

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. E011 OF 2025

JAMES

MVOI

NYANGE

.....**APPELLANT**

VERSUS

MWANAI

HAMISI

MTOTO

.....

.....**RESPONDENT**

RULING

1. By a Notice of Motion dated 4.2.25, the Appellant seeks the following orders:

1. ***Spent.***
2. ***THAT this Court be pleased to issue an order for stay of execution of part of the Judgment and orders issued by the Children's Court at Kilifi in Children's Case No. E014 of 2023 delivered through email on 21/1/2025 ordering the applicant to pay a monthly sum of 15,000/= towards food, care giver and entertainment of the minor pending the hearing and determination of this application.***
3. ***THAT this Court be pleased to issue an order for stay of execution of the part of the Judgment and orders issued by the Children's Court at Kilifi in Children's Case No. E014 of 2023 delivered through email on 21/1/2025 ordering the applicant to pay a monthly sum of 15,000/= towards food, care giver and entertainment of the minor pending the hearing and determination of the Appeal.***
4. ***THAT costs of this application be provided for.***

2. The Appellant is aggrieved by the judgment and has filed the appeal herein. The Appellant says he is aggrieved by order directing him to pay Kshs. 15,000/= monthly, towards food, caregiver and entertainment of the parties' child. His complaint is that his affidavit of means and the fact that he has 2 other children were not taken into account in making this order. The Applicant stated that he was ready to continue paying the child's school fees. However, that his salary is Kshs. 49,130/= and he is unable to pay school fees and the amount ordered as well as take care of his 2 other children. He further stated that his appeal has good chances of success and if execution is ordered, he will suffer irreparable loss.

3. The Respondent opposed the application *vide* a replying affidavit sworn on 11.2.25 and denied the allegations by the Respondent. She averred that the Respondent abdicated his parental responsibility towards the child before intervention by the trial court; that there was indolence on the part of the Applicant in filing his affidavit of means on time; that the trial court considered that the Applicant was a professional and can adequately provide for the child; that the judgment was fair and just as it adequately distributed parental duties to both parents and directed her to take care of shelter, clothing, sanitation, utility bills, school uniform and stationery. that the stay sought would be detrimental to the child. The Respondent stated that the stay sought if granted will be prejudicial to the welfare and best interest of the child.
4. It is the duty of every Court when dealing with a matter concerning a child, as I am in this Application, to bear in mind the provisions of Article 53(2) of the Constitution, which provides:

A child's best interests are of paramount importance in every matter concerning the child.

The best interest of the child imperative is also stipulated in Section 8 of the Children Act which provides:

(1) *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—*

(a) the best interests of the child shall be the primary consideration;

(b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.

(2) *All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—*

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child; and

(c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.

(3) ...

5. It is trite law that grant of stay of execution of an order pending appeal is discretionary. A party seeking stay of execution must satisfy the Court that he is deserving of the orders sought. The matter herein concerns the parties' child. As such, the Court must give prominence to the best interests of the child which are paramount. That parents have a statutory and moral duty to provide for the needs of their children cannot be gainsaid.
6. The paternity of the child herein is not disputed. Suspension of the maintenance order will not be in the best interests of the child. On this point, I associate with Musyoka, J. who in **Z M O v E I M [2013] eKLR** 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...

7. This issue of the monthly amount payable by the Applicant for the maintenance of the child is one of the grounds raised in the appeal pending before this Court. The Court has not had the benefit of seeing the lower court record to enable it make a considered determination on the same. The issue will best be considered at the hearing of the appeal and the Court must refrain from preempting the outcome of the appeal by delving into the same. In this regard, I am persuaded by Musyoka, J. who in the **Z M O v E I M** case (supra) observed:

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 arguments are heard from both sides on the merits of the same."

8. In view of the foregoing, I consider that a stay of execution would militate against the best interests of the child herein. Accordingly, I dismiss the Application dated 4.2.25 but with no order as to costs. In accordance with the general principle under section 95(3) of the Children Act and in order to meet the justice of the case, I direct the Appellant to file the record of appeal by 18.5.26 for the expedited hearing and disposal of the appeal. Mention on 20.5.26 for compliance.

DATED, SIGNED and DELIVERED in MALINDI this 17th day of April 2026

M. THANDE
JUDGE