



**SK v GW (Family Appeal E018 of 2025) [2026] KEHC 1244 (KLR) (5 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1244 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
FAMILY APPEAL E018 OF 2025  
FN MUCHEMI, J  
FEBRUARY 5, 2026**

**BETWEEN**

**SK ..... APPLICANT**

**AND**

**GW ..... RESPONDENT**

**RULING**

**Brief facts**

1. The application for determination dated 9<sup>th</sup> October 2025 seeks for orders of stay of the judgment in Ruiru Senior Principal Magistrates Court Children’s Case No. E033 of 2024 delivered on 3<sup>rd</sup> October 2025 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed Grounds of Opposition dated 4<sup>th</sup> November 2025.

**Appellant’s/Applicant’s Case.**

3. The applicant states that the judgment in Ruiru Senior Principal Magistrates Court Children’s Case No. E033 of 2024 was delivered on 3<sup>rd</sup> October against him despite him raising grounds of opposition and filing a replying affidavit on the procedure adopted by the respondent and also relied on a superior court decision. The applicant states that the trial court rendered the ruling without considering the decision he relied on or his evidence and submissions.
4. The applicant avers that the appeal has a reasonable chance of success and if the impugned orders are executed, the appeal may be rendered nugatory and he will be greatly prejudiced.

**The Respondent’s Case**

5. The respondent states that the applicant has not satisfied the mandatory conditions under Order 42 Rule 6 of the Civil Procedure Rules. Further, the impugned ruling properly found the applicant in



willful contempt and imposed a modest fine rather than imprisonment hence no prejudice warranting stay.

6. The respondent argues that the proceedings concern school fees and the welfare of the minors and thus staying enforcement would directly jeopardize their education and contravene Article 53(2) of *the Constitution*. Further the applicant's plea of financial difficulty was heard and rejected upon evidence, thus the court's discretion cannot be relitigated on identical facts.
7. Parties put in written submissions.

### **The Applicant's Submissions**

8. The applicant relies on Order 42 Rule 6 of the Civil Procedure Rules and the cases of Jumilla Attarwalla & Another vs Hussein Abdulaziz & Another [2015] eKLR; Housing Finance Company of Kenya vs Sharok Kher Mohammed Ali Hirji & Another [2015] eKLR and Amal Hauliers Limited vs Abdulnasir Abukar Hassan [2017] eKLR and submits that the trial court held him in contempt without considering his replying affidavit, submissions, superior court authorities on the subject and thus condemned him unheard and without the respondent satisfying the required threshold in proving contempt.
9. The applicant argues that contempt proceedings are somehow similar criminal proceedings should if the orders be stayed, the applicant stands to suffer incarceration unfairly thus suffering substantial loss which cannot be remedied with payment of damages or refund of the fine and further the appeal shall be rendered nugatory.
10. The applicant submits that he continues to perform his parental responsibilities and even brought evidence of arrangement with the school which the respondent did not controvert and thus the interests of the minors are not prejudiced by the grant of the orders.
11. The applicant submits that the application has been filed timeously as the application was filed six days after the impugned ruling. On the issue of security, the applicant prays that the court impose reasonable conditions for the grant of stay.

### **The Respondent's Submissions**

12. The respondent relies on the cases of Housing Finance Co. of Kenya vs Sharok Kher Mohammed Ali Hirji & Another [2015] eKLR and National Industrial Credit Bank Ltd vs Aquinas Francis Wasike (2005) eKLR and submits that the applicant faces a fine of Kshs. 30,000/- and not imprisonment as he claims. Further that he has not shown that she is unable to refund the said sum should the appeal succeed. Thus, he has failed to demonstrate substantial loss. Further, the applicant faces no risk of incarceration that would amount to substantial loss. The respondent further submits that she has paid Kshs. 102,500/- to prevent the children's exclusion from school. As such, granting stay would deny her the fruits of the ruling and place the burden of school fees solely on her.
13. The respondent refers to Article 53(2) of *the Constitution* and submits that courts have consistently declined to grant stay of such orders for the reason that the minor or minors are likely to suffer. Thus granting stay in the instant case would disrupt the children's schooling and basic welfare. Furthermore, the law does not allow an appeal to be used as a shield against parental responsibilities.
14. Relying on the decision in Kenya Hotel Properties Ltd vs Willesden Properties Ltd (2006) eKLR, the respondent submits that the applicant is in contempt of maintenance orders and he should not seek equitable relief such as stay while still in disobedience.



15. On the issue of security, the respondent relies on the case of Housing Finance Co. vs Sharok Hirji [2015] eKLR and submits that the applicant has failed to furnish security for the due performance of the decree. Further, the respondent submits that the ruling was delivered on 3<sup>rd</sup> October 2025 in the presence of both parties and therefore the alleged delay in uploading the ruling cannot justify the failure to comply or move the court promptly.

## The Law

### Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal

16. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-
1. “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
  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 1<sup>st</sup> 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.
17. Beyond the requirements of Order 42, this being a matter concerning children, this Honourable Court is enjoined by *the Constitution* of Kenya 2010 and the *Children Act* to consider the best interests of the children. *The Constitution* of Kenya 2010 provides at Article 53(2) that:-
- A child’s best interests are of paramount importance in every matter concerning the child.
18. The *Children Act* on the other hand provides at Section 8(1) that:
- In all actions concerning the children, whether undertaken by public or private or social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
19. As was observed in Bhutt vs Bhutt Mombasa HCCC No.8 of 2014 (OS), 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 an overriding consideration of the best interests of the child in accordance with Article 53(2) of *the Constitution* which provides:-
- In exercising its jurisdiction to grant stay of execution, the High Court is required by Order 42 Rule 6(2) of the Civil Procedure Rules to be satisfied that:-
- a. The applicant will suffer substantial loss if stay is not granted;



- b. The application for stay has not been brought without undue delay; and
- c. The applicant has provided security for the due performance of the decree.

20. Similarly in ZMO vs EIM [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. 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.

21. The applicant argues that he stands to suffer substantial loss as he may suffer incarceration following the contempt proceedings. I have perused the record and noted that the application leading to the ruling of the magistrate dated 3<sup>rd</sup> October 2025, sought for orders of contempt and attachment of the applicant's salary for recovery of Kshs. 102,500/- paid by the respondent towards school fees. The applicant did not dispute having been served with the judgment issued on 6<sup>th</sup> December 2024 but argued that he was going through financial constraints and requested the school to indulge him and executed an agreement with the school and paid some amounts to liquidate the school balance. It is evident that the trial court delivered a judgment requiring the applicant to pay school fees which he failed to honour, a fact that he admitted. Therefore by him failing to honour the said directions, the best interests of the children are not being considered as they will miss out on school. Further, the applicant did not seek to have the maintenance orders reviewed or appealed upon to reflect his financial challenges. This being the position, the judgment is still valid and enforceable. It is clear that the reasons for stay given the applicant are more self-centered on the side of the applicant on himself rather than considering the best interests of the children. In my view, the applicant has not shown that he will suffer substantial loss if the orders are granted. Rather, it is the minors who are likely to suffer loss and inconvenience in the event that the orders are granted.

22. The judgment herein was delivered on 3<sup>rd</sup> October 2025. The applicant filed his Memorandum of Appeal on 9<sup>th</sup> October 2025 and the current application on 9<sup>th</sup> October 2025. As such, the application has been filed timeously.

23. On the issue of security, the applicant has not offered any security. The grant of stay of execution is discretionary and this court shall exercise its discretion depending on the circumstances of the case and while balancing the rights of the parties to ensure justice. Relying on Section 95(3) of the Children's Act, it is my considered view that granting stay of execution would militate against the best interests of the children herein. Section 95(3) provides:-

In any proceedings in which an issue on the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child.

24. I am also persuaded by the decision of ZMO vs EIM [2013] eKLR where the court held:-

“The solution ideally lies in expediting the disposal of the appeal and staying the matter before the children's court to wait the outcome of the appeal. Tinkering with the quantum at this



stage would amount to determining the appeal before the arguments are heard from both sides on the merits of the same.”

25. In the interests of justice and in the best interests of the children herein, it is my considered view that the appeal herein be prepared for hearing on priority basis, for the expedited hearing and disposal of the same.
26. It is my considered view that the application dated 9<sup>th</sup> October 2025 has no merit and it is hereby dismissed.
27. The costs of this application shall abide in the appeal and in the event that this appeal is not pursued to conclusion, each party will meet their own costs of this application.
28. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 5<sup>TH</sup> DAY OF FEBRUARY 2026.**

**F. MUCHEMI**

**JUDGE**

