



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**EJO v RKO (Civil Case E136 of 2021) [2022] KEHC 12853 (KLR) (Civ) (5 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12853 (KLR)

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

**CIVIL**

**CIVIL CASE E136 OF 2021**

**MA ODERO, J**

**AUGUST 5, 2022**

**BETWEEN**

**EJO ..... APPLICANT**

**AND**

**RKO ..... RESPONDENT**

**RULING**

1. Before this Court for determination is the Application dated November 18, 2021 by which the Applicant EJO seeks the following orders:-
  - “ 1. Spent.
  2. Spent
  3. That pending the hearing and determination of this Appeal, the Honourable court be pleased to grant the Applicant an order of stay of execution of the Ruling of Hon J.A. ADUKE in Miscellaneous Application Case No. E1238 of 2021 at Nairobi delivered on October 19, 2021.”
2. The application which was premised upon sections 1A,1B,3A of the *Civil Procedure Act*, Order 42 Rules 6(1)(2)(3) and (6), Order 31 of the *Civil Procedure Rules*, sections 4, 24, 26, 90,91,97,98,99 and 113 of the *Children Act* 2001 and all other enabling provisions of the law and is supported by the affidavit of even date sworn by the applicant.
3. The respondent RKO opposed the application through her replying affidavit dated February 4, 2022. The application was canvassed by way of written submissions. The applicant filed the written submissions dated April 5, 2022 whilst the respondent relied upon her written submissions dated May 19, 2022.



## Background

4. The Applicant and the respondent are the biological parents of the minor E.K.O who is subject of these proceedings. The couple are currently separated. The applicant filed in the Nairobi children Court Suit No. 363 of 2020. In that matter the parties entered into a consent dated 18<sup>th</sup> November 2020 in the following terms:-

It Is Hereby Ordered by Consent

1. That the parties shall have joint legal custody of the minor.
2. That the defendant shall have actual custody of the minor and the Plaintiff shall have access as follows
  - a. That before the minor join school in July 2021, the plaintiff shall have access on alternate weekends from Saturday 9am-Sunday 6pm with effect from 28<sup>th</sup> day of November 2020.
  - b. That in mid-December the plaintiff may have additional access for 2 days on weekdays when he does not have access on the weekend.
  - c. That in January-June 2021, the Plaintiff shall access the minor on alternate weekends
  - d. That once the minor joins school in July 2021, the Plaintiff shall access on alternate weekends. School holidays shall be shared equally only if the Plaintiff has accommodation for the minor's nanny who shall be accompanying the minor until the minor turns 7 years old.
  - e. That half terms and public holidays shall be alternated.
  - f. That the 1<sup>st</sup> half of all school holiday shall also be alternated and the plaintiff shall begin.
  - g. That in the event the plaintiff acquires adequate accommodation he shall have access to the minor whenever the defendant travel out of town or out of the country.
3. That the plaintiff shall provide food for the minor at Kshs 15,000/- per month by the 5<sup>th</sup> of every month.
4. That the plaintiff shall maintain a comprehensive medical cover for the minor and both parent fingerprints shall be registered.
5. That the defendant shall provide shelter and utilities.
6. That both parties shall provide clothing.
7. That the cost of school fees and related expenses shall be shared equally.
8. That the minor shall join [particulars withheld] school. In the event of a transfer, the parties must discuss and agree on the school.
9. That the Defendant shall always inform the Plaintiff about the minor's health and education.
10. That either party shall inform the other when they intend to travel out of the country of Nairobi country with the minor.
11. That the matter is marked as settled.



12. That the consent is adopted as a judgment of the court.”
5. The Applicant later filed an application dated February 21, 2021 seeking a review of the consent dated November 18, 2020 by the addition of the following terms:-
- “(a) The plaintiff shall access the minor at a neutral place away from the defendant’s residence.
- (b) The plaintiff be granted virtual access to the minor in addition to the actual access granted by the court.”
6. The application for review of the consent orders was heard by Hon H.M. MBATI, Senior Resident Magistrate who in her Ruling delivered on October 29, 2021 granted the application for review of the consent.
7. Whilst the parties were engaged in the hearing in the Children’s Court, the respondent filed an application dated August 20, 2021 in Nairobi Misc. Case No. E1238 of 2021 alleging that she had been a victim of Gender Based Violence meted out to her by the applicant. The respondent prayed that the court issue Protection Orders under the provisions of the *Protection Against Domestic Violence Act*, 2015 restraining the Applicant from physically abusing or threatening to abuse the Respondent and orders to protect her against psychological abuse, damage to her property or intimidation of any kind from the Applicant. The Application was heard and vide a Ruling delivered on October 19, 2021 Hon Aduke Resident Magistrate issued the Protection Orders in favour of the respondent against the applicant.
8. The applicant was aggrieved by the ruling delivered on October 19, 2021, and filed the Memorandum of Appeal dated November 18, 2021. Contemporaneously with that Memorandum of Appeal, the Applicant filed this present application seeking to stay the orders of October 19, 2021 made by Hon Aduke in Misc No. E1238 of 2021.
9. The applicant contended that the trial magistrate failed to analyze all the evidence before him in granting the Protection Orders. That the said orders of Protection effectively denied him access to the minor despite the existence of orders issued by the Children Court granting him access.
10. The Applicant alleged that the Respondent has consistently endeavoured to separate him from his son yet she demands for maintenance, which he never fails to pay. He submitted that the Protection Orders ought to be stayed in order to allow him access to the minor to allow the child the opportunity to enjoy the parental love from both parents as enshrined in *the Constitution* of Kenya 2010.
11. The respondent in opposing the Application submitted that the heading of Notice of Motion/ Chamber Summons was defective as there is no such pleading known in law. She argued that the application is seeking to stay a negative order and this could not be allowed. It was averred that at no point did the Magistrate interfere with the orders of access made in E1363 of 2020. The Respondent urged the court to dismiss this application in its entirety.

### **Analysis and Determination**

13. I have carefully considered the application before this court, the Affidavit filed in reply as well as the written submissions filed by both parties. The only issue for determination is whether a stay of the orders made by the lower court on October 19, 2021 ought to be granted.
14. The respondent submitted that the application was defective due to the heading which read ‘Notice of Motion/Chamber Summons’. I do agree that an application ought to be brought by way either of Notice of Motion or a Chamber Summons but not by both. However, this error is not in my view



- fatally defective. Article 159 (2) (d) of the Constitution urges courts to administer substantive justice without undue regard to technicalities. The heading on the application does not affect the substance of said application.
15. Order 42 Rule 6(2) of the Civil Procedure Rules provides for the circumstances in which a stay may be granted 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.”
16. In Butt v Rent Restriction Tribunal [1979] EA eKLR the court held that –
- “1. The power of the court to grant or refuse an application for a stay execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
  3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements.”
17. It must be borne in mind that this matter concerns the welfare of a minor.
18. The Constitution of Kenya 2010 provides at article 53 (2) that:
- (2) A child’s best interests are of paramount importance in every matter concerning the child.”
19. Likewise Children Act at Section 4(2) provides as follows:-
- “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. (Own emphasis)
20. 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 constitution the Constitution.” (Own emphasis)



21. The impugned ruling was delivered on October 19, 2021. The present application was filed on November 18, 2021. The application was filed approximately one (1) month after the Ruling was delivered. In the circumstances, I find that this application was filed in a timeous manner.
22. The Applicant submits that he stands to suffer substantial loss if the stay orders are not issued. He alleges that the Protection Orders granted by the court have the effect of negating the orders of access made by the Children’s Court thereby denying the Applicant access to his son. I do agree with the Applicant that a Magistrate of concurrent jurisdiction has no jurisdiction to review orders of access made by the Children’s Court.
23. However upon close examination the Applicants arguments fall by the wayside. I have carefully perused both the orders of access made on October 29, 2021as well as the Protection Orders made on October 19, 2021. I find no clash and/or nor contradiction between the two orders.
24. The Protection Orders restrained the Applicant from abusing, intimidating or in any way accessing and/or harming/damaging the Respondent or her property. The said orders made no mention at all regarding the Applicants right to access to his son. Certainly, the orders made on October 19, 2021 did not in any way bar the Applicant from accessing the minor.
25. The applicant himself filed in the Children’s Court an application dated February 21, 2021 seeking to review the consent order dated November 18, 2020 by adding to said consent the following terms:-

“The Plaintiff shall access the minor at a neutral place away from the defendant’s residence.  
The Plaintiff be granted initial access to the minor in addition to the actual access granted by the court.” (Own emphasis)
26. In her ruling delivered on November 18, 2021, in which Hon Mbatia allowed the application for review of the orders of access, the court stated as follows:-

“I have considered the affidavits, submissions and the competing arguments advanced therein. I see no harm in granting prayer (a) and (b) of the Application, because they seek to deepen the relationship the Plaintiff has with his son. The minor is a boy who needs his father’s mentorship and guidance as he grows up to be a man. For the avoidance of doubts, I note that the consent did not require the Plaintiff to access the minor at the Defendants’ residence. Nevertheless, since the issue of a drop off and pick up point has been raised, I direct that minor shall be dropped and picked up from Central Police Station in Nairobi County.

In addition, either party is granted phone/virtual access to the minor everyday for 30 minutes at 7.30-8.00 pm when the minor is in custody of the other party. The party that wishes to have phone/virtual access shall provide phone/device and airtime/internet bundles for this purpose. Last but not least, each party shall bear its own costs.”
27. From the above it is clear that the applicant (by his own request) sought to access the minor at a neutral place. He does not have to exercise his rights of access at the residence of the defendant. The court also granted to the applicant virtual access to the child which virtual access is exercised by way of mobile phone, laptop or I-phone. Again, this does not require the applicant to go to the resident of the respondent. The Protection order prohibited the Applicant from accessing the residence of the respondent. The orders did not prohibit the Applicant from accessing his son.
28. I find that the orders of access are not in any way been negated and/or set aside by the Protection Orders made on October 19, 2021. The applicant is at liberty to access his son at venues other than at the



respondents residence. Therefore, I find that the applicant remains at liberty to continue to enjoy his right of access as granted by the Children’s Court. Accordingly, I find no merit in this application for stay. The same is dismissed in its entirety. This being a family matter I made no orders on costs.

**DATED IN NAIROBI THIS 5<sup>TH</sup> DAY OF AUGUST, 2022.**

.....

**MAUREEN A. ODERO**

**JUDGE**

