



**EOM v VKA (Civil Application E179 of 2024)
[2025] KECA 334 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KECA 334 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E179 OF 2024
HA OMONDI, LK KIMARU & AO MUCHELULE, JJA
FEBRUARY 21, 2025**

BETWEEN

EOM APPLICANT

AND

VKA RESPONDENT

(Being an application from the ruling of the High Court of Kenya at Kisii (T. A. Odera, J.) dated 29th November 2024 in HCCC MISC. No. E014 of 2024)

RULING

1. The applicant EOM, moved this Court pursuant to Rule 5(2) of the [Court of Appeal Rules](#) and section 4 of the [Children Act](#) seeking the following orders from the Court:
 1. That pending the hearing and determination of the appeal, proceedings in Kisii Children’s Case No. E009 of 2023 be stayed.
 2. Pending the hearing and determination of this application interim orders be issued granting the applicant physical and actual custody of the children.
2. The grounds in support of the application are stated on the face of the application and the annexed affidavit of the applicant. In summary, the applicant states that he is the father of the children whose custody is in dispute and is their primary caregiver. He depones that he has had the sole custody of the children since January 2023. He has lived with them at his resident at Soley in Muranga County since that date.
3. The applicant is aggrieved that the mother of the children, VKA (the respondent) instituted a suit seeking to obtain the custody of the said children before the Kisii Children’s court (Case No. E069 of 2023) which, in his opinion, is out of the jurisdiction of the court that he resides. He complained that availing himself and the children before Kisii Children’s court will cause him undue hardship and



inconvenience. He pleaded with the court to excuse him from physical attendance before the said court, as in his view, it would undermine his right to fair hearing and further, be against the best interest of the children as provided under Article 53 of Constitution and section 4 of the *Children Act* that mandates that the children's welfare and stability takes precedence over procedural considerations. The applicant averred that the continued proceedings before the Kisii Children's Court posed a risk of disrupting the children's stable environment and may compromise their welfare.

4. The applicant stated that it was for the above reasons that he moved the Kisii High Court in Miscellaneous Application E014 of 2023 seeking to have the said children's case transferred from Kisii to Muranga Children's Court, which in his view was convenient and legal venue to hear the custody dispute and in the best interest of the children.
5. The application was opposed by the respondent.
6. After considering the argument by the parties, the Superior court dismissed the application prompting the applicant to file the present application.
7. The respondent filed a replying affidavit in opposition to the application. The thrust of the opposition to the application was that the applicant in filing the present application, was engaged in the pursuit of frustrating the hearing and final determination of the custody dispute now pending before the Children's court. The respondent averred that the applicant had, on numerous occasions, disobeyed the Children Court's orders that required him to appear before the said court with the children. The respondent narrated how the applicant had abused the due process of the court by filing a multiplicity of applications in a bid to frustrate the hearing and final determination of the custody dispute by the Children's court.
8. In the premises, therefore, the respondent urged the court to dismiss the application as it lacked merit.
9. Prior to the plenary hearing of the application, both the applicant and the respondent filed their respective written submissions which they relied on during the plenary hearing. Ms. Wanjiru, learned counsel appeared for the applicant while Mr. Ochwang'i, learned counsel appeared for the respondent.
10. In his submissions, the applicant urged the Court to grant the order staying proceedings that is sought to preserve the best interest of the children in respect to their welfare and temporary custody. The applicant relied on this Court's decision in *B vs. B* [2014] eKLR; *Githubunguri v. Githubunguri* [1981] KLR 598 and *JKN v. Hon* [2019] eKLR in a bid to establish that orders of stay may be granted by this Court in children matters. The applicant submitted that he has established the twin principles required for this Court to grant the order of stay of proceedings under Rule (5)(2)(b) of this *Court's Rules*.
11. On her part, the respondent urged the court not to grant the orders of stay of proceedings as sought by the applicant as it would be against the best interest of the children. She submitted that the best interest and welfare of the said children could only be served by the Children's Court being allowed to determine the issue relating to the custody of the children on its merits. The respondent relied on the High Court decision of *MRM v. SMRM* Kisumu HC Civil Appeal No. 124 of 2022 and the Kisii ELC No. 14 of 2022 *MOCH Hotel Limited v. Kwanza Estates Ltd* where the said courts abhorred wastage of judicial time by parties filing unnecessary applications and seeking to stay proceedings in circumstances that were inimical to the fair administrative of justice.
12. We have carefully considered the application, the grounds in support thereof, the replying affidavit, the parties' submissions, the authorities cited and the law. The principles for granting an order of stay under Rules 5(2)(b) of this Court's Rules is settled. The applicant is required to show that his intended appeal is arguable and that unless the orders of stay craved for is granted, his intended appeal will be



rendered nugatory. (See [Trust Bank Limited & another v. Investech Bank Limited and 3 others](#) [2005] eKLR.

13. As regards specifically orders of stay of proceedings, this Court in [Silverstein v. Chesoni](#) [2002] IKLR 867 at P874 held:

“The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5(2)(b) of the Court’s own rules. But as the Court pointed out in the case we have already cited, and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay.”

This Court in [Makarsan Ramji & Sons Limited v. Athumani & Another](#) (Civil Application No. E034 of 2023) [2024] KECA 563 eKLR) 24th May, 2024 Ruling) held that:

“...We agree with the requirement that whereas the consideration for grant of stay of execution pending appeal are the same as those for stay of proceedings pending appeal, when it comes to the nugatory aspect, then in the latter case, a higher threshold is required to be met than in the former case. This must be so because an order staying proceedings has the effect of derailing pending proceedings before a determination is made therein. It interferes with the hearing schedules of the trial court and may lead to injustice being occasioned to the respondent whose constitutional right under Article 159(2)(d) may thereby be curtailed.”

14. This Court agrees with the reasoning of the Court in [Kenya Wildlife Service v. James Mutembei](#) [2019] eKLR where Gikonyo, J, held that:

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is grave judicial action which interfere with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay, and overall, right to fair trial. Therefore, the test for staying proceedings is higher and stringent.”

15. In the present application, the applicant states that he has an arguable appeal which he should be allowed to ventilate before this Court. He has annexed a draft memorandum of appeal in the affidavit in support of the application. In the said draft memorandum of appeal, the applicant, inter alia, avers that the trial court erred in failing to consider that his rights as a litigant were infringed since the children’s case regarding custody ought to have been filed at Murang’a Children’s court instead of Kisii Children’s court where the case was filed. At this stage of the proceedings, we are prepared to hold that the applicant has an arguable appeal, since he has established that the venue of the hearing of the case is an issue. As has repeatedly been held by this Court, an arguable appeal is not the one which will necessarily succeed but one which is not frivolous or unmeritorious.

16. As regards the second limb of whether the intended appeal will be rendered nugatory if the order sought staying proceedings is not granted, we hold that the applicant has not met the legal threshold. As correctly submitted by the parties, other than the ordinary principles guiding the court in the discharge of its mandate to administer justice, the Court in addition is required to take into consideration Article 53(2) of the [Constitution](#) which provides that:

“A child’s best interests are of paramount importance in every matter concerning the child.”



Section 4(3) of the *Children's Act* provides thus:

“All judicial and administrative institutions and all persons acting in the name of these institutions, where they are exercising any power conferred by this Act shall treat the interest of the children as the first and paramount consideration to the extent that this is consistent with adoption a course of action calculated to-

- a. Safeguards and promote the rights and welfare of the child;
- b. Conserve and promote the welfare of the child;
- c. Secure for the child such guidance and correction as it is necessary for the welfare of the child and in the public interest.”

17. It is in the best interest of the children that are the subject of the custody dispute between the applicant and the respondent for determination to be made as expeditiously as possible in regard to, who, as between the applicant and the respondent shall have their custody. In parallel with that determination, hinges the question of their education, maintenance and general well-being. It will not serve the best interest of the child for the proceedings before the Children's court to be stayed or derailed pending the hearing and determination of the intended appeal.
18. We are not convinced that the applicant's right to access justice from a particular court is of paramount importance as compared with the right of the concerned children to know their fate regarding their custody. We hold that the applicant's right to access justice at a venue of his choice is subordinate to the best interests of the children as mandated under Article 53(2) of the *Constitution* and section 4(3) of the *Children Act*.
19. For that reason, we hold that the applicant has not satisfied this Court that his appeal will be rendered nugatory if the proceedings before the Children's court is not stayed. In any event, it is not as if the applicant will not have a remedy in case he will be aggrieved by the decision rendered by the Children's court; his right of appeal to the High court is still intact and available to him, and if necessary, to this Court.
20. We have said enough. The application lacks merit and it is hereby dismissed with cost.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY, 2025.

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed



DEPUTY REGISTRAR

