



**BI v SKM (Family Miscellaneous Application E036 of 2025)
[2025] KEHC 5356 (KLR) (Family) (28 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5356 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

FAMILY MISCELLANEOUS APPLICATION E036 OF 2025

CJ KENDAGOR, J

APRIL 28, 2025

IN THE MATTER OF A.I.I. (MINOR)

BETWEEN

BI APPLICANT

AND

SKM RESPONDENT

RULING

1. This Ruling is on the Notice of Motion Application dated 28th January, 2025 filed by the Applicant. The Application is opposed.
2. The Applicant and the Respondent are the biological parents of the minor (A.I.I). The minor attends K.S. [particulars withheld] for her education. In 2024, a dispute arose concerning the minor’s maintenance, her education, and education related expenses. The Respondent sued the Applicant at the lower Court seeking various orders against the Applicant.
3. Before the matter could be determined, the Applicant brought an application where he asked the Court to issue a temporary restraining order prohibiting the minor from attending K. School. He also sought an order that the minor should only attend a school agreed upon by both parties. He argued that the minor’s continued education at K. School was not feasible to both parents due to his financial inability to afford the school.
4. The Court dismissed the Applicant’s application for lack of merit in a ruling delivered on 23rd January, 2025. It held that the minor would continue schooling at the current school (K. School) pending the full hearing of the case. It also directed that the Applicant would continue payment of school fees as directed by the Court.



5. The Applicant was dissatisfied with the decision of the lower Court and has presented a draft Memorandum of Appeal dated 29th January, 2025. He listed the following Grounds of Appeal;
 1. The Honourable Learned Trial Magistrate erred in fact and in Law in failing to consider any of the compelling evidence adduced by the Appellant at the trial Court to the effect that the Appellant's job position, the income changed and he could not therefore pay the school fees which was doubled at K. School.
 2. The Honourable Learned Trial Magistrate erred in law in holding that the Child shall remain schooling in K. School which the appellant can no longer afford to pay its fees from his earnings, yet there are schools offering the same academic standards where the child can learn but whose fees are affordable.
 3. The Honourable Learned Trial Magistrate erred in law by disregarding and failing to take into account the established legal principle that, where a party cannot afford the fees for a minor, they are permitted to change schools and for the minor to live within the means of the parents.
 4. The Honourable Learned Trial Magistrate so misdirected himself on matters of both Law and fact as to occasion a miscarriage of justice against the Appellant.
6. He asked the Court to allow the appeal and make an order to the effect that that his application dated 7th January, 2025 be allowed in terms of prayer 2. He also wants the Court to permit him to transfer the child to a more affordable school at the beginning of the 2nd term and for all future school terms. Lastly, he prayed that, if the Respondent insists on retaining the Child at K. School, each party be ordered to pay half of the school fees for the Child at K. School.
7. Alongside this appeal, the Applicant approached this Court through a brought a Notice of Motion dated 28th January, 2025 in which he sought the following orders;
 1. Spent.
 2. There be granted an order of stay of further proceedings in Children Case number MCCHCC/E1759/2024 at the Chief Magistrate's Court at Nairobi Children's Court, pending the hearing and determination of an appeal against the Ruling and order of the Chief Magistrate's Court at Nairobi in the matter, the Learned Hon. Mr. B.M Ochoi, delivered on 23rd day of January, 2025 in Children Case number MCCHCC/E1759/2024.
 3. The costs of this Application be provided for.
8. In the application, the Applicant argued that his intended appeal is arguable and unless an order of stay of further proceedings in Children Case Number MCCHCC/E1759/2024 at the Chief Magistrate's Court at Nairobi Children's Court is granted, the successful appeal will be rendered nugatory. He argued that he has partially complied with the Court order by paying school fees of Kshs.69,000/=. Furthermore, the Applicant is willing to continue paying school fees at the rate of Kshs.106,000 per term, as stipulated by the Court in the Court's ruling, until the appeal is heard and determined.
9. The application was supported by an affidavit dated 28th January, 2025 sworn by the Applicant. He stated that he is unable to sustain the minor at K. School. He stated that in addition to the minor's school fees, there is an additional monthly expenditure of Kshs.50,000/= towards the minor while at K. School, which includes Kshs.30,000/= for occupational therapy and Kshs.20,000/= for a shadow teacher. He stated that these expenses would be significantly reduced if the child were enrolled or transferred to an alternative school with comparable academic standards. He stated that his job



position and income changed and he cannot therefore pay the school fees which were doubled at K. School.

10. The Respondent filed a Relying Affidavit dated 7th March, 2025, whose contents I have carefully considered. The Applicant subsequently filed a Supplementary affidavit dated 20th March, 2025. The application was canvassed by way of written submissions.

Applicant's Written Submissions

11. The Applicant submitted that the application should be allowed and the stay of proceedings should be granted. He argued that his appeal is arguable and if the stay of proceedings is not granted, the appeal will be rendered nugatory. He argued that he has met the conditions set in the law since this is a matter where no security would be applicable. He also argued that if the stay of proceedings is not granted, there will be occasioned a grave miscarriage of justice and he will suffer irreparable loss and damage. He argued that the child will not suffer as a result of the stay of proceedings because he is willing to continue paying the school fees until the appeal is heard and determined.

Respondent's Written Submissions

12. The Respondent submitted that the application for stay of proceedings should not be granted. She argued that the Applicant has not met the prerequisite for the grant of a stay of proceedings pending appeal. She argued that in adjudicating matters concerning children, including an application for a stay of proceedings as in the present case, the paramount consideration is the best interests of the child. She argued that the application should not be granted because the Applicant has not demonstrated what substantial loss he stands to incur if the order for stay of proceedings is not granted. She argued that it was evident that the minor was the sole party at risk of suffering substantial loss in this matter.
13. She submitted that the present application seeks to deprive the minor access to justice as staying the proceedings before the lower Court would enable the Applicant to persist in flouting existing orders with impunity. She argued that an order for stay would effectively leave the minor without recourse should the Applicant continue to engage in contemptuous conduct.

Issues for Determination

14. I have read and carefully considered the grounds of the motion, the various affidavits, and submissions filed by the respective parties. I opine that the issue for determination is whether the proceedings of the trial Court in Nairobi Chief Magistrate's Court Children Case Number MCCHCC/E1759/2024 should be stayed pending the hearing of the appeal herein.
15. The Court in *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000* set out the considerations to be applied in an application for stay of proceedings. It held as follows;

“As I understand the law, 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 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 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”

16. Similarly, the Court in *G M M v K M M, N M M and N M M* (suing through mother and next Friend D M N [2017] eKLR, faced the same question and addressed itself in the following terms;

“The courts discretion in deciding whether or not to grant stay of proceedings is thus to be guided by the main principle of the interest of justice, as determined by three main factors;

- a) Whether the applicant has an arguable appeal.
- b) Whether the application was filed expeditiously, and
- c) The need for expeditious disposal of the cases and optimum utilization of judicial time.”

17. The Court in *Kenya Wildlife Service v James Mutembei* [2019] eKLR also relooked at the question about the threshold for granting stay of proceedings. The Court held that the test for stay of proceeding is high and stringent. It held as follows;

“Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent.”

18. Lastly, in *F K M v N K M* [2018] eKLR, the Court discussed the issue of stay of proceedings and held as follows;

“10. The Appellant/Applicant has prayed for a stay of proceedings in the lower Court. The law does not provide for application for stay of proceedings. However Order 42 rule 6 (1) does state that no appeal or second appeal shall operate as a stay of execution or proceedings. The learned authors of Halsbury's Laws of England, 4th Edn, Vol 37 pages 330-332 while discussing the court's general practice with regard to stay of proceedings stated:

“The stay of proceedings is a serious, grave and fundamental interference 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 reasonable doubt should not be allowed to continue.”

19. Based on the above authorities, I have examined the facts and evidence before me to determine whether the stay of proceedings pending appeal should be granted. I have seen the ruling of the lower Court dated 23rd January, 2025 and the Grounds of Appeal. I am satisfied that the Appeal is arguable and was filed expeditiously.

20. I have also considered the need for expeditious disposal of the case. The *Children Act* 2022 provides general principles with regard to proceedings in Children's Court. The Act provides that any delay in



determining the matter in the Children’s Court is likely to be prejudicial to the welfare of the child. Section 95 of the *Children Act* 2022 provides as follows;

“(3) In any proceedings in which an issue arises as to the upbringing of a child, the Court shall have regard to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child.”

21. In my view, the Applicant has not tendered any evidence or grounds to show this Court that the proceedings in Nairobi Chief Magistrate’s Court Children Case MCCCHCC/E1759/2024 beyond reasonable doubt should not be allowed to continue. I noted that the Applicant did not seek a stay of execution of the ruling in question, and he stated that he is willing to continue paying the school fees until the appeal is heard and determined. This notwithstanding, in my view, a stay of proceedings will cause delay in the determination of this matter, which is not in the best interest of the subject minor. The issues pending before the lower Court are more than just the school fees issue. I accordingly decline to stay proceedings in the lower Court.
22. The Search record shows that the Appellant lodged the Appeal in Family Appeal No. E020 of 2025, which is also before this Court. The Court will hear and determine the appeal lodged on a priority basis.

Disposition

23. These are the final orders of the Court.
 - a. The Application is hereby dismissed with no order as to costs.
 - b. The Applicant shall file the Record of Appeal within 30 days of this Ruling if the same has not been filed. The hearing date is to be fixed in the Appeal file.
 - c. The Miscellaneous Application file is closed.
24. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 28TH DAY OF APRIL, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Ms. Jaoko, Advocate for the Appellant

Ms. Juma, Advocate holding brief for Muturi Advocate for the Respondent

