



**JNW v MWN (Civil Appeal E184 of 2024)
[2025] KEHC 2232 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2232 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E184 OF 2024
HI ONG'UDI, J
FEBRUARY 27, 2025**

BETWEEN

JNW APPLICANT

AND

MWN RESPONDENT

RULING

1. This ruling is in respect of the notice of motion dated 26th September, 2024 where the appellant/ applicant seeks the following orders:
 - i. Spent
 - ii. Spent
 - iii. That there be stay of execution of the ruling delivered by Honourable Priscah Wamucii Nyota on 6th August, 2024 and the consequent orders thereon pending the hearing and determination of the appeal herein.
 - iv. That the costs of this Application be in the cause.
2. The application is premised on the grounds on its face plus the applicant’s supporting affidavit sworn on 26th September, 2024. The main reason why he seeks stay of execution of the Ruling delivered on 6th August, 2024 is that implementation of the said ruling will leave him without any finances, yet he has two households to cater for.
3. He has annexed a copy of his payslip (JNW1) showing he has a net pay of Ksh 100,000/64 per month and is expected to spend an average of Ksh 74,500/= monthly on the minors needs. That the school the minors go to is too expensive.



4. The respondent filed a replying affidavit opposing the application. She averred that the pay slip presented to court by the applicant was not a genuine one since the applicant earns around Ksh 250,000/- and not Ksh 100,000/- per month. Secondly that taking the minors to the CBC curriculum will be very detrimental to them as they will be taken classes back to enable them learn the CBC to be able to sit for their exams.
5. The application was canvassed by way of written submissions.

Applicant's submissions

6. These were filed by Kibatia & Company advocates and are dated 21st November, 2024. Counsel on the issue as to whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules submitted in the affirmative. Relying on the case of James Wangalwa & another V Agnes Naliaka Cheseto [2012] eKLR he submitted that the applicant stands to suffer irreparable socio economic harm if the ruling complained of continues to stand. The reason being that his net salary cannot sustain the payments he has to make. He has tabulated all the payments he has to make and this comes to an average of Ksh 74,500/-. That he fears the threats of being sent to civil jail. He urges the court to grant him the prayer for stay of execution.

Respondent's submissions

7. These were filed by Githui & Co. advocates and are dated 10th December, 2024. Counsel gave a summary of the facts before the Magistrate's Children's Court in Case No. E212 of 2023. He then raised three (3) issues for determination. On whether there is a competent appeal before this court on which an order of stay of execution may issue, counsel answered in the negative. He argues that the appeal is against an order to which section 75 of the *Civil Procedure Act* applies. Further that the applicant ought to have sought leave to file this Appeal but he did not. Reference was made to the case of A B P & another v T Z S [2019] eKLR. On whether the applicant had demonstrated substantial loss if the orders are not granted counsel again answered in the negative citing the case of James Wangaliwa & another V Agnes Naliaka Cheseto [2012] eKLR. He contended that an order for the applicant to pay half of the fees and school related expenses cannot occasion substantial loss.
8. Lastly counsel submitted that the decree in this case involves money. Stay may only be granted upon deposit of the decretal sum either in court or in an interest earning account. This would include arrears of school fees and school related expenses and further amounts sufficient for three (3) academic terms.

Analysis and determination

9. I have carefully considered the application, both affidavits, both submissions and cited case law and the law and I find the main issue to be whether this application is properly before this court.
10. First and foremost, the Appeal herein is challenging the Ruling allegedly delivered by Hon. Priscah Nyotah Magistrate in Nakuru Chief Magistrate's Children Civil Case No. E212 of 2023. What has been annexed to this Appeal is a Judgment delivered on 6th February, 2024. This Judgment has nothing to do with the alleged Ruling being challenged by the appellant/ applicant.
11. Further more no Ruling or certified copy of the Ruling allegedly delivered on 6th August, 2024 has been annexed to this Appeal, or Application.
12. To satisfy myself of the position, I called for the original lower court file, and have taken note of what transpired before the court on 5th August, 2024 and the directions/orders issued by the court. This was not a ruling as no application had been made, before that court. The position being what it is



the appellant/applicant should have complied with the provisions of section 75 of the Civil Procedure Act and sought leave of the Magistrate's court or High Court before filing the appeal to challenge the directions/orders. Section 75 of the Civil Procedure Act provides as follows:

Section 75(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted.

- a. An order superseding an arbitration where the award has not been completed within the period allowed by the court.
- b. An order on an award stated in the form of a special case.
- c. An order modifying or correcting an award.
- d. An order staying or refusing to stay a suit where there is an agreement to refer to arbitration.
- e. An order filing or refusing to file an award in an arbitration without the intervention of the court.
- f. An order under section 64
- g. An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree.
- h. Any order made under rules from which an appeal is expressly allowed by rules.

Also see the following cases

- i. ABP & another VTZS [2019] eKLR (supra)
 - ii. Peter Nyaga Murage V Joseph Mutunga Nairobi Court of Appeal Case No. 86 of 2015.
13. The orders that were issued by the Children's Court Magistrate Hon. Nyota on 5th August, 2024 are outside the ambit of the orders which have a right of appeal as outlined in section 75 above. The applicant ought to have sought leave before filing the appeal herein. This appeal is the basis on which the application dated 26th September, 2024 lies. The above being the position I find both the appeal and application to be incompetent and I strike out both of them with no order as to costs.
14. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 27TH DAY OF FEBRUARY, 2025 IN OPEN COURT AT NAKURU

H. I. ONG'UDI

JUDGE

