



FC v LR (Suing as Mother and as Next Friend of the Minors) (Family Appeal E021 of 2023) [2024] KEHC 4111 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4111 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
FAMILY APPEAL E021 OF 2023
HI ONG'UDI, J
APRIL 25, 2024**

BETWEEN

FC APPELLANT

AND

LR (SUING AS MOTHER AND AS NEXT FRIEND OF THE MINORS) RESPONDENT

RULING

1. In the Notice of Motion dated 23rd November 2023 the appellant/applicant herein prays for orders of stay of execution of the judgment and decree delivered on the 15th November, 2023 pending the hearing and determination of the appeal HCFA No. 21 of 2023.
2. The application is based on the grounds on its face and his affidavit of even date. He deposes that he was the biological father to the minors herein and had been married to the respondent from the year 2018-2022 when she moved out of their matrimonial home at her volition together with the minors. Further, that he had tried to hold peace talks with her and both families were also involved to persuade her to come back to their matrimonial home but she became adamant.
3. He deposed further that the respondent filed a suit as Nakuru CHCC No. E271 of 2023 against him seeking for maintenance of the minors herein. That the trial court in its impugned judgment ordered that he caters for the minors' school fees, all educational needs, cater for their medical cover and pay maintenance fee of Kshs. 6,000/= . He added that the same was to be obtained from his salary since had no other source of income, the respondent having taken over the diary shop. He deposed that as security and for the best interest of the minors pending the hearing and determination of this appeal, he was open to pay school fees and medical cover for the minors.
4. He went on to depose that the appeal had overwhelming chances of success and that if execution was not stayed, the said appeal would be rendered nugatory. Further, that no prejudice would be suffered



- by the respondent if the present application was allowed. He added that the plaintiff would not be able to repay the decretal amount in the event that the appeal succeeded if stay was not granted.
5. The respondent through her replying affidavits sworn on 4th November 2023 and 29th January 2024 respectively, averred that she was the biological mother to the minors and the plaintiff in children's case no. E271 of 2023. Further, that the judgment delivered by the trial Court on 15th November 2023 was granted in accordance with the provisions of law and in the best interest of the minors.
 6. She averred further that the trial Court distributed responsibilities to both of them as per the provisions of the children's Act 2022. That the appellant was ordered to provide Ksh, 6,000/= for food and clothing, fully carter for school fees and school accessories in a school he could afford while she was to provide shelter and utility bills. Further, that the responsibilities given to the appellant did not in any way prejudice his wellbeing or cause any irreparable damage as the orders were for the interest of the minors. She added that the minors had to be taken care of and stay of the said responsibilities would prejudice the rights of the minors. Also, that the appellant had not shown what substantial loss he would suffer if the orders of the trial court were allowed. She urged the court to dismiss the application with costs.
 7. The application was canvassed by way of written submissions.

Appellant/Applicant's Submissions

8. The appellant's undated submissions were filed by Mwangi Mandere Advocates on 12th January 2024. Counsel submitted that in determining the application for stay in children matters, Order 42 rule 6 of the *Civil Procedure Rules* ought to be complimented by an overriding consideration of the best interests of the child and in accordance with Article 53(2) of *the Constitution*. He placed reliance on Section 4(2) of the *Children Act* and the judicial decisions in *Butt v Restriction Tribunal* [1979] eKLR and *Loice Khachendi Onyango c Alex Inyangu & Another* [2017] eKLR.
9. Counsel submitted further that in the case of *K.W.M v R.N* [2015] eKLR, the applicants therein submitted that the best interest of a child ought to be maintained if an order of stay was issued and that if the orders of the trial court were executed he stood to be destabilized. That he was likely to be committed to civil jail and hence cannot provide for his children.
10. Counsel went on to submit that the applicant herein had satisfied the 3 tests required for grant of stay to be successful. That the appellant had brought his application without undue delay. Further, that he had demonstrated that he had an arguable appeal with high chances of success. Lastly, as security the applicant had offered to continue paying school fees, provide for educational needs, medical cover pending hearing and determination of the appeal.

Respondent's Submissions

11. The respondent's submissions are dated 9th February 2024 and were filed by the respondent in person. She identified one issue for determination namely; whether stay of execution of the judgment and decree may be allowed pending hearing and determination of the appeal herein.
12. She submitted that the trial court in issuing its orders considered their occupations and went ahead to distribute the responsibilities between them. It was her submission that under Article 53(2) of *the Constitution* a child's best interests was of paramount importance in every matter concerning the child. She added that under Article 53(1) of *the Constitution*, every child had a right of parental care and protection from both parents regardless of whether they are married or not.



13. She submitted further that the orders sought for stay of execution were aimed at delaying justice towards the subject minors which was against their best interests. She placed reliance on the case of [John Mwangi Ndiritu v Joseph Ndiritu Wamathai](#) [2016] eKLR and submitted that it was in the interest of justice for the court to expeditiously dispose of the suit because if the stay of execution orders were issued the minors basic needs would be prejudiced. She cited Order 42 rule 6 (2) of the [Civil Procedure Rules, 2022](#) on the requirement to be satisfied to warrant stay of execution orders.
14. She added that the purpose of stay was demonstrated in the case of [RWW v EKW](#) [2019] eKLR where the court held as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

Analysis and Determination

15. I have carefully considered the application, affidavits and submissions by the parties. I find the issue arising for determination to be whether an order for stay of execution is merited in the instant Appeal.
16. The principles guiding the grant of a stay of execution pending appeal are well settled. The same are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which 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.
17. In [RWW vs. EKW](#) [2019] eKLR, also relied on by the respondent the court addressed the purpose of a stay of execution order pending appeal, see paragraph 14 above.
18. From the law and the above decision, it is clear that the purpose of stay of execution is to preserve the substratum of a case pending the hearing and determination of an appeal. Further, a successful litigant has a right and expectation to enjoy the fruits of the decision rendered in his or her favour by the court, and a respondent who has lost a case also has a right of appeal to ventilate his or her displeasure with the said decision of the court. The court has a duty to weigh and balance both situations.
19. Further, in the case of [Regional Institute of Business Management v Lucas Ondong' Otiemo](#) [2020] eKLR the court observed as follows;

“20. Weighing the Applicants' right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of [the Constitution](#) of Kenya and the equally important Respondent's fundamental right that justice



delayed is justice denied as stipulated in Article 159(2)(b) of *the Constitution* of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Applicants if they were denied an opportunity to ventilate their Appeal on merit in the event an order for stay of execution was not granted”.

20. The application herein was filed on 23rd November after delivery of the Judgment on 15th November 2023. Hence, there was no delay in filing of the application.
21. On substantial loss, the appellant/applicant argued that if the stay orders were not granted, he risked being put in civil jail for non-compliance with the trial court orders. Further, that the appeal had overwhelming chances of success and that if execution was not stayed, the said appeal would be rendered nugatory. The respondent on her part argued that the appellant had not shown what substantial loss he would suffer if the orders of the trial court were allowed.
22. In the case of *Silverstein vs. Chesoni* [2002]1 KLR 867, the court observed that substantial loss was the cornerstone of both jurisdictions and the same had to be prevented by preserving the status quo because such loss would render the appeal nugatory.
23. As security the appellant/applicant offered to continue paying school fees, provide for educational needs, and medical cover pending hearing and determination of the appeal. The respondent does not deny having taken over the dairy shop. She is therefore making some good money.
24. As earlier noted, the grant of stay of execution is discretionary and the court will exercise this discretion on a case by case basis depending on the circumstances of the case. It is my opinion that this court must balance these rights to ensure that justice is served.
25. The above being the position, I allow the prayer for stay of execution on condition that the appellant continues paying school fees, providing for educational needs and medical cover for the children pending hearing and determination of the appeal. Failure to comply will lead to an automatic lapse of the order of stay of execution with no further reference to this court.
26. The appellant/applicant is urged to fast track the hearing of the appeal.
27. Each party to bear his/her own costs.
28. Orders accordingly.

Delivered virtually/physically, dated and signed this 25th day of April, 2024 in open court at Nakuru.

H. I. ONG’UDI

JUDGE

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