



**JLMO v PNI (Appeal E061 of 2025) [2026] KEHC 1559 (KLR)
(Family) (13 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1559 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
APPEAL E061 OF 2025
H NAMISI, J
FEBRUARY 13, 2026**

BETWEEN

JLMO APPELLANT

AND

PNI RESPONDENT

RULING

1. Before the Court is Notice of Motion dated 16 May 2025, brought under Order 42 Rule 6 of the Civil Procedure Rules, section 1A, 1B, 3A and 3B of the *Civil Procedure Act*, seeking the following:
 - i. Spent;
 - ii. That pending the hearing and determination of this Application there be a stay of execution of the orders given on 17 April 2025;
 - iii. That pending the hearing and determination of the Appeal against the judgement of Hon. Macharia on 17 April 2025 there be a stay of execution of the orders issued against the Defendant in Children’s Cause No. XXXXof 2016;
 - iv. That costs be in the cause.
2. The impugned judgment of the trial court directed the Applicant to refund to the Respondent outstanding school fees, school-related expenses, and maintenance arrears amounting to Kshs. 1,022,313/= within 60 days of the judgment. Furthermore, the trial court ordered the continued provision for the minor who had not yet attained the age of majority.
3. The Appellant/Applicant, aggrieved by this decision, filed a Memorandum of Appeal on 28 April 2025, raising various grounds challenging the propriety of the trial court’s findings, particularly



regarding the evidentiary basis of the arrears and the court's alleged failure to consider the Appellant's retirement status and financial incapacity.

4. The Respondent vehemently opposes the Application through a Replying Affidavit sworn on 20 June 2025 and written submissions filed thereafter. Her opposition is grounded on the premise that the judgment merely enforces a consent order entered into by the parties in 2017, that the Applicant has a history of non-compliance necessitating multiple enforcement actions, and that the best interests of the child supersede the Applicant's procedural requests for a stay.

The Genesis of the Dispute

5. The dispute originated in Milimani Children's Cause No. XXXX of 2016, filed by the Respondent seeking parental responsibility and maintenance for the parties' children. The record indicates that the parties, recognizing their shared parental responsibilities, recorded a Consent Order on 22 February 2017. This consent formed the bedrock of the parties' obligations for the subsequent eight years. Under the terms of this consent, the Applicant assumed specific financial duties: to pay school fees for the minors, to pay school-related expenses and to remit a monthly maintenance sum of Kshs. 5,000/= for upkeep.
6. The existence and validity of this Consent Order are not in dispute. The Respondent avers, and the Applicant does not effectively controvert, that this consent was entered into voluntarily and has never been set aside or varied by a court of competent jurisdiction. This fact is critical, as it establishes that the Appellant's liability for maintenance is not a novel imposition by the trial court but the crystallization of a long-standing agreement.
7. The relationship between the parties regarding the execution of this consent appears to have been fraught with difficulty. The Respondent alleges that the Applicant repeatedly defaulted on his obligations, necessitating judicial intervention to compel compliance. The record reflects a pattern of enforcement proceedings. In August 2018, the Respondent instituted a Notice to Show Cause to recover accrued arrears. In December 2021, further enforcement proceedings were initiated.
8. The trial court previously allowed the attachment of the Applicant's salary to recover arrears amounting to Kshs. 690,054/=.
9. This history of enforcement is relevant to the current Application as it informs the Court's assessment of the Applicant's conduct and the necessity for security. The Applicant's payslip, attached to his Affidavit, confirms the existence of a Court Attachment deduction of Kshs. 29,120/=, corroborating the Respondent's submission that coercive measures have been necessary in the past to secure maintenance.
10. The crux of the Applicant's argument is founded on two limbs: firstly, that he has an arguable appeal challenging the computation of the arrears; and secondly, that he will suffer substantial loss if execution proceeds because he is a retiree, having retired on 6 March 2025, and lacks the liquid means to pay the decretal sum. He avers that he faces the imminent threat of committal to civil jail, which would stifle his appeal and liberty.
11. The gravamen of the Applicant's argument is that the order requiring him to pay over Kshs 1 million within 60 days is impossible to comply with due to his retirement. He avers that without a regular salary and with his pension processing in the bureaucratic pipeline, he lacks the liquid cash to satisfy the decree immediately. He asserts that the immediate and inevitable consequence of his inability to pay will be the execution of the decree through committal to civil jail.



12. Relying on the principles of substantial loss as elucidated in Order 42 Rule 6 of the Civil Procedure Rules, the Applicant contends that the loss of liberty through civil imprisonment constitutes irreparable harm. He argues that incarceration for a civil debt—particularly when the validity of that debt is the subject of a pending appeal—would be a miscarriage of justice that no subsequent damages could cure. He posits that if he is incarcerated, he will be physically prevented from pursuing his appeal, managing his affairs, or following up on the very pension that is intended to settle his debts.
13. The Applicant invokes the reasoning in *Mwandaa & 4 others v Mwandoe & another* KEHC 25305, where the Court recognized that the threat of civil jail pending appeal qualifies as substantial loss. He argues that for a senior citizen and retiree, the physical hardship and social stigma of imprisonment are punitive measures that should not be deployed while an appeal with high chances of success is pending.
14. The Applicant further submits that the Respondent has not provided any security or proof of means to guarantee the refund of the decretal sum should the appeal succeed. He characterizes the Respondent's financial position as precarious or at least insufficient to ensure repayment of over Kshs. 1 million. He argues that if the money is paid out now and the appeal later succeeds, the Respondent would be unable to restore the status quo ante, rendering the appeal purely academic or nugatory.
15. However, this argument contains an internal contradiction. In his Affidavit, the Applicant attempts to paint the Respondent as financially capable to support the child, alleging she earns over Kshs. 200,000/= per month from the Kenya Airports Authority. The Applicant seemingly relies on the Respondent's wealth to argue she doesn't need the money, while simultaneously relying on her potential inability to refund it to argue for a stay.
16. The Applicant maintains that his appeal is not frivolous. He challenges the trial court's reliance on documents filed to compute the arrears of Kshs 1,022,313/=, arguing that these documents were never formally produced as exhibits, nor subjected to cross-examination or forensic verification during the trial. He contends that the trial court erroneously dispensed with the hearing of the Notice to Show Cause and proceeded to judgment without affording him a fair opportunity to contest the quantum of arrears. This raises a fundamental issue of fair hearing and the standard of proof in matrimonial proceedings regarding monetary claims. The Applicant asserts that this procedural irregularity forms a strong ground of appeal, warranting the preservation of the subject matter until the appellate court can review the record.
17. Cognizant of the requirement under Order 42 Rule 6(2)(b) to provide security, the Applicant pleads poverty. He states that due to his retirement and lack of access to loan facilities, he cannot deposit the full decretal sum. He implies that his previous employment and known pension status (though not yet accessed) should suffice as assurance that he is not a flight risk, urging the court to exercise its discretion to waive or lower the security requirement to avoid locking him out of the seat of justice.
18. The Respondent opposes the application through her Replying Affidavit and Submissions. Her opposition is founded on the sanctity of court orders, the best interests of the child, and the financial capacity of the Appellant.
19. The Respondent submits that the arrears did not arise in a vacuum but stem from a valid Consent Order recorded on 22 February 2017. She argues that the Applicant has never applied to set aside or vary this consent, and thus remains bound by it. She asserts that the trial court merely calculated the mathematical accumulation of unpaid dues mandated by that consent. In her view, the Applicant is attempting to relitigate the validity of maintenance obligations he voluntarily accepted years ago.
20. She rebuts the Applicant's claim regarding the lack of evidence, stating that the breakdown of school fees and related expenses was filed in court and that the Applicant had ample opportunity to challenge



them but failed to do so effectively. She points out that the Applicant previously had his salary attached for earlier arrears, establishing a pattern of default.

21. The Respondent invokes Article 53 of *the Constitution* and the *Children Act*, arguing that the stay of execution would directly harm the minor. She submits that the funds are required for the minor's education and upkeep. She highlights that while the Appellant cries poverty, the minor has educational needs that cannot be paused pending an appeal. She frames the application as a delay tactic intended to frustrate the minor's rights. She relies on *Z M O v E I M eKLR* to argue that stays of execution in maintenance cases are rarely granted because parental responsibility cannot be suspended.
22. Contrary to the Appellant's portrayal of destitution, the Respondent alleges that the Applicant is a man of means who recently retired and is entitled to a substantial pension. She argues that he has committed his earnings to personal ventures at the expense of his children. She urges the Court not to shield a parent who has abdicated responsibility from the consequences of lawful orders. Implicit in her submission is the argument that the Applicant's pension should be available to satisfy the maintenance arrears, a position supported by Section 101(5) of the *Children Act*.
23. A pivotal and uncontroverted fact has emerged during the hearing of this application: Since the delivery of the judgment on 17 April 2025, the Applicant has not made any payment towards the settlement of the amount ordered by the lower court. It is now February 2026. Ten months have elapsed since the lower court's judgment.

Analysis & Determination

24. The jurisdiction of this Court to grant a stay of execution pending appeal is derived from Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. The Rule stipulates that no order for stay of execution shall be made unless the court is satisfied that:
 - (a) 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.
25. This statutory framework is buttressed by case law, most notably *Butt v Rent Restriction Tribunal KLR 417*, which established that the Court's discretion must be exercised judicially to ensure that an appeal, if successful, is not rendered nugatory.
26. The first limb of Order 42 Rule 6(2) requires the application to be made without unreasonable delay. The judgment of the trial court was delivered on 17 April 2025. The Appellant filed the Memorandum of Appeal on 28 April 2025 and the instant application for stay on 16 May 2025. The timeline demonstrates that the Applicant moved the Court within 30 days of the judgment. In the realm of appellate litigation, this is prompt. There is no evidence of laches or dilatory conduct in filing this application. I, therefore, find that the condition regarding unreasonable delay has been satisfied.
27. The cornerstone of stay of execution is the demonstration of substantial loss. The Applicant argues that execution will lead to his civil imprisonment and that the Respondent will be unable to refund the decretal sum.
28. It is a settled principle of law that, generally, a money decree does not warrant a stay of execution because money paid can usually be refunded. This principle was elucidated in *Kenya Shell Ltd v Benjamin Karuga Kibiru [1986] KLR 410*, where the Court of Appeal held that unless the applicant can show that the respondent is a person of straw who would be unable to refund the money, substantial loss is not established.



29. In the present case, the Appellant alleges the Respondent lacks the means to refund Kshs. 1,022,313/= . However, as noted earlier, the Appellant contradicts himself by averring in his Affidavit that the Respondent has a lucrative career with Kenya Airports Authority (KAA) earning over Kshs. 200,000/= per month. If the Respondent is indeed earning such a salary, she cannot be described as a person of straw. The courts have consistently held that the burden of proving the respondent's inability to refund lies with the applicant. By asserting the Respondent's high income, the Appellant has failed to discharge the burden of proving irrecoverability of funds.
30. However, substantial loss is not limited to financial irrecoverability. It extends to situations where the execution process itself would cause irreversible harm. The Applicant expresses a genuine apprehension of being committed to civil jail. The decree is for a liquidated sum, and under Section 38 of the Civil Procedure Act, execution may proceed by attachment of property or arrest and detention of the judgment debtor.
31. The courts have increasingly recognized that the loss of liberty, even for civil debt, can constitute substantial loss. In *Mwandaa & 4 others v Mwandoe & another* KEHC 25305, the Court held that the threat of committal to civil jail pending appeal created a risk of substantial prejudice that warranted a stay. Similarly, in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the Court held that substantial loss includes situations where execution creates a state of affairs that irreparably affects the applicant's core existence or negates the appeal.
32. In this case, the Applicant is a retired civil servant. Committing a retiree to civil jail for inability to pay a lump sum of over Kshs. 1 million, before his appeal on the validity of that sum is heard, creates a scenario of extreme hardship. If the appellate court later finds that the arrears were miscalculated or that the Appellant was not liable for the full amount, his incarceration would have been an injustice that no refund could cure. The deprivation of liberty is, by its nature, irreversible.
33. Therefore, while the refundability argument fails due to the Respondent's employment, the loss of liberty argument succeeds in establishing substantial loss.
34. Order 42 Rule 6(2)(b) makes the provision of security a mandatory condition for the grant of stay. The purpose is to ensure that the successful litigant is not left with a hollow judgment if the appeal fails.
35. The Applicant pleads financial incapacity to provide security. He has attached a payslip showing a net pay of Kshs. 8,749/= prior to retirement. He claims his pension is not yet processed.
36. However, the Court cannot ignore the Respondent's submission regarding the Applicant's pension entitlement. The Applicant has retired from a pensionable government job. While the monthly cash flow may be currently restricted, the asset (the pension benefits) exists. In *FKO v MMT* [2024] KEHC 8347, a case involving child maintenance arrears, the court granted a conditional stay requiring the appellant to pay 50% of the arrears to the respondent and deposit the remaining 50% in a joint interest-earning account. This precedent balances the need for security with the immediate needs of the child.
37. Given the Applicant's admission of retirement, he is entitled to a gratuity and monthly pension. These funds are attachable for child maintenance arrears under Section 101(5) of the Children Act, which explicitly allows for the attachment of terminal benefits for child maintenance, overriding the protection usually afforded to pensions under the Retirement Benefits Act.
38. It would be unjust to grant an unconditional stay. The Applicant must demonstrate good faith. Pleading total poverty while awaiting a government pension is insufficient to deny the minor security for the judgment sum.



39. The Court must balance three competing factors: the Applicant's liberty, the Respondent's rights and the child's welfare. The Applicant's proposal for a blanket stay without security is untenable. It would leave the Respondent and the minor with nothing but a paper judgment for the duration of the appeal. Conversely, demanding the immediate payment of Kshs. 1.02 million from a retiree whose pension is processing might be practically impossible and lead to unjust incarceration.
40. The middle ground, supported by the precedent in *FKO v MMT* case, is a conditional stay.
41. The Applicant claims his pension is processing. This is a future asset that can serve as security. Furthermore, to prove his bona fides and ensure the child is not destitute, a portion of the judgment debt should be released immediately.
42. Section 101 of the *Children Act* allows this Court to enforce maintenance orders. It is equitable to order that a portion of the arrears be paid directly to the Respondent to cover immediate debts she may have incurred for the child's education, while the balance is secured.
43. In exercise of the discretion conferred upon this Court by Order 42 Rule 6 of the Civil Procedure Rules and Article 53 of *the Constitution*, and having found that the Applicant has established substantial loss regarding the threat of civil jail but failed to offer adequate security, I am inclined to grant a conditional stay of execution. The conditions are designed to protect the minor's welfare and secure the decree while preserving the Appellant's liberty to pursue his appeal.
44. It is hereby ordered:
 - i. There shall be a stay of execution of the judgment and decree delivered on 17 April 2025 in Milimani Children's Cause No. XXXX of 2016 regarding the lump sum arrears of Kshs. 1,022,313/=, pending the hearing and determination of this appeal, subject to the strict compliance with the conditions set out in Order (ii) below.
 - ii. The Appellant/Applicant shall pay to the Respondent the sum of Kshs. 300,000/= (being approximately 30% of the decretal sum) within thirty (30) days of the date of this Ruling. This payment shall go towards reimbursing the Respondent for school fees and related expenses already incurred.
 - iii. The Appellant shall deposit the balance of the decretal sum (Kshs. 722,313/=) into a joint interest-earning account to be opened in the names of the Advocates for both parties within ninety (90) days of this Ruling.
 - iv. In the alternative to the cash deposit in (iii) above, the Appellant may, within forty-five (45) days, provide a Bank Guarantee or an irrevocable undertaking from the Pensions Department to pay the said sum from his accrued pension benefits upon their release.
 - v. The Appellant shall continue to pay the monthly maintenance of Kshs. 5,000/= and pay all current and future school fees and school-related expenses for the minor, J.B., directly to the school or Respondent as and when they fall due, without default.
 - vi. In default of compliance with any of the conditions in Order (ii) or (iii) above, the stay of execution shall automatically lapse, and the Respondent shall be at liberty to execute the full decree, including by way of committal to civil jail, without further reference to this Court.
 - vii. Appellant is directed to file and serve the Record of Appeal within forty-five (45) days from today.
 - viii. The costs of this Application shall abide the outcome of the main appeal.



DATED AND DELIVERED AT NAIROBI THIS 13 DAY OF FEBRUARY 2026

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For the Appellant/Applicant: Mr Achillah

For the Respondent: Mr Nyamweya

Court Assistant: Lucy Mwangi

