



REPUBLIC OF KENYA



**KENYA LAW**  
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**BAO v DWJ (Family Appeal E003 of 2025) [2025] KEHC 6651 (KLR) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6651 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
FAMILY APPEAL E003 OF 2025**

**SM MOHOCHI, J**

**MAY 22, 2025**

**BETWEEN**

**BAO ..... APPLICANT**

**AND**

**DWJ ..... RESPONDENT**

**RULING**

1. Before this Court is the Notice of Motion application dated 13<sup>th</sup> February, 2025 by which the Applicant/Appellant, acting in person, is seeking the following orders:-
  - i. Spent.
  - ii. That pending the hearing and determination of this Appeal a stay of execution of the impugned judgment, Decree and consequential orders issued in Nakuru Children's Case No. E017 of 2020 delivered on 5<sup>th</sup> day of February 2025 be issued.
  - iii. That pending the hearing and determination of the Applicant's Application against the judgment of the Honourable Court delivered on 5<sup>th</sup> February, 2025, a stay of execution of the decree and judgement and all other consequential orders be issued.
  - iv. That pending the hearing and determination of the intended Appeal it is in the best interest of the minors that the status quo on the provision of the welfare of the minors through attachment of salary orders to attaching salary of public Officer dated 10<sup>th</sup>, November, 2020 to remain in force and the impugned judgment dated 5<sup>th</sup> day of February,2025, Decree and consequential orders be stayed.
  - v. That the minors should continuing schooling at their current school being St. Peters Elite School Gilgil to avoid any uncalled for and insensitive interruption with the school environment where the minors are used to until the intended Appeal is heard and determined.
  - vi. Spent



vii. That costs of this Application be in the cause

### **Applicant's Case**

2. The application is premised on the grounds therein and the supporting affidavit of the Applicant sworn on even date. She averred that judgment in Nakuru Children's Case No. E017 of 2020 was delivered on 5<sup>th</sup> February, 2025 and if not stayed the minors stand to lose. That the suspension of the maintenance order is not in the best interest of the Children especially in cases where paternity is not disputed and where the appeal is on quantum payable.
3. That it would be in the best interests if the status quo on the provision of the welfare of the minors through salary attachment vide order dated 10<sup>th</sup> November, 2020 is maintained.
4. That the Respondent has threatened to serve the judgment and decree to his employer to stop the attachment of salary which if effected, the minors will suffer irreparable harm.
5. That if the orders are not stayed; the intended appeal will be rendered nugatory and an academic exercise to the detriment of the best interest of the children. That she was willing to abide by any reasonable conditions set.

### **Respondent's Case**

6. The Respondent in response opposed the Application in his Replying Affidavit sworn on 3<sup>rd</sup> March, 2025. He averred that the application is misconceived an abuse of the Court process. That the judgment of the Court apportioned responsibility fairly and was therefore proper and in accordance with the law.
7. That the appeal has no chances of success and that the Applicant has not demonstrated with satisfaction the conditions for grant of stay of execution of judgment. No prejudice has been established if the orders sought are denied.
8. That the Applicant has not demonstrated the substantial loss she would suffer considering that the Respondent would be meeting the minors' education related expenses, medical cover and maintenance of Kshs 6,000 per month towards food and clothing
9. That the orders of 10<sup>th</sup> November, 2020 were interim in nature and as such were resolved by the judgement of 5<sup>th</sup> February, 2020. That he exhibited his pay slip of July 2023 before Court and as a result of the salary attachment he was left with Kshs 55 to survive and to cater for the responsibilities of his other family.
10. That if the status quo is maintained he would suffer irreparably as he will not be able to fulfil his other parental responsibility to his other child and her mother

### **Applicant's Submissions**

11. The Applicant submitted that the Court should intervene and restore salary attachment orders dated 10<sup>th</sup> November, 2020 for the best interest of the minors who risk being rendered vulnerable and if the Court deems fit while considering the inflation trends, increase the amount upwards.
12. She relied on SCK Petition no. 2 E003 of 2022 Mutheu Agatha Khimulu -vs Raheem Mehdi Aziz Azad & others, Eldoret HCCA No. E154 of 2021 GKM -VS- VAO, Nairobi HCCA No. E048 of 2021, CNN - VS- PGN and Kericho HCCA No. E005 of 2020 Beatrice Chelangat -vs- Kipkorir Bett



to submit that the Respondent has not demonstrated his steady contribution to the Welfare of the subjects.

13. That the issue of equality versus equity should not be mistaken by the Respondent and the situation of the parties herein must be taken into consideration. That she has been providing for the minors as the Respondent's contribution was not enough. That the Respondent's new marriage should be a reason to abdicate on his parental responsibilities.

### **Respondent's Submissions**

14. Through counsel it was submitted that in an application involving children, the best interest of the child is what is paramount and reliance was placed in *Bhutt & Bhutt Mombasa HCC No. 8 of 2014 (OS)* and *LDT v PAO [2021] eKLR*.
15. On substantial loss, it was submitted that the matter revolves around parental responsibility and the Court fairly apportion responsibility and therefore the issue of substantial loss does not arise.
16. That the question of whether the amount ordered for upkeep was fair and reasonable is something that can be addressed on appeal and not at the interlocutory stage.
17. On the issue of security, it was submitted that no security has been given or furnished by the Applicant and as such the condition has not been satisfied.

### **Analysis and Determination**

18. I have considered the application, the affidavit for and against it. I have also considered the submissions by the parties and what I am to determine is whether the orders sought should be issued.
19. First and foremost, I am alive to the fact that this is children's matter and at best, the best interests of the children in this case are paramount. The Court in the case of *AM v MAM [2012] eKLR* stated thus:-

“In deciding children's matters it is incumbent upon the courts to bear in mind that children are vulnerable members of society and are therefore susceptible to physical, psychological and other types of abuses. The courts remain the upper guardians of children's rights and interests, and where necessary, have a final say in determining the overall welfare of the child. This they do through a relatively delicate balancing of sensitive interests that relate to family status and touch on private lives of individuals.”

20. This Court is duty bound to consider what is best for the children as provided under Article 53 (2) of *the Constitution* and at Section 8 (1) and (2) of the *Children Act*.

21. Article 53(2) of *the Constitution* provides that:

“A child's best interests are of paramount importance in every matter concerning the child.”

22. Section 8(1) (a) and (b) of the Children's Act provided.

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—
  - a. the best interests of the child shall be the primary consideration;
  - b. the best interests of the child shall include, but shall not be limited to, the considerations set out in the First Schedule.



23. Having the best interest of the children in mind, regarding Prayer 2 & 3, the principles guiding the grant of a stay of execution pending appeal are provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules which provides:

“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.

24. The Court, in *LDT v PAO* (supra) stated: -

“(18) While considering stay of execution in respect to children matters, beside the above, the Court has to consider the best interest of the child. The applicant is expected to demonstrate that the minors will suffer if a stay is not granted... The best interest of a child is superior to rights and wishes of parents; they should incorporate the welfare of the child in its widest sense.”

[19] ...

[20]. The best interest of a child is superior to rights and wishes of parents; they should incorporate the welfare of the child in its widest sense. The respondent submitted that she has the actual custody of the minors and the minors are attending [Particulars withheld] and if the orders of stay are granted, it will not be in the best interest of the minors since it will mean the custody reverts to the applicant and the minors attend [Particulars withheld] Academy thereby interfering with education of the children.”

25. As to whether the Application was filed without undue delay, Judgement was entered on 5<sup>th</sup> February, 2025 and the Application together with the Memorandum of Appeal both dated 13<sup>th</sup> February, 2025 were filed on 14<sup>th</sup> February, 2025. I find this condition was met.

26. The issue of security for costs for due performance is discretionary and it is upon the Court to determine the same. In my view, this being a children’s matter and the subject in issue is a maintenance order which is not directed at the Applicant but the Respondent, security of costs does not apply in the circumstances.

27. On the issue of substantial loss, it is my considered view that the Applicant did not provide proof of the substantial loss the minors would suffer if the orders sought in the application are not issued. The Trial Court did make provision towards maintenance of the minors. The main concern raised by the Applicant is that the amount is not adequate and insists on reverting to the order of 10<sup>th</sup> November, 2020 when higher portion of the salary of the Respondent was attached.

28. On perusal of the Memorandum of Appeal dated 13<sup>th</sup> February, 2025 and the grounds raised therein and I agree with the Respondent that the issue of whether the amount the Court ordered to be paid by the Respondent in the best interest of the minors is something that cannot be determined at this point as it will be tantamount to determination of the Appeal at an interlocutory stage.



29. The Applicant has prayed that, the Court reverts to Order of 10<sup>th</sup> November, 2020 where the salary of the Respondent was attached, this is untenable for the reason that, the attachment order was interim in nature and was issued pending the determination of the suit. The same issue has been raised as a ground for appeal and equally cannot be the subject of this Court's determination at this point. On whether the Court can revert to the amount previously allowed is for deliberation in the appeal. Prayer No. 4 can therefore not issue.
30. Regarding Prayer No. 5, this Court cannot dictate which school a parent is to take their child to and neither can it issue an order compelling children to remain in a particular school and if it were to do so there are certain parameters to be met and arguments to be made on why the Court should make such an order. The argument it has only been raised as a prayer but not canvassed at all. There are no grounds propounded on why the Court should be compelled to order children to remain at a particular school. Such an order is untenable.
31. The Applicant who is acting in person had raised an argument that as a lay person, she cannot be solely and unfairly blamed for not acting to the required standard as it is anchored in *the Constitution* that justice should not be a reserve for the rich who can afford advocates to represent them. This argument has no basis, legal or otherwise.
32. From the foregoing, I find that there are no valid grounds to stay the orders of 5<sup>th</sup> February 2025 in Nakuru Children's case No. E017 of 2020. I therefore find no merit in the Application dated 13<sup>th</sup> February, 2025 and the same is disallowed.
33. This being an appeal involving the welfare of children, in the interest of justice, the appeal will be heard on a priority basis.
34. The Applicant/Appellant shall file the Record of Appeal within 60 days from this Ruling and cause the same to be placed before Court for directions.
35. I make no orders as to costs.

It is so ordered

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 22<sup>ND</sup> DAY OF MAY, 2025**

**MOHOCHI S.M**

**JUDGE.**

