



REPUBLIC OF KENYA



KENYA LAW
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NE v RC (Civil Appeal E013 of 2025) [2025] KEHC 3845 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3845 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO**

CIVIL APPEAL E013 OF 2025

JK SERGON, J

MARCH 27, 2025

BETWEEN

NE APPELLANT

AND

RC RESPONDENT

*(Being an appeal from the judgment/decree of the Honourable F.M NYAKUNDI
(PM) delivered on 21/01/2025 in Kericho CMCC No. E023 of 2024)*

RULING

(Being an appeal from the judgment/decree of the Honourable F.M Nyakundi (PM) delivered on 21/01/2025 in Kericho CMCC No. E023 of 2024)

RULING

1. The application coming up for hearing is a notice of motion dated 20th February, 2025 seeking the following orders;
 - (i) Spent.
 - (ii) Spent.
 - (iii) Spent.
 - (iv) Spent.
 - (v) That pending hearing and determination of the appeal, this Honourable Court be and is hereby pleased to issue an order of stay execution of the judgment dated 21/1/2025 in so far as the order compelling the Appellant to



remit a sum of Kshs. 30,000/= every month to the Respondent as upkeep and maintenance is concerned.

- (vi) That pending the hearing and determination of the appeal, the Honourable Court be and is hereby pleased to order that the Appellant does pay a sum of Kshs. 8,000/= every 10th day of the month as maintenance and upkeep of the Minors.
- (vi) That pending the hearing and determination of the appeal, the Honourable Court be and is hereby pleased to grant the Appellant/Applicant unlimited access to the minors.
- (viii) That costs of the application be provided for.

2. The Application is supported by grounds on the face of it and the supporting affidavit of Ngenoh Evans the Appellant/ Applicant herein.
3. He avers that vide a plaint dated 26.4.2024, he sued the Respondent herein for custody of the 4 Issues of marriage and that the reason for filing the suit at the subordinate court was because the Respondent forcefully and without notice took the custody of the minors from him. He further avers that vide a judgment delivered on 21.1.2025, the Hon. F.M Nyakundi (PM) ordered, among other directions/ orders, that he pay a sum of Kshs. 30,000/= every month towards maintenance and upkeep of the minors. He further avers that the learned magistrate also gave actual custody of the 4 issues to the Respondent, but granted him access during the weekends and holidays. He avers that he was aggrieved by the said decision and that he filed an appeal to this court.
4. He avers that the order requiring him to pay a sum of Kshs. 30,000/= is punitive. The said amount is excessive noting that the 1st and the 2nd Issues are in Boarding school.
5. He avers that he earns a net salary of Kshs. 100,000/=. Out of the said amount, he is supposed to pay school fees, cater for school expenses for the 4 minors and 2 other children who are schooling at Cheborgei Boys High School and Tengecha Boys School and to cater for accommodation for himself and subsistence with the said amount.
6. He avers that he is also servicing a loan with Absa Bank of Kshs. 2,022,948.45 as at 11.11.2024. He avers that he has other children that he is also providing for and he is also servicing loans which he took to facilitate the payment of school fees for the minors
7. He avers that he is likely to suffer substantial loss if the order is executed noting that in his judgment, the learned magistrate held that if he fails to pay the said amount, then “the court will have no option but to give an order to have the maintenance deducted from his employer.”
8. He avers that he is ready and willing to pay a reasonable amount as upkeep and maintenance of the minors, and proposed to pay a sum of Kshs. 8,000/= pending the hearing and determination of the application and appeal.
9. He avers that whereas the court should and must always consider the best interest of a minor, he believes that an order of payment of Kshs. 30,000/= is not considerate and reasonable. He avers that he is ready to provide for the minors as he was the one who filed the suit at the subordinate court for custody and maintenance.
10. He avers that he was advised by his advocates that the principles upon which the court may stay the execution of orders appealed from are: (a) The Applicant must approach the court timeously. (b) The Applicant must demonstrate the likelihood that he will suffer substantial loss if the order is denied and



- (c) The Applicant must also furnish security for the performance of the decree in the event the appeal does not succeed.
11. He avers that he approached this court timeously and has also demonstrated that he is likely to suffer substantial loss and is ready and willing to provide any security for the performance of the decree.
 12. He avers that the application has been brought without undue delay, given that the judgement was delivered on 21.1.2025. He further avers that he has an arguable appeal with high probability of success as can be seen from the Memorandum of Appeal.
 13. He avers that the balance of convenience clearly weighs in his favour owing to the nature of the orders issued against him.
 14. He avers that he is willing and ready to deposit security and or abide with any conditions that the Honourable Court may impose pursuant.
 15. He avers that the Respondent has shown all intentions and signs of being ready to execute the judgment of the subordinate court.
 16. He avers that to safeguard the substratum of the appeal, there is a need to stay the order requiring him to pay a sum of Kshs. 30,000/= every month towards the maintenance and upkeep of the minors but he is, however, willing and ready to pay a sum of Kshs. 8,000/= every month.
 17. The matter came up for inter partes hearing, the learned counsel for the applicant stated he served the application and served an affidavit of service. There was no response to the instant application and there was no representation on the part of the respondent.
 18. Having considered the pleading by the parties the issue (s) for determination is whether to grant a stay execution of the judgment/decree of the Honourable F.M Nyakundi (PM) delivered on 21/01/2025 in Kericho CMCC No E023 of 2024.
 20. On the issue as to whether to grant a stay of execution, the judgment was delivered on 21.01.2025 while the present application was filed on 20.02.2025. An application for stay invokes the discretionary powers of this court under Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010 that empowers the court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under Order 42, Rule 6 (2) which states as follows: “No order for stay of execution shall be made under sub rule (1) unless – a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.” This court notes that the instant application was filed timeously, and therefore not characterised by inordinate delay. The applicant contended that he approached this court timeously and has also demonstrated that he is likely to suffer substantial loss and that he is ready and willing to provide any security for the performance of the decree. There was no response on behalf of the respondent. This court having considered the pleadings by the applicant on the issue of stay and the circumstances of this case, it is the finding of this court that the applicant is entitled to a conditional stay of execution as he ventilates his intended appeal.
 21. This being a childrens’ custody and maintenance matter, this court is enjoined to look at the best interest of the minors herein. Whereas, the applicant has met the prerequisites for grant of stay orders, the principles for granting stay of execution in children matters was well settled in the case of *Bhutt v. Bhutt Mombasa HCCC No. 8 of 2014 (O.S.)* where the Court stated as follows: - “In determining an application for stay of execution in cases involving children, the general principles for the grant of



stay of execution Order 42 Rule 6 of the Civil Procedure Rules, must be complemented by overriding consideration of the best interest of the child in accordance with Article 53 (2) of *the Constitution*.” This court has taken cognisance of the applicants prayer of unlimited access to the minors pending hearing and determination of the appeal, however, it is the view of this court that the issue of access and legal custody is one of the grounds of appeal, therefore, the same ought to be canvassed during the hearing of the substantive appeal, this court will therefore refrain from giving orders on the issue of access and custody of the minors at this juncture.

22. Therefore, the notice of motion dated 20th February, 2025 is hereby allowed giving rise to issuance of the following orders:-

- (i) An order for stay of the judgment/decree in Kericho CMCC No E023 of 2024 is granted pending the hearing and determination of the appeal.
- (ii) The applicant is directed to pay a sum of Kshs. 20,000/= on or before the 10th day of every succeeding month as maintenance and upkeep of the minors pending hearing and determination of the appeal. In default of complying with order (iii) the orders staying execution shall lapse and the respondent shall be at liberty to execute.
- (iv) Costs shall abide in the outcome of the appeal.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 27TH DAY F MARCH, 2025.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Lang’at for the appellant

No appearance for the Respondent

