I must, in addition to the general grounds, consider whether issuing a stay would be in the best interest of the child.
9. In the case of *Bhutt v. Bhutt*, Mombasa HCCC No. 8 of 2014 (OS), the Court held that: -

“In determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution Order 42 Rule 6 of the *Civil Procedure Rules*, must be complemented by overriding consideration of the best interest of the child in accordance with Article 53 (2) of the *Constitution*.”
10. I note that Courts do not generally grant a stay of execution in children's maintenance matters. I rely on the persuasive authority of the case of *Z M O v E I M* [2013] KEHC 5590 (KLR) where it was held that: -

“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. 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.”
11. In this case, I am not persuaded that the appellant/applicant will suffer substantial loss for two reasons.
12. Firstly, what is sought to be appealed against is a negative order, to wit, the denial of review. There is ample authority that a stay of execution may not be issued where the order complained of is a negative order.
13. Secondly, I am not persuaded that the case is arguable, noting that the issue of *nashiza* appears to have been brought up as an afterthought. I say this, having warned myself that the Court has not heard both parties, and upon taking into account the possibility that the court may yet be convinced otherwise.
14. I am not persuaded that the application was filed with due diligence. As a matter of fact, the applicant appears to be motivated by a desire to prevent execution.
15. Since the three conditions must all be present, I need not consider the issue of security.
16. What of the stay of proceedings? This is a remedy that is granted sparingly. The Court must be satisfied that exceptional circumstances exist. I am guided by the decision of Prof. J Ngugi, J as he then was, in



Turbo Highway Eldoret Ltd v Muniu (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR) where the learned Judge stated that: -

- “ 21. In short, a stay of proceedings is a radical remedy which is only granted in very exceptional circumstances. In the words of Ringera J. in *Global Tours & Travels Limited* (Nairobi HC Winding Up Cause No. 43 of 2000): 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 cases, 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 (emphasis added)
22. What emerges from the discussion above is that the grant of a stay of proceedings pending the hearing of an interlocutory appeal in civil matters is a rare and exceptional remedy.”

17. I am not persuaded that exceptional circumstances exist in this case.

18. In the circumstances, I dismiss the application dated 7th July 2025. Each party will bear his/her own costs of the application.

19. Orders accordingly to issue.

DATED AND SIGNED THIS 3RD DAY OF DECEMBER 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

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GREGORY MUTAI

JUDGE

In the presence of:-

No appearance for the Appellant/Applicant;

Mr Mumin, for the Respondent; and

Norah – Court Assistant.

