



AWW v IRW (Suing as Mother/Next Friend of TW Minor) (Civil Appeal E027 of 2024) [2025] KEHC 5070 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5070 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E027 OF 2024
TW OUYA, J
APRIL 30, 2025**

BETWEEN

AWW APPLICANT

AND

IRW RESPONDENT

SUING AS MOTHER/NEXT FRIEND OF TW MINOR

RULING

1. The applicant herein, AWW, approached this court vide a Notice of Motion dated the 16th of October, 2024, seeking orders that this court stays the proceedings and order issued by the Chief Magistrate court on the 12th of September, 2021, pending the hearing and determination of the appeal filed before this court. Prayers 1 and 2 of the Motion are now spent.
2. The records of this court reveal that the applicant had initially approached this court vide a Notice of Motion dated the 16th of September, 2024, seeking for orders that the application be certified urgent; and that this court issues an order staying the ruling of the Chief Magistrate’s court at Ruiru in Children case no. E037 of 2024.
3. In support of that application, the applicant had alleged that the Chief Magistrate’s court in Ruiru CMCC E037 of 2024, delivered a ruling in respect of a Notice of Motion dated the 7th of May, 2024, that had been filed by the respondent herein without her submissions. That by the said ruling, the learned trial magistrate had granted custody of the minor to the respondent, whereas the children report that had been filed at the lower court was favourable to allow the applicant to continue having custody of the child. The applicant also contended that child is in school and that she had paid school fees for the 3rd term.
4. The application dated the 16th of September, 2024, was opposed by the respondent herein, INW, vide a replying affidavit sworn on the 15th of October, 2024. In the affidavit, the respondent had deposed



that she was the biological mother of the minor whose custody was in dispute; that contrary to the applicant's assertions that the learned trial magistrate issued the custody order without considering her submissions, the trial court had granted the applicant sufficient time from 5th of August, 2024, to file their submissions but they failed to file the same within the stipulated time. As such, the failure by the applicant to file her submissions within the stipulated time cannot now be used to invalidate the trial court's ruling.

5. The respondent contended that the issue of the applicant paying the 3rd term school fees for the minor was irrelevant, as the trial court vide its ruling addressed this issue and directed that the minor should not be transferred from her school until the end of the term, which condition she is ready to comply with. She further contended that the report by the children's officer was neutral and impartial, and the trial court after considering the same made its ruling in the best interest of the child.
6. The court's records further reveal that the Notice of Motion dated the 16th of September, 2024, was placed before Hon.Lady Justice Dorah Chepkwony on the 19th of September, 2024, and the learned judge after considering the same, issued directions that the application be served upon the respondent and that the said application be heard inter-parties on the 16th of October, 2024. The records further show that when the application came up for hearing on the 16th of October, 2024, the same had been placed before the deputy registrar and Mr. Ojienda, learned counsel for the applicant made a request that the said application be referred to the honourable judge.
7. However, before the said application could be heard inter-parties, the applicant through her learned counsel filed a Notice of Motion dated the 16th of October, 2024. It is this application that is the subject of this court's ruling.
8. The application is anchored on the grounds premising the Motion, and in the supporting affidavit sworn on the 16th of October, 2024, by Mr. Seth Ojienda, learned counsel for the applicant. In a nutshell, Mr. Ojienda averred that the respondent had issued a Notice to show cause for the applicant to attend court on the 17th of October, 2024, for purposes of committal to civil jail; that the Notice to show cause which was coming up for hearing on the 17th of October, 2024 was pursuant to the order issued on the 12th of September, 2024, which order was final in nature and was the reason the applicant had filed an appeal before this court.
9. Mr. Ojienda contended that the applicant had filed a Notice of Motion dated the 16th of September, 2024, which was placed before the Deputy registrar Thika on the 16th of October, 2024; however, the deputy registrar did not have the jurisdiction hence issued directions for the applicant to file the present application for the same to be placed before the judge in Kiambu.
10. He further contended that the applicant stands to suffer great prejudice which will render the matter in the Chief Magistrate court and the appeal nugatory. The respondent did not file a response to the application dated 16th of October, 2024.
11. The application was canvassed by way of written submissions following the directions that had been issued by this court on the 18th of October, 2024. The applicant's submission dated the 31st of October, 2024, was filed on her behalf by her learned counsel Ojienda & Co. Advocates. Whereas those by the respondent dated the 4th of December, 2024, was filed on her behalf by her learned counsel Mwangi Dedan Chege Advocates.
12. The applicant in her submission contended that she intends to proceed with the matter and she will therefore suffer great prejudice if the orders sought are not granted, as her appeal will be rendered nugatory.



13. She submitted that the granting of an order for stay of proceedings is purely a matter of judicial discretion; and that the principles surrounding the granting of an order for stay of proceedings as discussed in the case of *William Kamunge & 2 others versus Muriuki Mbithi*, included such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, the scarcity and optimum utilization of judicial time, and whether the application has been brought expeditiously.
14. The applicant further submitted that her application was filed in a timely and expeditious manner.
15. On the other hand, the respondent in her written submissions contended that before the applicant can be granted the orders sought in her application, she must demonstrate that she has met the legal criteria set out under Order 42 rules 6 of the Civil Procedure rules; that substantial loss may result unless the order is made and that it is in the best interest of the child that the stay is granted.
16. The respondent submitted that substantial loss referred to loss that cannot be adequately compensated by way of damages; and that the applicant has not demonstrated by way of specific and tangible evidence that she or the child will suffer if the custody order by the trial court is enforced. She further submitted that the applicant has not provided any evidence to demonstrate that she would be unable to recover the child or any other harm they might suffer if the trial court's order is enforced, as such, she has failed to meet the required threshold for substantial loss.
17. It was the respondent's submission that Article 53 (2) of *the Constitution* and Section 4(2) of the *Children Act, 2022*, emphasizes that the best interest of the child must be the guiding principle in any decisions affecting the child, particularly in custody matters; and that in this case, the child's stability and welfare requires that the custody order be enforced without delay, as any further delay would result in unnecessary harm to the child who has been denied access to her biological mother and is being held by the appellant without lawful authority.
18. I have carefully considered the application, the affidavits on record and the written submissions filed on behalf of both parties, having done so, I find that the key issue arising for determination is whether the applicant is deserving of the orders sought.
19. Before delving into the issue for determination before this court, I would like to state that this being a matter concerning a child, this court is bound by the provisions of Article 53 (2) of *the Constitution* and Section 8 of the *Children Act, 2022*, which provides that in all matters concerning children, the best interest of the child shall be of primary consideration.
20. Turning now to the prayer for stay of proceedings at the trial court pending the hearing and determination of the appeal filed before this court; it is trite that an order for stay of proceedings is one that is granted at the discretion of the court in the interest of justice. The power of the court to stay proceedings should be exercised sparingly and in exceptional circumstances considering that an order of stay of proceedings has the effect of interrupting a party's right to continue with the trial of his or her case on merit.
21. The Court of Appeal in *Lalita Devi Lalchand Galot versus Mohan Galot* [2020] KECA 704 (KLR); enumerated the factors that should guide the courts when faced with an application of this nature as follows:

“In Halsbury's laws of England, 4th Edition, Vol. 37 page 330 and 332. It is stated as follows:
The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to



continue.” This is a power which it has been emphasized, ought to be exercised sparingly, and only in exceptional cases. It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The application for a stay on this ground must show not merely that the plaintiff might not or probably would not succeed but that he could not possibly succeed on the basis of the pleadings and the facts of the case.” Ringera, J as he then was in the case of *Global Tours & Travels Limited. Nairobi HC winding up Cause No. 43 of 2000* expressed himself as follows: “As I understand the law whether or not to grant a stay of proceedings or further proceedings of a decree or order appealed is a matter of judicial discretion to be exercised in the interest of justice ... The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expedition of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

22. Similarly, the high court in the persuasive case of *Lucy Waithera Kimanga & 2 Others versus John Waiganjo Gichuri (2015) eKLR*; when outlining the factors that should be considered by the courts in an application for stay of proceedings expressed itself as follows:

“The legal considerations in an application for stay of proceedings have been enunciated in a host of judicial decisions which I need not multiply. Except I can cite some few, say, *Daniel Walter Rasugu Nbi Hccc No 15 of 2006*; *Global Tours & Travel Limited; Nairobi HC Winding Up Cause No.43 of 2000*; and *Kenya Power & Lighting Company Limited vs. Esther Wanjiru Wokabi [2014] eKLR*. The guiding legal principles gathered from these cases may be summarized as follows:

- a). The decision whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.
- b). The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted.
- c). In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order.
- d). In considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

23. Having stated that, I have gone through the grounds anchoring the application dated the 6th of October, 2024, together with the affidavit in support of the said application, and in my considered view, the applicant has not given this court any viable explanation as to why she wants the proceedings of the lower court stayed.



24. I have also perused the records of this court and I have noted that the proceedings of the trial court were not availed before this court for the court to ascertain the circumstances in which the trial court issued the orders dated the 12th of September, 2024.
25. The ruling which resulted in the said order being made was also not availed before this court, for the court to fully understand the basis that formed the trial court's decision to issue the said interim orders.
26. Given that the proceedings of the trial court were not availed, this court has also not been able to ascertain the circumstances that led the trial court to issue the orders dated the 30th of September, 2024, summoning the applicant to appear before the civil court to show cause why she should not be committed to civil jail for contempt of court.
27. Furthermore, I have also noted that contrary to the assertions made by the applicant that the orders by the trial court dated the 12th of September, 2024, were final, the same were issued on an interim basis pending the final hearing and determination of the main suit; as such, the trial court could still vary its earlier orders at the end of the main suit if it comes to the conclusion that it is in the best interest of the child to do so.
28. In any case, I am of the view that the appeal shall not be rendered nugatory should the proceedings of the lower court continues, considering that should the applicant be successful in this appeal she will have the custody of the child returned to her.
29. Article 50 of *the Constitution* makes it clear that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Article 159(2)(b) further mandates this court to ensure that justice is not delayed.
30. Considering that this is a matter that involves the welfare of a child, I am of the considered view that the hearing of the main suit at the trial court should not be delayed, as the same is likely to be prejudicial to the welfare of the child.
31. Based on the foregoing, I see no need to stay the proceedings of the trial court considering also that the applicant has not demonstrated the prejudice that she is likely to suffer should the proceedings at the trial court continue.
32. Turning now to the issue of stay of execution of the orders by the trial court dated the 12th of September, 2024, it is trite that in determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution provided for under Order 42 rule 6 of the Civil Procedure Rules, must be complemented by an overriding consideration of the best interest of the child in accordance with Article 53(2) of *the Constitution*.
33. This position was reiterated by the court in the case of *Bhutt v Bhutt* HCCC No 8 of 2014, 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 the overriding consideration of the best interest of the child in accordance with Article 53(2) of *the Constitution*."
34. Additionally, the court in *PNC versus NMC* [2021] KEHC 6486 (KLR); expressed itself as follows regarding this issue: "Beyond the requirements of Order 42, this being a matter concerning children, the Court is enjoined by *the Constitution* of Kenya 2010 and of the *Children Act*, to consider the best interests of the Children. *The Constitution* of Kenya 2010 provides at Article 53(2) that: "A child's best interests are of paramount importance in every matter concerning the child. The *Children*



Act elaborates further at Section 4(3) that: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.....The case before Court involves the custody of a minor rather than a money decree. Reference to substantial loss must be quantified from the point of view of the affected child, who is subject of the orders being appealed against and is the one likely to suffer.”

35. It is clear from the above case laws that in an application for stay of execution in respect to children matters, other than considering the factors set out in Order 42 rule 6 (2) of the Civil Procedure rules, the court also has to consider the best interest of the child. It must be demonstrated that the minor is likely to suffer if stay orders are not granted.
36. Having gone through the application and supporting affidavit, I have not found any reason as to why the respondent, who being the biological mother of the child, should be denied the custody of her child. Aside from stating that the applicant has lived with the minor for a period of 6 years, no other reason has been advanced as to why, the respondent being the biological mother of the child should be denied the custody of her child.
37. Furthermore, the relationship between the minor and the applicant has not been disclosed to this court; and the applicant has not demonstrated why she should be given priority for the custody of the child instead of her biological mother.
38. Section 11 (1) of the Children Act makes it clear that every child has the right to parental care, Section 11 (2) further makes it clear that every child has the right to live with his or her parents except as otherwise provided by the Act. Given the above, and considering also that no evidence has been adduced to demonstrate that the respondent is not fit to have custody of the minor, I see no need to interfere with the order of the trial court.
39. Flowing from the foregoing, the application dated the 16th of October, 2024, lacks in merit and is hereby dismissed with costs to the respondent. I see no need to interfere with the orders issued by the trial court.

Determination

40. It is hereby ordered that:
 - i. The applicant shall immediately return the minor to the respondent;
 - ii. Should the applicant be interested in pursuing the appeal filed before this court, a record of appeal should be filed within a period of thirty (30) days from the date of this ruling.
 - iii. Matter to be mentioned before the Deputy registrar after 30 days from the date hereof to confirm compliance.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30th DAY OF APRIL, 2025

HON. T. W. OUYA

JUDGE

For Appellant/Applicant..... Ojienda

For Respondent.....Chege

Court Assistant...Doreen

