



CKM v SW (Appeal E049 of 2025) [2025] KEHC 11804 (KLR) (Family) (7 August 2025) (Ruling)

Neutral citation: [2025] KEHC 11804 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
APPEAL E049 OF 2025
H NAMISI, J
AUGUST 7, 2025**

BETWEEN

CKM APPELLANT

AND

SW RESPONDENT

RULING

1. The appeal herein arises from an Order made by the Children’s Court on 20 March 2025 in respect to 2 applications. In the first Application, the Appellant/Applicant herein sought the following orders:
 - i. Pending the hearing and determination of the main case or further orders of the Court, this Court to allow the transfer of the minors from their current school to another school to continue with their education;
 - ii. That costs of the Application be provided for.
2. The second application was filed by the Respondent herein, and sought the following orders, inter alia:
 - i. That there be an early inter partes hearing date for this application for orders that there be personal attendance of the Plaintiff herein for purposes of proceeding for prayer (3) hereof;
 - ii. That the court be pleased to order the plaintiff to be committed to civil jail for a term of not exceeding 6 months for contempt or to be fined for disobedience of the orders issued on 20 December 2023 and 1 March 2024 by this Court;
 - iii. That the Plaintiff to pay costs of this Application.
3. The trial court heard the two applications and rendered its Ruling dismissing the Appellant’s application and allowing the Respondent’s application.



4. Aggrieved by this Ruling, the Appellant lodged the appeal herein and simultaneously filed a Notice of Motion dated 1 April 2025 seeking the following orders, inter alia:
 - i. That pending the hearing and determination of this Application, the Court be pleased to order a stay of proceedings in Milimani Children Case No. E1607 of 2023;
 - ii. That the Court be pleased to grant a stay of execution of all consequential orders emanating from the Ruling of the Hon. Elizabeth Muiru delivered on 20 March 2025 in Milimani Children Case No. E1607 of 2023 pending hearing and determination of the appeal;
 - iii. That the Honourable Court be pleased to allow the transfer of the minors from [Name Withheld] to [Name Withheld] to continue with their education.
5. The Application is supported by the Affidavit sworn by the Appellant/Applicant and premised on the grounds on the face of it. The Applicant avers that pursuant to an order made on 3 November 2023, the Appellant/ Applicant was directed to pay school fees at the minors' current school to the equivalent of school fees payable at [Name Withheld], which was the minors' former school. The Appellant/Applicant avers that he is currently unemployed and facing extreme difficulties in paying school fees at the minors' current school, [Name Withheld]. Due to these financial constraints, the Appellant/Applicant applied to the trial Court seeking to transfer the children to another school, which application was disallowed.
6. It is the Applicant's case that while the trial court found him to be in contempt of the orders, the Court ignored the fact that he has been systematically denied meaningful access to the children, particularly the youngest. He contends that the Respondent's actions reveal a pattern of manipulation and disregard for fundamental parental rights.
7. The Applicant also filed a Further Affidavit to which he attached a copy of the impugned Ruling.
8. The Respondent filed a Replying Affidavit opposing the Application. The Respondent avers that the Application is meritless, without factual or legal basis, vexatious and otherwise an abuse of the Court process or a tactic by the Applicant to continue frustrating the minors and the Respondent. The Respondent avers that the application is based on misrepresentation of facts meant to mislead this Court.
9. The Respondent contends that a stay of execution pending appeal is granted to preserve the subject matter of the appeal and prevent the appeal from being rendered nugatory if the Appellant ultimately wins the appeal. However, in this instance, the crux of the appeal is the transfer of the children to [Name Withheld], which ground arose from the application dismissed by the trial court. The Respondent contends that this Court cannot stay execution of a negative order, which is the order disallowing the Application seeking to transfer the children from [Name Withheld]. The Respondent questions how the appeal would be rendered nugatory when the orders being challenged cannot even be stayed since the Application forming the basis of the appeal was disallowed.
10. Further, the Respondent avers that the Applicant comes to this Court with unclean hands. He has failed to inform this Court that when the matter came up for Ruling on 20 March 2025 before the trial Court, Counsel for the Applicant herein mitigated for him and the trial Court gave him a warning. The Respondent contends that had the Court not given him a reprieve by way of warning, and without stay orders, the Applicant would be in jail or fined. As such, there is no threat of the Applicant being arrested or fined for the disobedience. Invariably, there is nothing to be stayed by this Court.



11. Parties were directed to canvass by the Application by way of submissions. No submissions were filed within the time directed, so this Court will proceed to determine the application on the basis of the Affidavits filed.

Analysis & Determination

12. The conditions for stay pending appeal are set out in Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 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. In the case of Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
14. In Kenya Hotel Properties Ltd V Willesden Investments Ltd (2007) eKLR the Court of Appeal held that where undue hardship is occasioned on the applicant then the balance of convenience is in his favor. When the Court has to determine an application for stay of execution, it is bound to consider whether the said application meets the threshold and requirements for granting the order as stipulated under Order 42 rule 6. In this case the application was made timeously without unreasonable delay. The grounds to consider, therefore, are sufficient cause, substantial loss and overriding objective of the best interest of the children as argued by the Applicant.
15. In this instance, the impugned Ruling dated 20 March 2025 has 2 aspects to it: the dismissal of the Applicant’s application seeking to transfer the children from [Name Withheld] and the Respondent’s Application for contempt of court by the Applicant which was allowed.
16. I have keenly read the Application and the Affidavits. I note that in its Ruling of 20 March 2025, the trial Court did not direct any of the parties to do anything, to refrain from doing anything or to pay any sum.
17. In the case of Western College Farts and Applied Sciences vs. Oranga & Others [1976] KLR 63, the Court of Appeal whilst considering whether an order of stay can be granted in respect of a negative order stated inter alia as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”



18. This position was reiterated by the same court in *Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah* [2008] eKLR, where it held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences v Oranga & Others* [1976] KLR 63 at page 66 paragraph C).”

19. Adopting the same reasoning, I find that Applicant seeks to stay a negative order which is one that is incapable of execution, and thus, incapable of being stayed.

20. On the second issue of the contempt orders, the Respondent avers that the Applicant was cautioned by the trial court, which is why he has not been arrested or fined to date, despite there being no stay orders. I note that the Applicant did not dispute this information in his Further Affidavit. Presumably, this is the actual position. Furthermore, the issue was hardly mentioned by the Applicant in his Supporting Affidavit, perhaps because it is not of great concern at this juncture. This Court will, therefore, presume that there is no eminent risk of arrest.

21. On the issue of substantial loss, the same was discussed in the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto*, Bungoma High Court Misc Application No 42 of 2011, where the Court held that:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.”

22. In view of the foregoing, I find no merit in the present application. The same is dismissed.

23. This being a family matter, I make no orders on costs.

DATED AND DELIVERED AT NAIROBI THIS 7 DAY OF AUGUST 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Appellant/ Applicant: Mr. Osiemo

Respondent: SW

Court Assistant: Lucy Mwangi

