



**SJK & another v JMO (Civil Appeal E006 of 2025)
[2025] KEHC 3660 (KLR) (Family) (24 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3660 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E006 OF 2025
HK CHEMITEI, J
MARCH 24, 2025**

BETWEEN

SJK 1ST APPELLANT

JK 2ND APPELLANT

AND

JMO RESPONDENT

RULING

1. This ruling relates to the application dated 30th December, 2024 filed by the 1st and 2nd Appellants/Applicants, SJK and JK; seeking for orders that:-
 - (a) Spent.
 - (b) There be a stay of execution of orders dated 30th December, 2024 in Milimani Magistrate’s Court Children’s Case No. 1585 of 2024 pending the hearing of this application inter partes.
 - (c) There be a stay of execution of orders dated 30th December, 2024 in Milimani Magistrate’s Court Case No. 1585 of 2024 pending the hearing and determination of the intended appeal.
 - (d) The actual custody of the minor herein (LKM) be granted to the 2nd Applicant pending the hearing and determination of the intended appeal.
 - (e) This Honourable Court be pleased to set aside the orders made on 30th December, 2024 in the best interest of the minor herein.
 - (f) The costs of this application be provided for.



2. The application is supported by affidavit sworn by SJK on 1st January, 2025. She avers inter alia that she is the child's biological mother, while the 2nd Applicant is her maternal grandmother.
3. In a ruling delivered on 20th December, 2024, Hon. Bernard Ochoi (Mr.) granted JMO (the Respondent) physical custody and direct care of the minor, LKM. Legal custody was awarded to SJK and JK. Additionally, JK, the child's grandmother and primary caregiver in the mother's absence, was granted visitation every alternate weekend from Saturday at 10:00 am to Sunday at 4:00 pm. SJK was allowed unrestricted access to the child via video and telephone calls or any other form of technology while she is abroad. That before the 1st Applicant left for Australia to pursue a master's degree until 2026, the minor and the 2nd Applicant had been living with her.
4. The Applicants have filed a notice of appeal against the ruling and are awaiting the official typed proceedings. They argue that relocating the minor from her current residence with her grandmother to the Respondent's care would not be in her best interests, as it could cause instability. Furthermore, such a move would place the child in the Respondent's rural home, limiting both the 2nd Applicant's and the child's access to each other.
5. That the Applicants do not oppose the Respondent having access to the minor but express concerns about his financial stability, as his sources of income remain unknown, and he has not previously contributed to the child's well-being, including financial support or fulfilling parental responsibilities. The 2nd Applicant has been solely covering all expenses for both the minor and the 1st Applicant and is financially capable of continuing to support the child while the mother is studying in Australia.
6. The application is opposed vide replying affidavit sworn by JMO on 14th January, 2025. He avers inter alia that he is the minor's biological father and has been unable to have physical custody and care of her since August 2024, when her mother left for Australia. As a result, the court ruled in his favor on 20th December, 2024. A report from the children's office confirmed his suitability to have physical custody. Despite the minor being a 3-year-old girl, he is an involved father and should be allowed to play a greater role in her upbringing, especially now that her mother is abroad.
7. Before the 1st Applicant left for Australia and before they started to have differences, they lived together with the minor at his current residence and shared parental responsibilities. At that time, the 1st Applicant was employed at [particulars withheld] Hospital, and he had hired a nanny to care for the child while he was at work. He has a stable income and a suitable living environment for the child.
8. He opposes the request for a stay of execution and argues that if any changes in the minor's circumstances arise while she is under his custody, the court can always review and adjust its orders. Granting the stay request would negatively impact the child's development, as he has already planned to enroll her in school.
9. All the parties have not filed written submissions on the instant application.

Background

10. The genesis of this application is the ruling delivered by Hon. Benard Ochoi on 20th December, 2024 which ordered that:-
 - 1) That the Plaintiff JMO is hereby granted physical actual care and control of the minor LKM.
 - 2) The plaintiff and first defendant will have legal custody.



- 3) The grandmother, 2nd defendant, has been a primary caregiver and is also an essential figure in the child's life especially in the absence of the child's mother. She is granted access every alternate weekend on Saturdays from 10. 00 am to Sunday 4. 00 pm.
- 4) For any period, the 1st Defendant is out of the country, she shall have unimpeded access to the minor through telephone, video calls and through any other appropriate use of technology.

Analysis and Determination

11. I have carefully considered the application before this court and the responses thereto. The court was off record able to engage with the parties online during the process of giving directions on the application.
12. What was before the trial court just as in this case is basically interim in nature. The substantive suit is yet to be heard and the trial court was alive to the same.
13. This court will not wish to enter into much discussion about the merits or otherwise of the main suit. Suffice to state that at the center of it all is the interest of a three-year-old minor. What is undisputed at this stage is that the mother is undertaking her studies in Australia and the minor was left under the care of her maternal grandmother.
14. The marriage between the parents seemed not to have worked or at least there were issues which I think will come out during the substantive hearing. These issues should not cloud the best interest of the child.
15. I reckon that all the parties love the child and that is why they each stake a claim over her. Of course, it is now, unless otherwise proven that such a toddler will best be taken care of by the mother. The man will ordinarily take care but with the aid of a nanny.
16. In this case the presence of the maternal grandmother in my view will make things easier since the Respondent will not have to worry about the issue of the nanny. An experience grandmother will even be more helpful as the child matures unless again it is shown that she is unable to take care.
17. The argument by the Respondent that he wanted to enroll the child in a kindergarten is still valid and he could do so with the assistance of the mother-in-law. His rights of access to the minor cannot be gainsaid. Being a father, he must have unlimited right.
18. All that the court is stating is that in regard to the daily care of the child, the maternal grandmother in the interim and pending the full determination of the matter is best suited. The Respondent must be granted full access especially during weekends to bond and have time with his child.
19. The other issues of upkeep or education will be well handled by the trial court as it seems they were not raised before me.
20. The principles for granting stay of execution in children's matters was well settled in the case of *Bhutt v. Bhutt Mombasa HCCC No. 8 of 2014 (O.S.)* where the Court stated, "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*."
21. In allowing this application and based on the overriding interest of the minor the best way is to dispense with the matter expeditiously so that the parties can well settled knowing their fate and further chatting the way forward for the minor.



22. In the premises I allow by varying the trials court orders as hereunder:-

- (a) The orders dated 30th December 2024 in children's case number 1585 of 2024 are hereby set aside.
- (b) The minor LKM shall pending the determination of the suit at the lower court shall be under the actual care and custody of JK, the maternal grandmother.
- (c) The Respondent JMO shall have unlimited access to the minor specifically on weekends between 8am to 6pm with due and prior arrangements with the 2nd Applicant.
- (d) The suit at the lower court be heard expeditiously and on priority basis.
- (e) Since there was no formal appeal, this matter is marked as settled and the file closed.
- (f) Costs in the cause

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 24TH DAY OF MARCH 2025.

H K CHEMITEI

JUDGE

