



MMG (Suing as the Mother and Next Friend of PMK, TA, FB, DK and EM) v TO (Civil Appeal (Application) E012 of 2023) [2023] KECA 1197 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KECA 1197 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E012 OF 2023
FA OCHIENG, LA ACHODE & WK KORIR, JJA
OCTOBER 6, 2023**

BETWEEN

MMG (SUING AS THE MOTHER AND NEXT FRIEND OF PMK, TA, FB, DK AND EM) APPLICANT

AND

TO RESPONDENT

(An application for stay of execution pending the hearing and determination of an intended appeal from the Judgment of the High Court at Nakuru, (M. T. Matheka, J.) dated 6th February, 2023 in CHILDREN'S CA No. E005 of 2021)

RULING

1. Before us is an application dated February 9, 2023 in which the applicant prays for an order of stay of execution of the judgment of the High Court (M. T. Matheka, J.) dated February 6, 2023 pending the hearing and determination of this application and the intended appeal. The applicant also prays for an order that the status quo obtaining prior to the delivery of the impugned judgment be maintained in the best interest of the minors pending the hearing and determination of this application and the intended appeal.
2. The application is brought pursuant to Rule 5(2)(b) of the [Court of Appeal Rules](#), 2022 and sections 3, 3A and 3B of the [Appellate Jurisdiction Act](#) and sections 8 and 9 of the [Children's Act](#) No 29 of 2022. The application is supported by the applicant's affidavit and on the grounds that:
 - a. On June 24, 2021 the trial magistrate delivered judgment against the respondent in Nakuru CMCC Children Case No. E002 of 2021.
 - b. Being partially dissatisfied with the judgment, the applicant lodged an appeal before the High Court.



- c. The applicant was dissatisfied with the orders of the High Court, with regard to maintenance, and she is desirous of lodging an appeal, in that regard.
 - d. The applicant's contention is that the orders placed DK, a female child of tender years in the custody of the respondent, who has since remarried and also works for gain outside the jurisdiction of the court.
 - e. The applicant is of the view that the impugned orders disregarded article 53 of the Constitution, sections 2, 4, 8, 9, 102 and 103 of the Children's Act, the wishes of the minors and their best interests.
 - f. Should the respondent be allowed to execute the orders, the intended appeal will be rendered nugatory to the detriment of the minors.
 - g. The intended appeal is arguable and has high chances of success; it has been brought in good time; in good faith, and in the best interest of the minors.
 - h. The minors DK and EM stand to suffer prejudice if the orders sought are not granted as they have already developed a sibling bond and separating them would cause them unnecessary mental and emotional anguish.
 - i. The respondent will suffer no prejudice should the orders sought be granted.
3. In his replying affidavit, the respondent stated that:
- a. He is the father of the minors; PMK – 14 years, TA -12 years, FB – 11 years and DK – 10 years whom he has been living with since they were born.
 - b. He has had the sole parental responsibility of the minors since 2016 when the applicant abandoned them. At the time, DK was 3 years old.
 - c. The respondent lives with his wife and has on occasion made effort to reconnect the minors with the applicant.
 - d. In June 2020, the minors visited the applicant but the applicant failed to return the minors when schools reopened in January 2021.
 - e. Subsequently, the applicant enrolled the minors in a new school. The respondent obtained a court order which allowed the minors to go back to their former school.
 - f. DK was placed in the custody of the applicant vide the judgment of the trial court on June 24, 2021.
 - g. Aggrieved, the respondent appealed against the decision and the High Court held that the judgment of the trial court did not take into consideration the welfare of the child who had lived with the respondent and her other siblings for 5 years without any problem.
 - h. The High Court directed that the order on custody and access during school holidays with respect to PMK, TA and FB apply to DK mutatis mutandis.
 - i. The respondent felt that the order granting 50:50 custody was appropriate as it allowed both the applicant and the respondent an equal opportunity to take care of the minors.
 - j. The respondent is of the view that the stay of execution order, if granted, will be more injurious to the welfare of DK.



- k. The respondent is of the further view that the applicant has no arguable appeal that outweighs the welfare and interest of DK as PMK and FB are female minors who are in his custody.
 - l. The respondent refuted claims that DK is sickly and claimed that DK had a UTI infection while in the custody of the applicant as a result of being subjected to unhygienic conditions.
 - m. The orders the applicant seeks to stay are at the core of the minors' welfare, and that the minors will be highly prejudiced.
4. At the hearing of the application Mrs. Mukira, learned counsel appeared for the applicant whereas Mr. Kibet, learned counsel appeared for the respondent. Counsel relied on their respective written submissions which they opted to briefly highlight as follows.
 5. Mrs. Mukira submitted that the appeal is arguable and will be rendered nugatory as DK has been in the custody of the applicant and is in school. The trial court in making its decision observed that DK had been assaulted by her stepmother and that her siblings had asked the court to allow DK to stay with the applicant. Counsel argued that destabilizing DK at this stage would be detrimental to her and the respondent is agreeable that the status quo be maintained. Counsel contended that prayer (a) gave the minors to a stepmother who was not party to the suit. Counsel was of the view that it is discriminatory for the court to give custody of E.M to the applicant and hold that she is not suitable for the older children. Counsel prayed for status quo to be maintained as this court has the power to grant the said order.
 6. The applicant relied on the case of *Trust Bank Limited & another vs Investech Bank Limited & 3 others* [2000] eKLR in outlining the discretionary nature of this court's jurisdiction under Rule 5(2)(b) and the twin principles which must be demonstrated before an order of stay of execution is granted; that is, the appeal or intended appeal is arguable and unless stay is granted, the appeal or intended appeal will be rendered nugatory.
 7. The applicant pointed out that the trial magistrate awarded actual custody of DK to the applicant. This order was set aside by the appellate court and custody of DK was awarded to the respondent. The applicant relied on this and the other grounds enumerated in the draft memorandum of appeal in submitting that the appeal is arguable. To buttress this submission, the applicant made reference to the case of *EAO v SON* [2014] eKLR.
 8. On the nugatory aspect, the applicant submitted that DK has been in her actual custody and execution of the impugned judgment would mean that DK would be released to the custody of the respondent who works in Embu County. That it is in the best interest of the minors that the status quo obtaining prior to the impugned judgment be maintained. The applicant also prayed for costs.
 9. Mr. Kibet on the other hand was of the view that the appeal could not be rendered nugatory as there was a default position. Counsel reiterated that the specific orders the applicant seeks to stay are not in the interest of the minors. The orders relate to counselling, shared custody, social inquiry report by the Children Officer, payment of school fees and the custody of EM to the applicant in whose custody the minor has always been. Counsel was of the view that it is misplaced and discriminatory to remove one child from her siblings.
 10. The respondent reiterated his averments in the replying affidavit in submitting that the appeal was not arguable.
 11. Relying on the case of *NOB v AA* [2014] eKLR the respondent submitted that the appeal will not be rendered nugatory. The respondent emphasized that the best interest of the child militates on not granting an order for stay of execution. The respondent was of the view that DK is entitled to the same



and equal treatment as her siblings whom she has grown up together with. Citing the case of *PKM v SPM's Court Nairobi* [2022] KECA 467 (KLR) where the court held thus:

“We do not see how that would prejudice him or render the appeal nugatory. In addition, under article 53(2) of the *Constitution* “a child’s best interests are of paramount importance in every matter concerning a child.”

12. We have carefully considered the application, the grounds in support thereof, the affidavits, submissions by counsel, authorities cited and the law. We take cognizance of the fact that the jurisdiction of this court under Rule 5(2)(b) is original, independent and discretionary. However, we note that the discretion is to be exercised judiciously and with reason; not on impulse or pity.
13. Rule 5(2)(b) is a procedural innovation designed to enable the court to preserve the subject matter of an appeal where one has been filed or an intended appeal where the notice of appeal has been filed. In the case of *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others* [2013] eKLR this court stated *inter alia*:
 - i. In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 others v Nderitu & another* (1989) KLR 459.
 - ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
 - iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & another v Thornton & Turpin (1963) Ltd.* (1990) KLR 365.
 - iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No Nai 189 of 2001.
 - v. An applicant must satisfy the court on both of the twin principles.
 - vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
 - vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & another v Pioneer Holdings (A) Ltd & 2 others*, Civil Application No 124 of 2008.
 - viii. In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. *Damji Pragji (supra)*.
 - ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
 - x. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
 - xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence



the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.

14. It follows therefore that, the applicant has a duty to demonstrate that she has an arguable appeal, and upon satisfying that principle, she has the additional duty to demonstrate that the appeal, if successful would be rendered nugatory in the absence of an order of stay as demonstrated in the case of *Trust Bank Limited & another v Investech Bank Limited & 3 others* (*supra*).
15. In determining whether the appeal is arguable or not, this Court in the case of *Dennis Mogambi Mang'are v Attorney General & 3 others* [2012] eKLR held that:

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”
16. On whether the applicant has established an arguable appeal, we have considered the applicant’s annexed draft memorandum of appeal. Among the issues raised and emphasized by the applicant is that the trial court awarded the applicant custody of the minor, DK which order was set aside by the appellate court. The applicant seeks for the status quo obtaining prior to the High Court judgment to be maintained so that she can retain actual custody of DK pending the determination of the appeal. The respondent on the other hand is of the view that separating the minors is discriminatory since they have grown up together and it would be in the best interest of DK if the order granting her custody to the respondent is executed.
17. We find that the issues involving children are sensitive issues which need to be handled with utmost sensitivity to the minors’ best interests. It is on the strength of these sentiments that we find that these issues will be well canvassed and determined within an appeal rather than an application for stay. Therefore, the issues raised in the draft memorandum of appeal are in our considered view not frivolous and are deserving of the court’s consideration.
18. On whether the appeal will be rendered nugatory should the impugned judgment not be stayed, it is common ground that DK has been in actual custody of the applicant since June 2021 when the judgment of the trial court was delivered. Prior to that, DK and her three siblings were in the custody of the respondent and his wife, and all the minors went to the same school.
19. We find that execution of the High Court decree will revert the parties to the position they were in prior to the trial court judgment. This in our considered view will not render the appeal nugatory. Should the appeal succeed, the court would have no difficulty in reversing the situation on the ground. But in the meantime, it could be disastrous to the wellbeing of the minors if the court were to stay orders pertaining to counselling; shared custody; Social Inquiry Report by the Children Officer; and payment of school fees.
20. In the circumstances, although the applicant has demonstrated that the appeal is arguable, she has failed to establish that it will be rendered nugatory if the instant application is dismissed, culminating in the stay of execution. The applicant has therefore failed to demonstrate the existence of both limbs as required by Rule 5(2) (b) of this *Court’s Rules* and as was determined in the case of *Republic v Kenya Anti-Corruption Commission & 2 others* [2009] KLR 31.
21. Accordingly, the application dated February 9, 2023 is hereby dismissed. Costs shall abide the outcome of the intended appeal. We direct that the said appeal be fixed for hearing on a priority basis.

DATED AND DELIVERED AT NAKURU THIS 6TH DAY OF OCTOBER, 2023.

F. OCHIENG



.....
JUDGE OF APPEAL

L. ACHODE

.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

