



**FMOA v AMAB (Family Appeal E018 of 2023)
[2024] KEHC 4204 (KLR) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 4204 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E018 OF 2023**

**G MUTAI, J
MARCH 15, 2024**

BETWEEN

FMOA APPLICANT

AND

AMAB RESPONDENT

RULING

1. Before the court are two Notices of Motion dated October 6, 2023 and October 26, 2023. The said applications were filed by the Appellant/Respondent.
2. The notice of motion dated October 6, 2023 seeks the following orders: -
 - a. That the honourable court be pleased to take additional evidence in the instant appeal;
 - b. That the honourable court be pleased to summon Paula Mandu, aka Paula Pamba, to be cross-examined on the impugned invoice dated 9 January 2023;
 - c. That the Honourable Court be pleased to grant such other and/or further relief as this Honourable Court might deem fit and just to grant in the unique circumstances of this matter; and
 - d. That the costs of this application be in the cause.
3. The application is premised on the grounds stated in the body of the said motion and the supporting affidavit of the applicant sworn on October 6, 2023. The applicant stated that the trial court, in its ruling of June 26, 2023, reviewed the maintenance order based on false information filed in court by the respondent in her notice of motion dated January 27, 2023, in which she alleged that she was enrolled in a baking school. The respondent further stated that the invoice dated January 9, 2023 was issued by Paula Mandu, aka Paula Pamba, the owner /teacher of the baking school. The said person had denied



- the existence of such a baking school when questioned about the same via phone call and WhatsApp message via her phone number 0xxx.
4. He further stated that he filed a notice of motion dated February 28, 2023, seeking to summon the said person to appear in court on 6th March 2023 for cross-examination on the said invoice. The said prayer was granted. Subsequently summons was duly served on Paula. Despite being served Paula failed to appear in court on the said date. The trial court declined to issue warrants of arrest, thus denying him the opportunity to examine her on the alleged invoice. On June 26, 2023, the trial court dismissed his application and reviewed the maintenance orders relying on the impugned invoice, which amounts to a violation of his right to a fair trial.
 5. He stated that nothing barred the respondent from filing evidence at the trial court on the existence of the baking school. Further, the intended cross-examination would remove vagueness and doubt about its existence, which is a substantive issue in the appeal.
 6. In response, the respondent filed grounds of opposition opposing the application on the grounds that the appellant/applicant has appealed against a similar application and sought a similar prayer in the Memorandum of Appeal dated September 19, 2023 cited. It was urged that the evidence sought to be adduced does not meet the threshold for adduction of additional evidence, that the evidence sought is not credible in the sense that it is capable of belief, and that the Applicant has not met the threshold set by law and precedent on adduction of additional evidence on appeal.
 7. The application was canvassed through written submissions. The applicant, through his advocates, Mwashushe & Company Advocates, filed his written submissions dated 15 November 2023. His counsel identified three issues as coming up for determination: whether or not the additional evidence should be taken on appeal as prayed, whether or not the application is opposed, and who is to bear the costs.
 8. On the first issue, counsel relied on section 78(1)(d) of the *Civil Procedure Act* and submitted that the same empowers this honourable court to take additional evidence or to require that the trial court take the same once an appeal is filed. That the cross examination of Paula Pamba will assist the court reach a just determination on the impugned invoice and that the additional evidence is relevant to the appeal.
 9. Counsel relied on article 50(1) of the *Constitution* and submitted that the Applicant was denied his right to a fair trial as he wasn't given an opportunity to interrogate the Respondent's evidence on the impugned invoice.
 10. On the second issue, it was submitted that the Grounds of Opposition filed by the Respondent do not offer any factual response to the Applicant's issues, and therefore, the averments in his affidavit remain unopposed.
 11. On the last issue, counsel relied on section 27 of the *Civil Procedure Act* and submitted that costs follow the event and urged the court to allow the application with costs.
 12. The Respondent, through her advocates, Lawrence Obonyo Legal Advocates, filed her written submissions dated January 12, 2024. Counsel identified two issues as coming up for determination, namely, whether the evidence sought meets the threshold for the adduction of additional evidence on appeal and whether the Appellant/Applicant has appealed against a similar application or sought a similar prayer in the amended Memorandum of Appeal dated 19th September 2023.
 13. On the first issue, counsel submitted that there is no new evidence that was not tendered before the trial court. It was submitted that the Appellant/Applicant was seeking to circumvent the appeal through the application herein, as the issues raised are the subject of the appeal. It was further submitted that



- the Appellant/Applicant had not exhausted all the avenues in the trial court and was simply forum shopping, which is an abuse of the court process.
14. Counsel further submitted that the Appellant/Applicant had not demonstrated how the said evidence was relevant to the protection of the child's best interest. It was urged that no sufficient reason was given to justify the adduction of the additional evidence and the application is an attempt to retry the matter.
 15. On the second issue, counsel submitted that the appeal emanates from the trial court's ruling on a similar application seeking the same prayers. It would be prudent for the court to determine the appeal.
 16. Counsel submitted that the grounds of opposition suffice as a response to the application as provided for in order 50 rule 16(1) of the *Civil Procedure Rules* and should, therefore, be treated as such. In conclusion, counsel urged the court to dismiss the application.
 17. The appellant/applicant's second application seeks the following orders:-
 - a. Spent;
 - b. Spent;
 - c. That the honourable court be pleased to stay the proceedings in Tononoka Children Case Exxx of 2022 AMAB v FMOA pending hearing and determination of this appeal;
 - d. That the honourable court be pleased to set aside the orders issued on October 25, 2023 in Tononoka Children Case Exxx of 2022 AMAB v FMOA; and
 - e. That the costs of this application be in the cause.
 18. The application is premised on the grounds stated therein and the Supporting Affidavit of the Applicant dated October 26, 2023.
 19. He stated that the proceedings of October 25, 2023 were initiated during the pendency of the proceedings in this appeal, which the Respondent failed to disclose to the court. He further stated that the application dated 25th October 2023 seeks to review the judgement dated 9th January 2023 and the impugned ruling dated 26th June 2023, which, if issued, would affect the maintenance orders in force, which orders are the subject of the appeal. If the said application proceeds, it will render the appeal nugatory.
 20. He further stated that the Respondent continues to make a mockery of the court process by instituting parallel proceedings and obtaining irregular orders, which affect him and the children. He urged the court to allow the application as prayed.
 21. In response, the Respondent filed Grounds of Opposition dated 23rd January 2024 opposing the application on the following grounds: that the Applicant's said application is frivolous, vexatious and an abuse of court process; that the said application had been overtaken by events, as the interim orders given on 25th October 2023 lapsed on 6th November 2023; that the proceedings of the lower court were confirmed as stayed on 17th January 2024 pending the determination of the appeal by this court; that the applicant's said application is incompetent in law; and that the said application is ill-conceived and is otherwise unsustainable in law and ought to be accordingly dismissed with costs.
 22. This second application was canvassed by way of written submissions. The Appellant/Applicant's counsel filed written submissions dated 30th January 2024. Counsel submitted on two issues she identified as being due for determination, namely, whether or not the lower court proceedings should be stayed pending the hearing and determination of the appeal and who is to bear the costs of the suit.



23. On the first issue, Counsel submitted that a stay of execution under order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#) is different from a stay of proceedings.
24. On the second issue, counsel relied on section 27 of the [Civil Procedure Act](#) and submitted that costs follow event and urged the court to allow the application with costs against the Respondent.
25. Counsel further submitted that the Grounds of Opposition filed by the Respondent on 23rd January 2024 do not offer a substantive response to the issues raised.
26. The Respondent, through her advocates, filed her written submissions dated 12th February 2024. Counsel submitted on two issues, namely, whether the application has merit and who ought to bear the costs of the application.
27. Counsel submitted that the Courts have discretionary power to issue a stay of proceedings. Counsel relied on order 42, rule 6(1) of the [Civil Procedure Rules](#).
28. On costs, counsel submitted that this being a children's matter, each party should bear its own costs. Counsel urged the court to dismiss the application herein.
29. I have considered the two applications, the grounds of opposition therein and the rival submissions by both counsels. In my view, the issues that call for my determination are as follows:-
 - a. Whether this court should take additional evidence;
 - b. Whether the court should summon Paula Mandu for purposes of cross-examination; and
 - c. Whether the proceedings at the trial court should be stayed.
30. I am going to discuss the first two issues together.
31. Order 42 rules 27, 28 and 29 of the [Civil Procedure Rules, 2010](#) provides that:
 27.
 1. The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if
 - a. the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
 - b. the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.
 2. Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred, the court shall record the reason for its admission.
 28. Wherever additional evidence is allowed to be produced, the court to which the appeal is preferred may either take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to take such evidence and to send it when taken to the court to which the appeal is preferred.



29. Where additional evidence is directed or allowed to be taken, the court to which the appeal is preferred shall specify the limits to which the evidence is to be confined and record on its proceedings the points so specified.
32. Further, the Supreme Court, in the case of *Mohamed Abdi Mahamud v Ahmed Abdullabi Mohamad & 3 others* [2018] eKLR stated:-
- “... We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:
- a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
 - b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
 - c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
 - d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
 - e. the evidence must be credible in the sense that it is capable of belief;
 - f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
 - g. whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
 - h. where the additional evidence discloses a strong prima facie case of willful deception of the Court;
 - i. The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.
 - j. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
 - k. The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.
33. In this case, the reasons advanced for additional evidence and summoning of Ms. Paula Pampa for cross-examination are that the ruling of the trial court of June 26, 2023 was based on the non-attendance of the said person and that the court relied on the impugned invoice dated 9th January 2023. That being denied a chance to cross-examine Ms. Paula Pampa interfered with his right to a fair trial and to access



to justice. It was also urged that cross-examination of the said person would assist the court in reaching a just determination of the issues in contestation herein.

34. The trial court, in determining the issue in its ruling, stated:-

“...it is not within this court’s jurisdiction to carry out investigations, and neither am I versed with the mechanism to know if the invoice is a forgery. The contents of the communication between the defendant and the alleged owner of the school are not from an investigative body but from defendant who is a party to this suit. The authenticity of the communication is questionable since neither the plaintiff nor the court are privy to the communication. The said Paula could not be secured in court for cross-examination either.”

35. In making its orders on maintenance, the trial court discussed the issue of lack of baking classes by the respondent and her lack of financial ability to contribute to the maintenance of the children due to the same and other reasons extensively and stated:-

“...it is common ground now, and it even came out during the trial that she is not working. It is worthy to note that it is not easy and comfortable for one to rely /depend on family to feed your children. The support only lasts as long as they are willing. One therefore has to struggle so as to participate. She has said she is doing baking classes so that she can find a way to participate.

At the moment, therefore, the plaintiff does not have a source of income, and it is not fair to burden her family fully with the burden of food and daily upkeep for the children. The relatives or the plaintiff’s family have no legal responsibility binding them towards the children. This is a duty that lies squarely on the plaintiff and the defendant and cannot be delegated. It is for this reason that this court deems fit that the defendant assists the plaintiff with the food and daily upkeep items when she has the children since he has a better financial standing than the plaintiff.”

36. The Applicant herein has appealed against the ruling of the trial court of 26th June 2023 and has raised the issue of the invoice and the cross-examination of Paula in his grounds of appeal.

37. It would appear to me that the evidence of Ms Paula is key in these proceedings. It is only Paula who can say with certainty whether the Respondent is enrolled in the alleged baking school. If the school does not exist or if it does, but she is not enrolled in it, then the decision of the Court below was based on misrepresentation. The rule of law depends on the integrity of judicial proceedings. In my view, therefore, it is important for this court to allow additional evidence and summon Paula for cross-examination so as to help this court reach a just determination.

38. The Applicant, in his second application, has sought a stay of proceedings of the trial court. The court in the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR stated:-

“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. See Ringera J in the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000* persuasively stated thus;

“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” (emphasis added)

39. Further the court in the case of [*Port Florence Community Health Care v Crown Health Care Limited*](#) [2022] eKLR stated:-

“Notably, the conditions under which either the trial court or an appellate court may order stay of proceedings pending an appeal have not been specified...The court therefore has to rely on the settled principles on when proceedings may be stayed pending appeal. The question of whether or not to grant an order for stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously. The court has to consider if it will be in the interests of justice to grant the same. The underlying interest ought to be that the appeal should not be rendered nugatory.”

40. This Court is averse to issuing a stay of proceedings. The reason for this is that, in this court’s view, such an order should be issued sparingly and only in the clearest of cases. Orders of stay of proceedings interfere with a court’s ability to determine matters quickly and is one of the reasons our courts have case backlogs. Having said so, and taking into consideration the earlier decision to hear the evidence of Ms Paula, it is necessary, in the interest of justice, that the proceedings in the Court below are stayed so that this Court and the trial Court do not embarrass each other.

41. Thus, I find and hold that it is in the interest of justice that proceedings in Tononoka Children’s Case Exxx of 2022 be stayed pending the hearing and determination of the appeal herein.

42. The upshot of the foregoing is that the two applications have merit and are hereby allowed.

43. Although costs ordinarily follow the event, I note that this this being a children’s matter, the award of costs is inappropriate. In the circumstances parties shall bear their own costs.

44. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 15TH DAY OF MARCH 2024

GREGORY MUTAI

JUDGE

In the presence of:-

Ms Mwashushe, for the Appellant/Applicant;

Mr Oyas, for the Respondent;

Arthur – Court Assistant.

