DO v VEA (Civil Appeal E029 of 2024) [2025] KEHC 3630 (KLR) (24 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3630 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CIVIL APPEAL E029 OF 2024

WM MUSYOKA, J

MARCH 24, 2025

BETWEEN

DO ..... APPELLANT

AND

VEA ..... RESPONDENT

(Being an appeal from the judgement of Hon. EC Serem, Resident Magistrate, RM, in Busia CMC Children Case No. E004 of 2024, delivered on 19th June 2024)

RULING

1. I am called upon to determine an application, dated 19th December 2024. It seeks stay of execution of a judgement, delivered in Busia CMC Children Case No. E004 of 2024, on 19th June 2024, pending the hearing and determination of the appeal herein, among other orders.

2. The affidavit, sworn in support, is by DO, the appellant, on 19th December 2024. He avers that the judgement awarded the custody of the children, the subject of the proceedings, to the respondent, and ordered him to pay to her Kshs. 27,500.00 per month for upkeep. He avers that his net salary per month currently stands at Kshs. 49,695.00, and that he has other children to care for. He states that the children have declined to stay with the respondent, hence he is yet to hand them over to her.

3. I have not come across a reaction, to the application, by the respondent.

4. Directions were made, on 14th January 2025, for canvassing of the application by way of written submissions. Both sides have complied. I have read through the written submissions, and I have noted the arguments made.

5. Grant of stay is premised on Order 42 rule 6 of the Civil Procedure Rules, which emphasises substantial loss and furnishing of security. However, those provisions were tailored for ordinary suits, and not the suits contemplated under the *Children Act*, Cap. 141, Laws of Kenya. There is a right of appeal, and what I need to consider are the terms, which are just, upon which stay orders can be granted.

6. This is a children's matter, and the best interests of the child principle must be adhered to.

7. I note, from the filings here at the High Court, that the orders, that the trial court made, on 19th June 2024, have not been complied with. Custody of the children was awarded to the respondent, and, therefore, that required the appellant to handover the minors to the respondent. That has not happened, as the appellant claims that the children have declined to move in with the respondent. It would also mean that he has not paid the moneys, ordered by the court as monthly maintenance, given that the respondent does not have the children.

8. I note that the order was made on 19th June 2024, and 9 months down the line, there has been no compliance. I am alive to the fact that I did grant temporary orders on 31st December 2024, however, that was in ignorance of the fact that the children were still with the appellant, and that decision was based on the presumption that the appeal was largely on the quantum of maintenance. As at the date that order was made, on 31st December 2024, there had been no compliance, for over 6 months.

9. If it is true that the children had refused to move in with the respondent, the best course of action should have been to move the trial court, to make orders for facilitating compliance or to make alternative orders, to vary the earlier ones, instead of behaving as if the orders of 19th June 2024 did not exist.

10. Stay of execution of a court decision, whether a decree or order, is an equitable remedy. It is discretionary. One of the factors that would affect exercise of discretion is conduct of the parties. Lack of appetite, for compliance with court orders, would be a thing to note.

11. Court orders are not propositions or suggestions. They are made for the purpose of them being obeyed or complied with. The impugned orders were made for welfare of the children. Even as the appellant seeks to challenge the said orders on appeal, he should make a conscious effort to obey them, even if he does not agree with them. It would defeat or weaken the concept and practice of administration of justice if court orders would be made, and then they are disregarded with impunity.

12. A party who approaches a court of equity with unclean hands should not expect equity to be done to him. Let there be compliance with the orders of the trial court, first, even as the appeal against the orders is being prosecuted, for I note that the children in question are of tender years.

13. In view of what I have stated above, I shall, as I hereby do, dismiss the application, dated 19th December 2024. The temporary orders made on 31st December 2024 are hereby discharged. The original trial court records shall be returned to the trial court, for compliance with the orders of 19th June 2024. In the meantime, let the appellant file his record of appeal, in the next 21 days. This appeal matter shall be mentioned on 28th April 2025, for directions on disposal of the appeal. Orders accordingly.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 24TH DAY OF MARCH 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Okutta, instructed by Ouma-Okutta & Associates, Advocates for the appellant.

Mr. Juma, instructed by JV Juma & Company, Advocates for the respondent.