



**DMN v WNK (Family Appeal E032 of 2025)
[2025] KEHC 11278 (KLR) (Family) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11278 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
FAMILY APPEAL E032 OF 2025
CJ KENDAGOR, J
JULY 29, 2025**

BETWEEN

DMN APPLICANT

AND

WNK RESPONDENT

JUDGMENT

1. The parties herein have a custody and maintenance case at the Children’s Court in Nairobi. The Children’s Court issued directions on 31st January, 2025, and the Appellant, being aggrieved, lodged the present appeal.
2. The directions issued ordered the applicant to comply with the ruling published on 3rd July, 2024. Additionally, the trial Court ordered that the Applicant pay the outstanding amount as specified in that ruling within seven days. The trial Court also ordered that if the payment is not made within this period, a warrant for the Applicant’s arrest will be issued.
3. Along with the appeal, the Applicant filed a notice of motion application dated 19th February 2025, which is the subject of this ruling. It seeks the following orders:
 - a. That that Application be certified urgent and service be dispensed of and it be heard ex-parte in the 1st instance due to its urgency;
 - b. That the honourable court be pleased to issue a temporary stay of execution of the warrant of arrest issued on 10th February, 2025 by Honourable Andrew Githinji pending the hearing and determination of this application;



- c. That the honourable court be pleased to issue a temporary stay of execution of the warrant of arrest issued on 10th February, 2025 by Honourable Andrew Githinji pending the hearing and determination of the appeal;
 - d. That the honourable court be pleased to issue a temporary stay of execution of the Ruling of Honourable Andrew Githinji delivered on 31st January, 2025 in Children Case No.831 of 2015 and all consequential orders thereto pending the hearing and determination of this application;
 - e. That the honourable court be pleased to issue a temporary stay of execution of the Ruling of Honourable Andrew Githinji delivered on 31st January, 2025 in Children Case No.831 of 2015 and all consequential orders thereto pending the hearing and determination of the appeal;
 - f. That this honourable court be pleased to grant leave to the applicant to liquidate the decretal amount in equal monthly instalments of Kenya Shillings 5,000/=;
 - g. That the honourable court do issue any further orders it deems fit in the interest of justice.
 - h. That costs of this application be in the cause.
4. The application is opposed. Both parties filed submissions.

Applicant's case

5. The Applicant faults the trial Court's orders regarding the payment of outstanding amounts, stating that he is unable to make the payments due to ill health and financial constraints.
6. He argues that the directions issued did not take his financial situation into account and that his potential arrest will only make it more difficult for him to provide for his child.
7. The Applicant contends that a stay of execution should be granted under the current circumstances. He argues that if the stay is not granted, he will suffer irreparable harm, and the appeal will be rendered nugatory.

Respondents' case

8. The Respondent argued that a stay of execution should not be granted.
9. The Respondent contends that the Applicant frequently makes unsubstantiated claims and has defaulted on payments for child maintenance, which led to the trial Court's orders.
10. The Respondent claims that the application submitted is intended to undermine the decisions of the Court and to avoid making the necessary maintenance payments, thereby prolonging the minor's suffering.

Analysis and determination

11. The parties' affidavits and submissions mostly focused on the merits of the appeal, but I do not want to comment on the same. That will be for the appeal determination. The issue for determination is whether the Applicant has met the threshold for the grant of stay of execution orders pending appeal.
12. Being an application for stay of execution, the relevant provision applicable to the application is Order 42 Rule 6 1 & 2 of the [Civil Procedure Rules](#). The Order provides 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.
13. Courts have set the conditions that an Applicant has to satisfy to get a stay of execution pending an appeal. In *Francis Muthusi Malombe & 7 others v Daniel Kaloki Malombe & 9 others* [2022] eKLR, the Court discussed the import of Order 42 Rule 6 (i) of the *Civil Procedure Rule*, and held as follows;
- “ 35. I have already cited the provisions of Order 42 Rule 6 (i) of the *Civil Procedure Rule* above. It is clear from the cited Rule that in the 1st instance, the court appealed from may for “sufficient cause” order stay of execution. Granted that a stay of execution is discretionary matter, this court must be satisfied that the following conditions are met by the applicant: -
- (i) He/she must show a good cause.
 - (ii) He/she must show that a substantial loss may result unless the stay is granted.
 - (iii) He must show that there is no unreasonable delay in filing the application for stay.
 - (iv) Such security as the court may order for due performance of such decree or order as may ultimately be binding on him.”
14. Courts have also created a special jurisprudence on stay of execution in children matters. The prevailing jurisprudence is that the threshold for granting a stay of execution in children matters differs slightly from the threshold applicable in ordinary disputes. The special rule is that Courts must exercise extreme caution in children matters before granting stay of execution orders. This was restated in *BRO v WJNW (Suing as Mother and next friend of DJO (Minor))* [2020] eKLR, where the Court held as follows;
38. . It is trite that in children matters, courts should exercise extreme caution before granting stay of execution orders. This is because issues of maintenance do affect the welfare and livelihood of a minor. To allow stay will imply stoppage of some sphere of life e.g a child will not eat, dress drink or have shelter. The orders sought against the minor’s mother have a direct negative effect to the welfare of the minor whose interest ranks first in priority to those of the parents.”
15. This special jurisprudence was recently advanced by the court in *Akello v Wamuri (Miscellaneous Civil Application E122 of 2022)* [2024] KEHC 3610 (KLR) (8 March 2024) (Ruling), where the court observed as follows;
- “ 26. While considering stay of execution in respect to children matters, beside the above, the Court has to consider the best interest of the child. The applicant is expected to demonstrate that the minors will suffer if a stay is not granted.
27. It is now trite that, in applications for stay in respect of decrees or orders made in matters involving children, the welfare of the children in question be given utmost consideration.”



16. This principle was also alluded to by the Court in *Bhutt v. Bhutt*, Mombasa HCCC NO. 8 of 2014 (O.S.) where the court observed 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 an overriding consideration of the best interest of the child in accordance with the injunction of Article 53(2) of the *Constitution*...”

17. Guided by the authorities mentioned above, I have reviewed the evidence to determine whether the threshold has been met and what is in the best interests of the minor in this case.

18. The Applicant did not annex the ruling that is said to have been the primary consideration for issuing the directions or orders that are the subject of this appeal. Without it, this Court cannot determine whether he has a good cause.

19. There is no doubt that the application was filed without delay, and that imminent arrest poses a threat to the Applicant’s liberty. But again, the orders of stay sought directly impact the welfare of the minor, whose interests take precedence over those of the parents.

20. The parties have had the children’s case in Court since 2015, and based on what has been presented in this application and the response by the respondent, there is an amount of Kshs.40,000/= monthly upkeep that the Applicant is required to pay, and he fell into arrears, which led to enforcement.

21. Execution represents a valid legal process, and for a party to seek a stay, it is imperative to present a compelling case- particularly in matters concerning children- demonstrating that granting the stay would not adversely affect the child’s well-being.

22. The Applicant openly acknowledges that he is in arrears and proposes a payment plan of Kshs. 5,000/= per month, a figure that falls significantly short when compared to the Respondent’s outlined needs. The child is stated to be suffering from epilepsy and ADHD, conditions that necessitate comprehensive medication therapy. Consequently, the Applicant’s proposed amount is not only unreasonable but also insufficient to serve as effective security in the context of the application for stay of execution.

23. Based on the circumstances of this case, I have concluded that it is not in the best interest of the minor to order a stay of execution or to allow payment of the decretal amount in the monthly instalments proposed by the Applicant. The most appropriate course of action is to expedite the hearing of the appeal to bring litigation to a close. A child custody case lingering in Court for ten years is certainly excessive, especially when a judgment has already been made. This prolonged process is having a noticeable impact on the parties, as evidenced by the distress expressed in their affidavits. The situation is particularly concerning for the child, whose needs cannot be postponed.

24. Disposition;

- i. The application dated 19th February 2025 is dismissed for lack of merit;
- ii. Costs of the application shall be in the cause;
- iii. The Record of Appeal shall be filed within 21 days; and
- iv. The matter shall be mentioned on 9th September 2025 before the Deputy Registrar to confirm filing.

25. It is so ordered.



**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS
ONLINE PLATFORM ON THIS 29TH DAY OF JULY, 2025.**

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Ms. Obunde Advocate for the Applicant

Ms. W - Respondent

