



REPUBLIC OF KENYA



HML v JKK (Family Appeal E037 of 2023) [2024] KEHC 4202 (KLR) (15 March 2024) (Ruling)

Neutral citation: [2024] KEHC 4202 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA**

FAMILY APPEAL E037 OF 2023

G MUTAI, J

MARCH 15, 2024

BETWEEN

HML APPLICANT

AND

JKK RESPONDENT

RULING

1. Before this court is a Notice of Motion dated 1st December 2023. The application seeks the following orders: -
 - a. Spent;
 - b. Spent;
 - c. Spent;
 - d. That pending the hearing and determination of the appeal filed herein being Mombasa Family Appeal No E037 of 2023 the honourable court be pleased to grant stay of execution of the ruling/orders made on the 27th November 2023 in Tononoka MCCHCC/E370/2023;
 - e. That pending hearing and determination of the appeal filed herein being Mombasa Family Appeal No. E037 of 2023 the honourable court be pleased to stay further proceedings in Tononoka MCCHCC/E370/2023;
 - f. Spent; and
 - g. That costs of this application be in the cause.
2. The application is premised on the grounds therein and the supporting affidavit of the applicant, sworn on 1st December 2023.



3. The Appellant/Applicant stated that the trial court, in its ruling of 27th November 2023, handed over the custody of the minor to the Respondent. Being aggrieved, he instructed his advocates to file an appeal.
4. He further stated that he has had custody of the minor since his wife died in May 2023 as the biological father and that he sought custody because he did not want any future interruptions. Further, the minor is attending school under the British System under his constant supervision and care.
5. The Appellant/Applicant averred that the minor never stayed with the grandmother (the Respondent) during his mother's lifetime and even after her demise. The finding that the minor and his sister attend the same school was made without any basis, as the evidence on record was to the contrary. The impugned decision was made without seeking any independent report from institutions concerned with children's matters.
6. He averred that his appeal is arguable and that he should be allowed to ventilate his grievances. He urged the court to allow the application in the interest of justice, equity, and the best interest of the child.
7. In response, the Respondent filed a Replying Affidavit sworn on 11th December 2023.
8. In the said affidavit, she stated that the Appellant/Applicant forcefully took away the minor from her, separating him from his sister, and has since refused to return him. The subject child and his sister are in the same group of schools and have always lived together.
9. She further stated that the impugned ruling of the trial court is sound and in the best interest of the children and should not be interfered with. The trial magistrate stayed her orders pending the children's officer's report. She urged the court to dismiss the application with costs.
10. The applicant filed a Further Affidavit sworn on 18th December 2023.
11. He reiterated the position in his supporting affidavit. He stated that the fact that the Respondent was listed as the next of kin of his deceased wife does not grant her custody of the minor at his exclusion as his father. Further, the minor and his sister have never been in the same school as they are not of the same age group. The British system of learning is complicated and needs keen guidance, which the respondent cannot offer to the minor due to her old age.
12. He further stated that the trial magistrate ought to have waited for the Children's Officer's report before delivering her ruling and urged the court to allow the application as prayed.
13. The application was canvassed by way of written submissions. The Appellant/Applicant, through his advocates Akanga Alera & Associates Advocates, filed his written submissions dated 12th January 2024.
14. Counsel submitted that if the stay is not granted and the orders of the trial court executed, it will be another round of battle for the applicant to have back the custody of the child in the event the appeal succeeds and that the same will destabilize the minor. Counsel urged the court to consider the best interest of the child and allow the application as prayed.
15. The Respondent, on the other hand, through her advocates, J.M. Makau & Company Advocates, filed her written submissions dated 25th January 2024.
16. Counsel submitted that the application was premature as the trial magistrate suspended her orders, awaiting a report by the children officer of the sub-county where the children reside. Further, the applicant did not extract the court order, which is the one he ought to have appealed against as per sections 79B and 79G of the Civil Procedure Act. If the applicant had extracted the same, he would have



awaited the outcome of the report by the children's officer. Counsel urged the court not to interfere with the ruling of the trial court. Further counsel urged the court to dismiss the application with costs.

17. I have considered the application, the responses and the rival submissions by both counsels and the issues that emerge for determination are: -

- a. Whether stay of execution should issue; and
- b. Whether a stay of proceedings should be issued.

18. Stay of execution is provided for under order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#) 2010 which provides: -

- a. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 order set aside.
- b. 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.

19. The Court of Appeal in [Butt versus Rent Restriction Tribunal](#) [1979] eKLR gave direction on how a court should exercise its discretion in granting stay of execution and held that: -

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory...”

20. The dispute in this case concerns the custody of a minor. The Appellant/Applicant argues that if a stay is not granted, the minor will be destabilized, and the issue of custody will recur in the event the appeal succeeds.

21. The court in the case of [A M versus M A M](#) [2012] eKLR gave guidance on what a court should consider in deciding children matters and stated: -

“In deciding children’s matters it is incumbent upon the courts to bear in mind that children are vulnerable members of society and are therefore susceptible to physical, psychological and other types of abuses. The courts remain the upper guardians of children’s rights and interests, and where necessary, have a final say in determining the overall welfare of the child.



This they do through a relatively delicate balancing of sensitive interests that relate to family status and touch on private lives of individuals.”

22. From the foregoing, it is my view that it is of paramount importance to grant a stay of execution of the trial court’s ruling of 27th November 2023, pending hearing and determination of the appeal. I am guided by Article 53 (2) of the [Constitution](#) and Section 8(1) of the [Children Act](#) 2022 which provide: -

Article 53 (2) of the Constitution provides: -

A child’s best interests are of paramount importance in every matter concerning the child.

Section 8(1) of the Children’s Act 2022 provides;

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—
 - a. the best interests of the child shall be the primary consideration;
 - b. the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.

23. On whether stay of proceedings should issue 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)”

24. Although this Court frowns upon interlocutory appeals and is loath to stay proceedings, it is my view that this is the one matter where an exception ought to be made. The Appellant/Applicant is the father of the minor. It would be in the interest of justice if the appeal could be heard and determined first without materially disrupting the child's life.
25. In the circumstances, I find and hold that it is in the interest of justice that I stay the proceedings of the trial court in Tononoka MCCHCC/E370/2023 pending the hearing and determination of the appeal. To prevent the abuse of the court process, the hearing of the appeal will be fast-tracked.



26. It is clear that I have found merit in the application. The same is allowed.
27. This being a family matter, each party will bear his/her own costs.
28. Orders accordingly.

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

GREGORY MUTAI

JUDGE

In the presence of:-

Mr. Otieno holding brief for Mr. Akanga for the Appellant/Applicant;

No appearance for the Respondent; and

Arthur – Court Assistant.

