

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MANDERA SUB-REGISTRY**

**CIVIL APPEAL NO. E001 OF 2025**

**ADAN IBRAHIM MOHAMED.....**

**APPELLANT**

**VERSUS**

**JAWAHIR DUBE ADAN.....**

**RESPONDENT**

**RULING**

1. Vide a plaint dated 24-2-2025, the respondent herein being the next friend to her minor children namely; I.A.I and I.A.M. filed a suit against the appellant her husband seeking;
  - a) Maintenance and shelter of khs 30,000/= every month
  - b) Children be included in the appellant's medical cover to access health services.
  - c) An order for salary attachment of khs 30,000/= for Maintenance and shelter.
  
2. In response, the respondent filed a defence dated 12-3-2025 stating that;

Judgment of the learned Kadhi in KCDC/E030/2024 be adopted as the judgment of the honourable court to the effect that the defendant( appellant herein) do provide children upkeep of kshs 10,000/= on monthly basis through the plaintiff(respondent herein); the respondent to have a right to visit children whenever he wanted; the plaintiff be granted custody, care, and control of the minors; legal custody of the children be shared out between the plaintiff and defendant; and each party to bear own costs.

3. After hearing the case, the trial court ordered; custody of the children be awarded to the plaintiff/ respondent; the defendant to cater for the welfare of the children by paying kshs 15,000/= monthly; the defendant to have unlimited visitation and access rights to the children and; the plaintiff to cater for the children in terms of food, shelter and clothing.
4. Aggrieved by the said judgment and in particular the order to pay maintenance of kshs 15,000/= per month, he lodged an appeal seeking orders to continue paying kshs 10, 000/= as ordered by the Kadhi's court in the aforesaid Kadhi's judgment where divorce and child maintenance affecting the same children was determined.
5. Consequently, he filed a notice of motion dated 27-11-2025 seeking stay of execution particularly payment of Kshs 15,000/= and instead prayed to continue paying kshs 10,000/= as ordered by the Kadhi's court pending hearing and determination of the application. The application is supported by the affidavit sworn by the applicant on the same day. He averred that the trial court did not take into account his affidavit of means dated 28-08-2025 which revealed that his net income as per his pay slip was kshs 20,623. That if he were to pay the said amount, he will remain with a balance of Kshs 9,623/= which will not be enough to sustain his survival.
6. Despite service of the application, the respondent did not file any response. The applicant therefore urged the court to grant the application as prayed.

7. I have considered the application herein which is not opposed. It is trite that an application does not automatically succeed simply because the same is not opposed. See the case of **Konchellah v Sunkuli & 2 others (Civil Application 26 of 2018) [2018] KESC 58 (KLR) (7 September 2018) (Ruling)** where the **Supreme Court held that a case must be determined on merit even if not opposed.**
8. The only issue for determination is whether the applicant has met the threshold for stay of execution. Order 42 rule 2 (6) of the civil procedure rules is clear on the principles for consideration before granting an order of execution. Firstly, an applicant must prove that; substantial loss is likely to arise if the order is not granted; that the application has been filed without undue delay; and that security for due performance of the decree has been provided. See **James Wangalwa & another v Agnes Naliaka Cheseto Misc Application No 42 of 2011 [2012] eKLR** where the court held that;

**“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.**

**The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very**

**essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein Vs .Chesoni [2002] 1KLR 867, and also in the case of Mukuma Vs. Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:**

**“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”**

9. In the instant case, the applicant is seeking that the amount he was ordered to pay was beyond his means considering that his net income was only 20,623. From the lower court record, the applicant did attach a pay slip showing his net income. This fact has not been challenged nor denied. What are the consequences of paying kshs 15,000/= ? It is most likely that the applicant may not be able to meet that obligation hence the possibility of committal to civil jail. To that extent, he is likely to suffer substantial loss as committal to civil jail arising from two contradicting decisions from the magistrate's court and Kadhi's court is likely to deprive the applicant his liberty and most likely lose his employment opportunity.

10. As to the element whether the application was filed without undue delay, the record is clear that judgment was delivered on 20-11-25 and the application filed on 1-12-25 which is less than a month. In my view the application was filed within reasonable time. Regarding deposition of security, this is not an appropriate case to make such order. Accordingly, the applicant has met the minimum requirements for grant of stay of execution orders.
11. Considering that the application is not opposed and the applicant has been paying kshs 10,000/= as per the Kadhi's court and further in view of the meagre net income received by the applicant from his salary which is the only known source of income, it is my finding that it is reasonable that the applicant continues paying Kshs 10,000/= pending hearing and determination of the appeal. Costs shall be in the cause.
- Dated, signed and delivered virtually this 27<sup>th</sup> day of February 2026.

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**J. N. ONYIEGO**  
**JUDGE**