



ENK v SAN (Family Appeal E018 of 2024) [2024] KEHC 7217 (KLR) (24 May 2024) (Ruling)

Neutral citation: [2024] KEHC 7217 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E018 OF 2024**

G MUTAI, J

MAY 24, 2024

BETWEEN

ENK APPELLANT

AND

SAN RESPONDENT

RULING

1. In a ruling delivered on 21st March 2024, the trial Court ordered, inter alia, that:-
 - a. That the Plaintiff shall retain the actual physical custody of the children;
 - b. That the Plaintiff present the children DKN and EKN at MaryJoy Kindergarten and Primary School for them to undertake an interview within three days of the date of the ruling;
 - c. The results of the said interview should be communicated to the Court by Monday, the 25th day of March 2024.

2. The Appellant/Applicant was aggrieved by the decision and filed an appeal. He also filed a Notice of Motion application dated 25th March 2024, *vide* which the following orders were sought:-
 1. Spent;
 2. That the honourable Court be pleased to issue an order staying execution and or proceedings emanating from the ruling of the Principal Magistrate, Hon Nelly Chepchirchir, at Tononoka Law Courts in MCCHCC/E022/2024, delivered on 21st March 2024;
 3. That the honourable Court be pleased to order the minors, namely DKN and EKN, do attend the previous school, Zuri School, pending the hearing and determination of the application and the intended appeal;



4. That the honourable Court be pleased to issue an order placing the minors in the actual custody of the Appellant to enable them to attend school pending the hearing and determination of the application and intended appeal;
 5. That the honourable Court be pleased to issue any other orders as it may deem appropriate; and
 6. That the costs hereof be provided for.”
3. The grounds upon which the application is based are set out in the body of the application as well as in the Supporting affidavit of the Appellant/Applicant sworn on 25th March 2024. The Appellant/Applicant contends that the Respondent unilaterally moved the children from their former school and sought to enrol them at MaryJoy Kindergarten and Primary School without involving him. He averred that she commenced the proceedings in the Court below. He is aggrieved by the conduct of the children officer and also by the decision of the Court below, which he avers went beyond the pleadings of the parties.
 4. On her part the Respondent filed an application dated 5th April 2024 *vide* which she sought the following orders:-
 1. That this application be heard *ex parte* in the first instance and service of the same be dispensed with;
 2. That this honourable Court be pleased to issue a production order requiring Ernest Njoroge Kanyoro, the Appellant/Defendant herein, to pay for school fees and any related school expenses for the minors as directed by the Tononoka Magistrate Court coming next month since I have borrowed to pay for admission and their exams at MaryJoy Primary;
 3. That this honourable Court be pleased to help the minors to join MaryJoy Kindergarten & Primary School, which (is) the best school in Mombasa and the same costs as the former school called Zuri School; and
 4. That costs be in the cause.
 5. The Respondent filed a Replying Affidavit, sworn by her, on the 3rd day of May 2024, after the application herein had been canvassed. She deposed that the two children were pupils in Zuri School, Naivasha, until the end of the 2023 school year. In her view, the trial Magistrate considered all the relevant matters and made the correct decision in her ruling dated 21st March 2024, as she gave both parties an opportunity to submit on the relevant issues. She further stated that the ruling took into account the children’s best interest and was well reasoned. She, therefore, prayed that I dismiss the application.
 6. The application dated 26th March 2024 was argued before me on 2nd May 2024. Mr. Bosire, learned counsel for the Appellant/Applicant, submitted that the application was unopposed as no Replying Affidavit had been filed. He stated that the Appellant/Applicant stays in Naivasha while the Respondent resides at Utange in Mombasa. He urged that the children weren’t attending school as the Respondent is jobless. Counsel averred that the Appellant/Applicant previously paid school fees.
 7. Mr. Bosire submitted that having the children attend the proposed school in Mombasa would put his client under a great strain. He therefore urged that I allow the application.
 8. The Respondent submitted that she too had an application *vide* which she seeks to have the Appellant/Applicant compelled to take the children to school at MaryJoy as he had not been laying school fees. She submitted that they were forced to come to Mombasa by the Appellant/Applicant.



9. I have considered the submissions of the parties. In my view, the following are the issues I am called upon to determine: -
1. Whether or not a case has been made for this Court to stay the execution of the orders of the Court below; and
 2. Whether the application filed by the Respondent dated 5th April 2024 has merit.
10. Order 42 Rule 6(2) of the [Civil Procedure Rules](#) provides as follows: -
- “No order for stay of execution shall be made under subrule (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.”
11. When determining whether or not to stay proceedings, Courts consider the following 3 factors: -
- a. Will the Applicant suffer substantial loss if the stay sought is not granted?
 - b. Has the application for stay been made without unreasonable delay? and
 - c. Has security been provided by the Applicant?
12. In addition to the 3 factors I have stated above when a Court is considering a children matter, it must take into account the Constitutional and legal precept found in Article 53(2) of the [Constitution](#) and Section 8 of the [Children Act](#), 2022 that the best interest of the child is paramount.
13. In stating this, I am guided by the decision of the Court in the case of Bhutt versus Bhutt; Mombasa HCCC No 8 of 2014 where the Court held that,
- “in determining an application for stay of execution in cases involving children, the general principles for we grant of stay of execution under Order 42 Rule 6 of the [Civil Procedure Rules](#) must be complemented by the overriding consideration of the best interest of the child in accordance with Article 53(2) of the [Constitution](#)”.
14. The Appellant/Applicant avers that complying with the Court orders is too onerous for him. He would prefer that custody be restored to him so that the children can go to school in Naivasha.
15. Will there be a substantial loss in this matter? In my view, the substantial loss in this issue is that of the child. The best interest of the minors is of paramount importance, and the inconvenience suffered by the parents is of secondary importance.
16. The Appellant/Applicant stated that he previously paid school fees for the minors at Zuri School. However, he failed to provide evidence showing that MaryJoy's fees were substantially higher than those he previously paid. In the circumstances, I am unable to agree that the Appellant/applicant will suffer a substantial loss that would warrant the issuance of a stay of execution.
17. Regarding the second test, I note that the instant application was filed without undue delay.
18. In my view, the third test is inapplicable to children.



19. My reading of order 42 Rule 6(2) of the *Civil Procedure Rules* is that the requirements are conjunctive, not disjunctive. An Applicant must meet the test as a whole. Where one factor is missing, the application must fail.

20. I must add that stay of execution orders are rarely issued in children matters. The reason for this was stated authoritatively by Musyoka J in *ZMO versus VEIM* [2013] eKLR in the following terms:-

“As a matter of principle 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 it. Suspension of a maintenance order is not in the best interest 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 quantum payable.”

21. There is no dispute regarding paternity in this case. The dispute is on whether the minors should be enrolled in the proposed school and if the Appellant/Applicant has the means to pay the fees payable in the new school. In other words the main point of contestation is the quantum of fees payable.

22. It is evident that the Appellant/Applicant’s primary motivation is his own convenience. As I have already indicated, the interest of the children is primary consideration.

23. The Appellant/Applicant has freely admitted that the minors aren’t going to school despite the orders of the trial Court to that effect. In my view, the equitable maxim that he who comes to the Court of equity must do so with clean hands is relevant. Having not come to this Court with clean hands, he does not deserve the remedies he seeks.

24. Should I stay proceedings in the Court below as sought in Prayer No. 2? Stay of proceedings is a very drastic remedy that courts should grant sparingly. This is especially so where what is appealed against is an interlocutory decision. This is so because stay of proceedings has the effect of delaying the just and timely determination of cases.

25. Ringera J (as he then was) in *Global Tours & Travels Limited (Nairobi HC Winding Up* Cause No. 43 of 2000) stated as follows:-

“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.”

26. Joel Ngugi, J (as he then was), in *Turbo Highway Eldoret Ltd v Muniu* (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR) (30 June 2022) (Ruling) held as follows: -

“23. As a general matter, an appellate court will only exercise its discretion to grant a stay of proceedings pending an appeal over an interlocutory matter before



a magistrate's Court or Tribunal only in exceptional circumstances. While difficult to determine with mathematical precision when the Court will use this power, it is only to be sparingly used where, in the words of South African authors, *Gardiner and Lansdown* (6th Ed. Vol. 1 p. 750), "grave injustice might otherwise result or where justice might not by other means be attained." As the authors correctly write, the Court will generally "hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the Court below."

24. Hence, the propriety of granting a stay of proceedings pending an appeal over interlocutory matters is decided on the facts of each case and with "due regard to the salutary general rule that appeals are not entertained piecemeal." (*Walhaus & Others v Additional Magistrate, Johannesburg & Another*, 1959 (3) SA 113(A) at 120D; *S. v Western Areas Ltd & Others* 2005 (5) SA 214 (SCA) at 224D.)
27. There are no exceptional grounds in this matter to justify stay proceedings. Allowing the application, in any event, creates the clear and present risk that several appeals will be filed, which must then be entertained piecemeal.
28. Regarding custody, it is my view that it would not be advisable to disturb the finding of the trial Court at this point. In the interest of justice the appeal will be determined on priority basis.
29. It is clear that I have not found merit in the application. The same is dismissed.
30. The application filed by the Respondent, on the other hand, is misguided. She seeks to enforce the order of the trial Court. The said application ought to be filed at the trial Court. The same is also dismissed.
31. This being a children's matter, each party shall bear own costs.
32. Orders accordingly.

DATED AND SIGNED THIS 24TH DAY OF MAY 2024 AT MOMBASA. RULING DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of :-

No appearance for the Appellant/Applicant;

No Appearance for the Respondent; and

Arthur – Court Assistant

