HNM v NGM (Children's Appeal Case E064 of 2024)
[2025] KEHC 2226 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2226 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CHILDREN'S APPEAL CASE E064 OF 2024

HI ONG'UDI, J

FEBRUARY 27, 2025

BETWEEN

HNM ..... APPLICANT

AND

NGM ..... RESPONDENT

RULING

1. This ruling is in respect of two (2) applications filed by the appellant/applicant. The first one is dated 4th April 2024 and the second one 22nd January 2025. Parties on 4th February 2025 consented to the said applications being consolidated since they both are seeking for stay of execution of the ruling and orders issued by the Honourable R. Kefa in Nakuru Misc Application No. E005 of 2024 on 8th January 2025. Further, that the court be pleased to issue any other order as it may deem fit just and appropriate plus costs of the application.

2. Each application is premised on the grounds on its face as well as the affidavits of the appellant/ applicant sworn on even date. He deponed that the respondent filed an application for the extension of parental responsibility in Nakuru Misc Application No. E005 of 2024 and a ruling was delivered on 14th March 2024 in her favour. Being dissatisfied with the said ruling he filed an appeal vide the memorandum of appeal dated 25th March 2024.

3. He further deponed that unless restrained by this court from executing the orders issued by the trial court, the appeal filed herein would be rendered nugatory and he stood to suffer irreparable loss and prejudice. That the application was brought without delay and it is the duty of the court to preserve the substance of his appeal. He added that it was in the interest of justice and fairness that the court grants him the orders sought.

4. In response, the respondent filed two replying affidavits dated 29th January 2025 and 12th June 2024 together with a supporting affidavit dated 17th January 2021. In the said affidavits she urged the court

not to issue stay of orders and to instead compel the appellant/applicant to pay for her college fees and all her college related expenses. She averred that she had missed the college intake in March 2024 but she was able to enrol for the September intake. Further, that the appellant/applicant had failed to pay her college fees and she therefore risked dropping out of college. She urged the court to dismiss the applications.

5. Both applications were canvassed by way of written submissions.

Appellant/applicant's submissions

6. These were by filed by Munene & Chege Company Advocates and are dated 5th February, 2025. Counsel gave a brief summary of the applications and identified two issues for determination.

7. The first issue is whether there was inordinate delay in prosecution of the application dated 4th April 2024 for stay of execution. Counsel submitted in the negative and relied on two authorities one of them being *Moses Mwangi Kimani v Shammi Kanjirapparambil Thomas & 2 Others* [2014]eKLR where Justice F. Gikonyo defined inordinate delay as follows:

> " There is no precise measure of what amounts to inordinate delay as that would differ from case to case depending on the circumstances and facts of each case; for instance, the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however, advised for courts not to take the word "inordinate" in its dictionary meaning, but to apply it in the sense of excessive as compared to normality."

8. The second issue is whether the honourable court should issue stay of execution of the ruling delivered by the trial court on 4th March 2024 and resultant decisions and orders pending the hearing and determination of the appeal. Counsel equally submitted in the affirmative and cited Aricle 50 of the *Constitution* of Kenya, Order 42 rule 6 (2) of the *Civil Procedure Rules* and several decisions among them *RWW v EKW* [2019] eKLR, where the court considered the purpose of a stay of execution order pending appeal, in the following words:

> " 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 any prejudice that cannot be compensated by an award of costs.

9. In conclusion, she cited section 3A of the *Civil Procedure Act* and the decision in *Kamlesh Mansukhalal Damki Parni v Director od Public Prosecution & 3 Others* [2015] eKLR and urged the court to exercise its discretion in his favour.

Respondent's submissions

10. These submissions were by filed by Ntabo & Abuga advocates and are dated 7th February, 2025. Counsel gave a brief background of the applications and submitted that there was inordinate and inexcusable delay by the applicant in prosecuting his application dated 4th April 2024. Further, that

stay of execution in a child maintenance case is granted while considering the best interest of a child, no undue delay and proof of substantial loss.

11. She placed reliance on the decision in *PSA v DNG* Civil Appeal E099 of 2023 where Justice P.M. Nyaundi declined to grant stay of execution in a children case and held as follows;

> " The welfare of the children is paramount - consideration and cannot be stayed detrimental to the welfare of the said children. In the case of *DOB v DMA* [2021] eKLR the court addressed itself on the issue of staying maintenance as follows:
>
> > " in matters concerning children, the best interest of the child is of paramount importance. The accepted principle in application for stay of execution of maintenance orders in children's cases is that the suspension of the maintenance order is not in the best interest of the child"

12. In conclusion, she urged the court to dismiss both applications.

Analysis and determination

13. I have considered the applications, affidavits, submissions by the parties and the cited authorities. I find the issue arising for determination to be whether an order for stay of execution should issue against the ruling delivered on the 14th March, 2024 in Nakuru Misc Application No. E005 of 2024.

14. 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—
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> (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.

15. In *R WW v EKW* [2019] eKLR, also relied on by the respondent the court addressed the purpose of a stay of execution order pending appeal, in the following words:

> " 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.
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> 9. 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."

16. From the provisions of 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 defendant 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 both situations.

17. Further, in the case of *Regional Institute of Business Management v Lucas Ondong' Otieno* [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".

18. The applications herein are dated 4th April 2024 and 22nd January 2025 respectively. The ruling being challenged was delivered on 14th March 2024. There was therefore no delay in filing of the 1st application. However, there was delay of approximately 10 months in filing the second one. No sufficient reason was given by the appellant in the delay in prosecuting the application dated 4th April 2024 and in filing his application dated 22nd January 2025.

19. On substantial loss, the appellant/applicant argued that if the stay orders are denied, the appeal would be rendered nugatory. The respondent on her part argued that the appellant/applicant had failed to demonstrate what substantial loss he would incur by paying his daughter's fees.

20. In the case of *Silverstein v 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.

21. 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 each case. It is my opinion that this court must balance these rights to ensure that justice is served. I agree with respondent's argument that the appellant/applicant has not demonstrated what substantial loss he would suffer by paying her school fees. Further, in the event the appeal succeeds the appellant/applicant can always seek for a refund of the monies paid. It is important to note that the respondent has an equal right to education just like the other children of the appellant/applicant and to deny her the opportunity to join college would be discriminatory and not in the interest of justice. Moreover, the respondent is already enrolled in college and her college fees need to paid even as the appellant/applicant pursues his Appeal.

22. The above being the position, I do decline to allow the prayer for stay of execution.

23. The upshot is that both applications dated 4th April 2024 and 22nd January 2025 are hereby dismissed with no orders as to costs.

24. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 27TH DAY OF FEBRUARY, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE