

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CIVIL APPEAL NO. E023 OF 2025

ABDIKARIM IBRAHIM ABDULLAHI.....
APELLANT

VS

ANAB ABDIKARIM ABDULLAHI.....
RESPONDENT

RULING

1. The matter pending determination before this court is an application dated 11.12.2025 filed under certificate of urgency pursuant to Order 42 rule 6 of the civil procedure rules and Sections 3A and 63(e) of the civil procedure Act seeking the following orders;
 - i. Spent.
 - ii. A conservatory order be issued granting a temporary stay of execution of the judgment and orders of Hon. R. Aganyo, SPM, delivered on 19.11.2025 in Children Case No. E027 of 2025, pending the *inter partes* hearing and determination of this application.
 - iii. A further order be issued granting a stay of execution of the judgment and orders of Hon. R. Aganyo, SPM, delivered on 19.11.2025 in Children Case No. E027 of 2025, pending the hearing and final determination of the appeal herein.
 - iv. Costs of this application be provided for.

2. The application is supported by the affidavit sworn by the applicant deposing that the Hon. Magistrate's judgment is not only unrealistic but also contrary to the evidence. That the execution of the judgment and orders of the lower court will cause him substantial loss as he earns a salary of Kes. 32,000.00/- against a maintenance order of Kes. 24,000.00/- and therefore, the same will make him unable to meet his basic needs if this court doesn't intervene.
3. In reply, the respondent stated in an affidavit sworn on 16.01.2026 that the trial court's finding was not excessive contrary to the applicant's claim. The respondent asserted that the applicant was a man of means, owning herds of camels and goats, and therefore could not convincingly allege that the order of the trial court was burdensome. It was further argued that the applicant's claim of substantial loss was unfounded and if the court were to grant the orders sought, the minors the subject of this matter would be the ones to suffer.
4. The respondent further contended that the appeal does not raise any substantial issue, describing it as frivolous and unmeritorious. She urged the court to consider the best interests of the minors by dismissing the application.
5. I have read and considered the notice of motion herein and the response thereof. The only issue for determination is whether the application meets the threshold for grant of the orders sought.
6. The crux of the matter is the amount ordered to be paid as maintenance by the appellant being 24,000/= against his

monthly salary of 32,000/=. He alleged that if honoured, he will remain with nothing to survive on. On the other hand, the respondent argues that the appellant has other sources of income being herds of camels and goats and failure to pay as directed, the subject minors will suffer.

7. The law governing Stay of Execution is provided under Order 42 Rule 6 of the Civil Procedure Rules 2010 which states as follows;

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 order set aside.

2. No order for stay of execution shall be made under subrule (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 decree or order as may ultimately be binding on him has been given by the applicant.”

8. From the above provisions of the Civil Procedure Rules, three conditions must be met to warrant an order of stay of execution;
 - a. That substantial loss may result to the applicant unless the order is made.
 - b. That the application has been made without unreasonable delay.
 - c. Security as the court orders for the due performance.

9. The above principles were enunciated in the case of **Butt vs Rent Restriction Tribunal [1979]** where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said thus:
 - a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.**
 - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.**
 - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his**

opinion, a better remedy may become available to the applicant at the end of the proceedings.

d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements...

10. The court takes note that the applicant is aggrieved by the order requiring him to pay monthly maintenance of Kes. 24,000/-. Additionally, the applicant alleged that the same shall place him under considerable strain, as he found the amount unsustainable. That unless the relief sought herein is granted, the applicant is unlikely to cater for his basic needs.

11. In the case of **Century Oil Trading Company Ltd vs Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007**, Kimaru J. (as he was then) stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an

issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

12. In view of the circumstances of this case and taking into account that the monthly salary of the appellant which is not disputed is about 32,000/=, deducting 24,000/= out of it will render the appellant without pay or literally jobless. The effect will be to default hence committal to civil jail which will imply losing his job or become destitute at the altar of the children’s best interests.
13. Courts should not subject parents to a state of destitution in the name of a child’s best interest. Parental interest should be balanced against those of a child. Losing a job would in my opinion amount to substantial loss.
14. As to the existence of other sources of income, the same is a matter of proof which has not been established.
15. On whether the application was filed promptly, this court notes that it was filed on 11.12.2025 while the impugned decree was issued on 19.11.2025, just 3 weeks after the judgment. This court

thus finds the appeal and this application for stay of execution have been filed without undue delay.

16. In view of the above holding, it is my finding that the applicant has met the threshold for grant of stay orders.
17. The applicant before the trial court indicated that he has been paying Kes. 5,000/- towards the maintenance of the minors herein, hence prayed that he be allowed to continue paying the same. From the record, it is clear that the minors subject to this suit are two in number, being roughly 3 and 4 years. Clearly they are still of tender years hence the need to ensure that in every decision to be made, their best interest must be observed. It is not lost to this court that both parents ought to provide for their children but within their means. [See Constitution, art.53 and Section 4(3) of the Children’s Act, 2022].
18. It is trite that when considering an application for grant of stay of execution in children’s matters, the interest of a minor should be considered. This position was well illustrated in the case of **Bhutt vs Bhutt Mombasa HCCC NO. 8 of 2014 (O.S.)** where the Court stated as follows:

“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.”

19. In view of the foregoing, it is this court's finding that it is reasonable to issue interim maintenance orders in the best interests of the children. Pending the appeal, the applicant shall contribute Kes. 10,000/= monthly instead of 24,000/=:, and continue providing school fee (if any) plus medical cover to the minors.
20. Consequently, it is my finding that this notice of motion application is merited and the same is allowed with the following orders;
- i. That a stay of execution of the trial court's orders dated 19.11.2025 in Children Case No. E027 of 2025 at the SPM's Court at Wajir be and is hereby granted pending hearing and determination of the appeal herein.**
 - ii. That the applicant shall pay interim monthly maintenance of Kes. 10,000/= instead of 24,000/=**
 - iii. That the applicant shall continue covering the children's school fees (if any) and meet medical needs pending the appeal.**
 - iv. The costs shall abide the outcome of the appeal.**

Dated, signed and delivered virtually this 5th day of March 2026

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J. N. ONYIEGO
JUDGE

