



JMK v EW (Civil Appeal 319 of 2023) [2024] KEHC 345 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEHC 345 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 319 OF 2023
FN MUCHEMI, J
JANUARY 25, 2024**

BETWEEN

JMK APPELLANT

AND

EW RESPONDENT

RULING

Brief Facts

1. The applications for determination are dated 30th March 2023 and 2nd May 2023. The application dated 30th March 2023 seeks for orders for stay of execution of the ruling in Ruiru SPMC Children’s *Case No. E063 of 2022* delivered on 14th March 2023 whereas the application dated 2nd May 2023 seeks for the orders for stay of proceedings in the same case pending the hearing and determination of the appeal.
2. The respondent filed a Replying Affidavit dated 19th April 2023, 30th November 2023 and 8th January 2024 in opposition to the respective applications.

Applicant’s Case On The Application Dated 30th March 2023.

3. The applicant states that he married the respondent in 2006 under Kikuyu Customary Law and their union was blessed with two issues, Sandra Wambeti Muriu and Sophie Wanjiru Muriu. The applicant further states that the respondent moved out with the minors from their matrimonial home causing him to file Ruiru Children’s *Case No. E063 of 2022* seeking for orders of access of the minors. The trial court delivered its ruling on 14/3/2023 granting actual custody, care and control of the minors to the respondent and gave the applicant limited and supervised access to the minors on alternate Saturdays from 12pm to 6pm and during school holidays. The lower court further ordered the applicant do pay school fees and meet school related expenses as well as pay a sum of kshs. 125,000/- every 5th of the month for maintenance of the minors. Being aggrieved with the decision of the trial court, the



applicant filed this appeal and states that the sum of kshs. 125,000/- is extraneous as both minors are in boarding school. The applicant further avers that the respondent is a person of means being a civil engineer at Kenya Rural Roads Authority (KERRA) and thus ought to be subjected to maintain the minors and sustain herself.

4. The applicant is apprehensive that if orders for stay of execution is not granted, the respondent shall proceed with execution to his detriment. The applicant further states that if the ruling is executed, the said appeal shall be rendered nugatory.

The Respondent's Case

5. The respondent opposes the application and states that she was forced out of the matrimonial home after the applicant subjected her and the children to extreme violence. The respondent states that the Children's Officer report was essential as the applicant had not interacted with the children since December 2022 and he would subject them to physical harm or emotional torture.
6. The respondent states that the lower court delivered its ruling in consideration of the fact that the applicant solely retained all the properties they had gathered during the subsistence of their marriage and therefore he was collecting the rent alone and benefiting solely. The respondent further states that the applicant collects rent of over one million from the said properties but was not assisting the children in any manner until the trial court ordered him to pay maintenance.
7. The respondent avers that before their separation with the application, they held a joint account where the rental income was being collected and the same was used for family expenses including the children's needs but the applicant diverted the rental income and thus the respondent argues that she and the children have been forced to survive from her little earnings.
8. The respondent further states that despite the trial court making orders for child maintenance, the applicant has failed to comply with any of the orders and yet he seeks the assistance of this court for stay orders.
9. The respondent avers that if the court grants stay of execution, she will be overburdened with parental responsibility as the applicant continues to benefit from the proceeds of the matrimonial property solely pending the determination of the court. The respondent argues that the applicant is more than able to pay the upkeep amount of kshs. 125,000/- and even more without a strain. Consequently, the respondent prays that the court enhance the upkeep amount to kshs. 500,000/-.
10. The respondent argues that the applicant has no intention of meeting his part on parental responsibility as he has not made any proposal of what he is willing to take up pending the hearing of the appeal. Parental responsibility is a shared responsibility and the respondent argues that granting stay as prayed will defeat the provision of law and aid the applicant in avoiding the same.
11. The respondent states that the applicant disobeyed the trial court's orders of surrendering one of the matrimonial homes to her and instead moved into their matrimonial home in Ruiru with his new wife and child. The respondent further states that applicant has not demonstrated the kind of loss he stands to suffer yet he is opting to disobey court orders to the detriment of the minors.
12. The respondent thus urges the court to consider the best interests of the children and reject the application for stay as the applicant has come to court with unclean hands.



The Applicant's Case On The Application Dated 2Nd May 2023.

13. The applicant states that the respondent has filed a Notice To Show Cause application dated 17/4/2023 in Ruiru Children's *Case No. E063 of 2022* and the same is yet to be heard on 18th May 2023. The applicant argues that he stands to suffer irreparable loss and damage and the appeal shall be rendered nugatory unless the proceedings in the children's court are stayed. The applicant argues that the appeal raises arguable points of fact and law as the trial court gave its ruling on extraneous orders which did not arise in the application such as actual custody. Further the trial court erred by failing to consider that both minors were in boarding school and thus the sum of kshs. 125,000/- as maintenance was excessive. The applicant further argues that the trial court failed to consider that the applicant was paying school fees in the sum of kshs. 220,000/- per term. The applicant further argues that the trial magistrate erred by failing to order that the applicant and respondent file affidavit of means before making a ruling on the maintenance of the children and sustenance of the respondent.

The Respondent's Case

14. The respondent states that since the trial court rendered its ruling on 14/3/2023, the applicant has made no effort to make good any part of the judgment. The respondent states that she has solely been paying school fees for the minors despite the lower court ordering him to pay the same.
15. The respondent further states that she and the children reside in a rental apartment while the applicant is in possession of two of their matrimonial homes in Syokimau and Juja and he is also in possession of many other properties that are giving him rental income.
16. The respondent avers that although the applicant was granted visitation rights, he has failed to visit the children or make arrangements to see them. Thus, the respondent urges this court to allow her to proceed with execution as the applicant cannot obey court orders unless they are in his favour.

The Applicant's Submissions

17. The applicant relies on the case of *University of Nairobi v Ricatti Business of East Africa* [2020] eKLR and submits that that he has an arguable appeal. The applicant further submits that his grounds of appeal include the trial court erred by finding him solely responsible to take up parental responsibility by catering for the school fees, medical expenses and an extraneous amount of kshs. 125,000/- per month yet the children are in boarding school. The applicant further submits that the trial court erred in ordering that he cater for the respondent's sustenance despite the fact that the respondent has meaningful employment with Kenya Rural Roads Authority (KERRA) as a civil engineer. The applicant further submits that the trial court erred further by ruling on accommodation, which is subject to a matrimonial cause filed at Milimani High Court. The applicant further argues that his prayer for unlimited access to the minors in school was dismissed and yet he would not be able to follow up on their academic progress.
18. Relying on the case of *Reliance Bank Ltd v Norlake Investments Ltd* [2021] EA 227, the applicant submits that if stay of execution is not allowed, the ruling by the trial court will render him incapable of providing for the children due to the huge sum declared which is not in their best interest.
19. The applicant further submits that the sum of kshs. 125,000/- as maintenance is not justified as the children are in boarding school and the same shall benefit the respondent and her son borne out of wedlock during the subsistence of their marriage.



20. The applicant further submits that he is apprehensive that if the said ruling is not stayed, he stands to lose his liberty as the respondent may take warrants of arrest against him and that will render the appeal nugatory.
21. The applicant relies on the case of *H.M.I. v K.B.H* [2021] eKLR and submits that the parallel proceedings in the children's court and the appellate court will bring confusion and will highly prejudice him as he shall be condemned unheard.

The Respondent's Submissions

22. The respondent submits that upon the children's court issuing its orders on 14th March 2023, the applicant has never made good of the same including paying school fees and upkeep. Resultantly, the respondent submits that she has shouldered all the responsibility relating to the children on her own. The respondent relies on Order 42 Rule 6(2) of the *Civil Procedure Rules* and the cases of *Bhutt v Bhutt* Mombasa HCCC No. 8 of 2014; *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR and *R.W.W v E.K.W* (2019) eKLR and submits that the applicant has failed to meet the threshold to be granted stay of execution. Furthermore, the applicant has failed to demonstrate how stay of execution will serve the best interests of the children pursuant to Article 53 of the *Constitution*.

The Law

Whether The Applicant Has Satisfied The Conditions Set Out In Order 42 Rule 6 Of The Civil Procedure Rules For Stay Of Execution Pending Appeal.

23. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-
 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
 2. 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 1st 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.
24. Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:
 1. Substantial loss may result to him unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.



25. Beyond the requirements of Order 42, this being a matter concerning children, this Honourable Court is enjoined by the Constitution of Kenya 2010 and 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.

26. The Children Act 2022 on the other hand provides at Section 8(2) that:

In all actions concerning the children, whether undertaken by public or private or social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

27. As was observed in *Bhutt v Bhutt Mombasa HCCC No.8 of 2014 (OS)* 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 interests of the child in accordance with Article 53 (2) of the Constitution which provides:-

In exercising its jurisdiction to grant stay of execution, the High Court is required by Order 42 Rule 6(2) of the Civil Procedure Rules to be satisfied that:-

- a. The applicant will suffer substantial loss if stay is not granted;
- b. The application for stay has not been brought without undue delay; and
- c. The applicant has provided security for the due performance of the decree.

28. Similarly in Z.M.O v E.I.M. [2013] eKLR Musyoka J. stated:-

As a matter of principle, grant of stay of execution of maintenance orders in children's cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute. To my mind, once a maintenance order is made where parentage is undisputed it should not be suspended pending appeal, where the appeal is on the quantum payable.

29. On the issue of substantial loss, the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR held as follows:-

"No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

30. The applicant contends that he stands to suffer irreparably as he shall be subjected to pay an extraneous amount of kshs. 125,000/- as maintenance yet the children are in boarding school. The applicant further contends that the respondent shall levy execution against him and he stands to suffer irreparably. The respondent argues that the applicant has not demonstrated the substantial loss the minors stand to suffer as this is a children's matter and their best interests is of paramount importance. On perusal of the applicant's affidavit, I have noted that the applicant has stated that he stands to suffer



substantial loss by being forced to pay an excessively high amount in terms of maintenance if the orders sought are not granted and further that the intended appeal shall be rendered nugatory if stay is not granted. The applicant further, in his submissions argues that he stands to suffer substantial loss as he is apprehensive that he shall be committed to civil jail and thus will not be in a position to provide for the minors. Notably, the applicant has stated how he stands to suffer if the orders of stay are not granted, however, this being a children's case, the best interests of the child are more paramount than those of the parties. The children's interests supersede those of the parties as was enunciated in the case of C.K.K v C.M.M. [2016] eKLR where the Judge stated:

“In the circumstances of this case it is Baby CMM and not the two protagonists who stands to suffer loss since we are not dealing with a material claim.”

31. Likewise, in the instant case, it is the children and not the applicant who stands to suffer substantial loss if the orders sought are not granted. The rights of the children override the rights of the applicant and the applicant has not demonstrated to this court what substantial loss the children stand to suffer if the orders for stay are not granted.
32. Furthermore, it has not been refuted by the applicant that he has not honored the court's orders since the ruling was rendered.

The Application Has Been Made Without Unreasonable Delay.

33. The ruling herein was delivered on 14th March 2023. The applicant filed his Memorandum of Appeal on 23rd March 2023 and the application herein for stay on 31st March 2023. It is my considered view that the application was filed timeously.

Security Of Costs

34. The purpose of security was explained in the case of Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the *Civil Procedure Rules* acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

35. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant has not offered any form of security. It is thus my considered view that stay of execution would work against the best interests of the children herein in that they would not have the provision of maintenance for quite some time pending hearing and determination of this appeal.
36. Section 95 (3) of the Children Act 2022 which sets out the general principles with regard to proceedings concerning children. It provides:-

In any proceedings in which an issue on the upbringing of a child arises, 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.



37. I am also persuaded by the decision of *Z.M.O. v E.I.M* [2013] eKLR where the court held:-

The solution ideally lies in expediting the disposal of the appeal and staying the matter before the children's court to wait the outcome of the appeal. Tinkering with the quantum at this stage would amount to determining the appeal before the arguments are heard from both sides on the merits of the same.

38. It is thus my considered view that stay of execution would work against the best interests of the children herein in that they would not have the provision of maintenance for quite some time pending hearing and determination of this appeal.

39. In the interests of justice and in the best interests of the children herein it is my view that the applicant has not met the threshold of grant of the orders of stay of execution.

Whether The Applicant Has Met The Conditions For Grant Of Stay Of Proceedings Pending Appeal.

40. It is trite law that whether or not to issue an order for stay of proceedings is a matter of the court's discretion exercised after due consideration of the merits of the case and the likely effect on the ends of justice. The exercise of that discretion should be premised on conscientious and judicious decision based on defined principles which were expounded by Ringera J in *Global Tours & Travels Limited*, Nairobi HC Winding Up Cause No. 43 of 2000:-

“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 justicethe sole question is whether it is in the interest of justice to order a stay of proceedings and if it is so, 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.

41. In that regard, for an order of stay of proceedings to issue the following points of consideration ought to be adhered to:-

- a. Whether the applicant has established that he has a prima facie arguable case;
- b. Whether the application was filed expeditiously; and
- c. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

Whether The Applicant Has Established That He Has An Arguable Case

42. Cognizant of the fact that an arguable appeal needs only raise a single bona fide point worthy of consideration by the Judge who will hear the appeal and it need not be one that must necessarily succeed. *Cooperative Bank of Kenya Ltd v Banking Insurance of Finance Union (Kenya)* [2015] eKLR.

43. I have keenly perused the memorandum of appeal and the reasoning of the trial court whilst rendering its ruling dated 14/3/2023. Without going to the merits of the appeal, it is my considered view that



the applicant has not raised arguable grounds of appeal with a high probability of success. In my view, I am not convinced that this condition has been satisfied.

Whether The Applicant has Established Sufficient Cause to the Satisfaction of the Court that it is in the Interest of Justice to Grant the Orders Sought

44. In an application to stay proceedings the court is required to exercise judicial discretion in the interest of justice. This has been demonstrated in the case of *Christopher Ndolo Mutuku & Another v CFC Stanbic Bank Limited* (2015) eKLR the court observed that:-

“.....what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”

45. I have perused the record and noted that the applicant’s main contention is that the sum of kshs. 125,000/- is extraneous as the minors are in boarding. The applicant further states that if the proceedings are not stayed he stands to be highly prejudiced as he may be condemned unheard. I have also noted that the applicant has argued that he stands to suffer prejudice if the orders are not sought, but has not appreciated the fact that the minors shall stand to suffer if the orders are granted. Staying the proceedings in the children’s court will be prejudicial to the minors as they need to be maintained, attend school and be provided with health care. The trial court took cognizance of this and fact in its ruling and issued orders on interim basis pending the determination of the suit. Thus if the suit is stayed, the case will be delayed and the children stand to suffer in terms of their needs not being met. Furthermore, the applicant has not even mentioned that he has been maintaining the children or providing their school fees in any way since the lower court rendered its ruling. In fact, the respondent has demonstrated through receipts how she has been paying school fees, and maintaining the minors which was not denied.

46. It is thus my considered view that the best interests of the children will not be served by staying the proceedings of the children’s court. Consequently, this court finds that the applicant has not met the threshold for the orders of grant of stay of proceedings.

47. Consequently, I reach a conclusion that the applications dated 30th March 2023 and 2nd May 2023 has no merit and must fail.

48. The two applications are hereby dismissed with costs to the respondent to abide in the appeal.

49. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 25TH DAY OF JANUARY 2024.

F. MUCHEMI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

