



REPUBLIC OF KENYA



**KENYA LAW**  
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**LNK v SWM (Civil Appeal E039 of 2024)**  
**[2024] KEHC 15347 (KLR) (Family) (29 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15347 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**  
**CIVIL APPEAL E039 OF 2024**

**PM NYAUNDI, J**  
**NOVEMBER 29, 2024**

**BETWEEN**

**LNK ..... APPLICANT**

**AND**

**SWM ..... RESPONDENT**

**RULING**

1. Before this court is the Notice of Motion application dated 24<sup>th</sup> April 2024 by which the Applicant Lydia Njeri Kinyanjui seeks the following orders:-
  - 1 Spent.
  - 2 Spent.
  3. That this Honourable Court be pleased to grant a stay of execution of the ruling and any subsequent orders delivered on 11<sup>th</sup> April 2024 by Hon. Elizabeth Muiru PM in the Children's Court at Nairobi in Case No. E036 of 2024 pending hearing and determination of the appeal herein.
  - 4 That the costs be borne by the Respondent.
2. The Application was premised upon Sections 1A, 1B, 3A and 65(1) (b) of the *Civil Procedure Act*, Order 42 Rule 6, Order 51 of the Civil Procedure Rules, Article 159 of *the Constitution* of Kenya and all other enabling provisions of the law, and was supported by the Affidavit of even date sworn by the Applicant.
3. In response, the Respondent Samwel Watari Mwangi opposed the application through a Replying Affidavit dated 13<sup>th</sup> May 2024. He averred That the Applicant in the trial court did not file an



affidavit of means or any evidence to justify her allegations. On the other hand, he has been providing maintenance for the minor and sending upkeep. He also took out an insurance cover for the minor. He argued That the Applicant equally has parental responsibility over the minor but instead, she wants him to provide everything.

4. That the amount awarded by the trial magistrate is reasonable considering the fact That the minor has an insurance cover, he buys the minor's food, clothing and frequently sends the Applicant money. Further, That the amount is reasonable considering the age of the minor who is barely two years old. He avers That the ruling of 11<sup>th</sup> April 2024 is in the best interest of the minor and he has been complying with the court's orders. The applicant on the other hand has been denying him access of the minor. He argued That he has another family and a young baby to take care of.

### **Background**

5. The parties herein were involved in Nairobi Children Case No.E036 of 2024 the trial court was tasked to determine an application dated 9<sup>th</sup> January 2024 where the Respondent sought the following orders;
  - a. That this application be certified as urgent and heard ex-parte in the first instance.
  - b. That this Honourable Court be pleased to grant the Applicant reasonable access to the minor pending the hearing and determination of this suit.
  - c. That this honourable court be pleased to grant the Applicant reasonable access to the minor pending the hearing and determination of this application.
  - d. That this honourable court be pleased to grant joint legal custody of the minor to be shared equally between the Applicant and the Respondent pending the hearing and determination of this suit.
  - e. That this honourable court grants any further orders it deems just and fit .
  - f. That the costs of this application be provided for.
6. On 11<sup>th</sup> April 2024, Hon.E.Muiru , Principal Magistrate made the following orders;
  1. The Plaintiff and the Defendant are granted joint legal custody of the minor.
  2. The Plaintiff is granted access on alternate weekends from Saturday 10 am to Sunday 6 pm.
  3. The plaintiff shall provide monthly maintenance of Kshs. 7,000/= payable to the Defendant to cater for food and Defendant shall cater for shortfall.
  4. The Defendant shall provide a list of clothing items required by the minor after every 3 months and the Plaintiff shall purchase the same.
  5. The Plaintiff to maintain the child in the medical cover.
  6. The Defendant to provide shelter and utilities thereto.
7. The Applicant was aggrieved by the court's orders and filed an appeal before this court.

### **Applicant's Submissions**

8. The Applicant submitted That in determining stay of execution in children matters, the best interest of the child is paramount as provided by Section 53(2) and Section 4 of the [Children Act](#).
9. There was no delay since the application was brought on 23<sup>th</sup> April 2024 only 13 days from the ruling.



10. The Applicant submitted That the amount awarded by the trial court is little. That the trial court failed to acknowledge That she has limited resources while the Respondent is a man of means.
11. On substantial loss, she relied on the decision of GKM v GAO (suing as mother and next friend)[2022] eKLR. She averred That she stands to suffer loss if the orders she seeks in the application 24<sup>th</sup> April 2024 are not granted. That this court should compel the Respondent to pay Kshs. 105,000/= monthly maintenance while she pays for rent.

### **Analysis And Determination.**

12. I have considered the application before me, the Reply filed by the Respondent as well as the written submissions filed by each party. The Applicant is seeking orders mainly to stay the orders issued by the trial court on 11<sup>th</sup> April 2024.
13. The guiding principle on all matters touching on children is found under Article 53(2) which provides That:  
A child's best interests are of paramount importance in every matter concerning the child
14. In the case of Bhutt v Bhutt Mombasa HCCC No. 8 of 2014, the Court held as follows:-  
In determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution Order 42 Rule 6 of the civil Procedure Rules, must be complemented by overriding consideration of the best interest of the child in accordance with "Article 53(2) of *the Constitution*."
15. In this appeal, this court is in effect being called upon to determine whether the trial court was properly guided when it made the ruling on interim maintenance.
16. As a general rule or guideline, the trial court was obligated to take into account the income or earning capacity and financial abilities of both parties before rendering a decision. The trial court was also required to consider the financial needs and other requirements of the child.
17. At this stage, it may be difficult for this court to interrogate some of the issues raised because the matter had not moved to full trial where the issues would have been interrogated. The Applicant has for example stated That she earns only Kshs. 15,000 per month. she stated That the Respondent earns over Kshs. 500,000 monthly. The Respondent argued That the Applicant did not file her affidavit of means. The Appellant further argues That her salary is not enough to sustain the minor's needs.
18. In my considered view, if That is factual, the appellant should have simply invoked Section 99 of the Children's Act. The Children Court is seized with jurisdiction & discretion to vary the orders made to suit the expediencies currently obtaining. Section 99 of the Children's Act provides;  

The court shall have the power to impose such conditions as it thinks fit to an order made under this section and shall have the power to vary, modify or discharge any order made under Section 98 concerning the making of any financial provisions, by altering the times of payments or by increasing or diminishing the amount payable or may temporarily suspend the order as to the whole or any part of the money paid and subsequently revive it wholly or in part as the court thinks fit.
19. There is nothing That prevents the Applicant from moving the trial court for any order That is just to both parties. It is important to note That at all times the primary consideration is not the hardship occasioned by a maintenance order or any other consideration but the best interest of the child as



stipulated under Section 4 of the Children’s Act & Article 53(2) of *the Constitution*. In LAO vs OK Arap M [2019] eKLR the court moved to vary a maintenance order and observed as follows:-

The court in the exercise of its power may impose conditions, vary modify or even discharge a maintenance order for the making of a financial provision. The Court may also increase or decrease or change the times of payments of the amount payable under a maintenance order. Additionally, the court has the power and discretion to temporarily suspend the whole or any part of the maintenance amount and subsequently revive it wholly or in part as it deems fit. For a party to be deserving of an order of variation of a maintenance order, it must be demonstrated That such variation is in the best interest of the child.

20. In the premises, this court finds no merit in this appeal. I will not make any order as to costs.

**DATED, SIGNED AND DELIVERED ON THE VIRTUAL PLATFORM, AT NAIROBI THIS 29<sup>th</sup> DAY OF NOVEMBER, 2024.**

**PATRICIA NYAUNDI**

**JUDGE**

In the presence of:

Fardosa Court Assistant

