



**EWK v RST (Civil Appeal E105 of 2024)
[2025] KEHC 10907 (KLR) (Family) (17 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 10907 (KLR)

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

**FAMILY
CIVIL APPEAL E105 OF 2024**

**CJ KENDAGOR, J
JUNE 17, 2025**

BETWEEN

EWK APPLICANT

AND

RST RESPONDENT

RULING

1. The background of this case is that Respondent lodged a custody and maintenance case at the Chief Magistrate’s Nairobi Children Court against the Appellant. At the time of filing, the case was presented in the matter of BEK and BN. The parties entered into a mediation settlement agreement that related to three children, making an addition of one BKM.
2. The case at the Children’s Court was marked as settled upon the adoption of the Mediation Settlement Agreement. It was reopened after the Respondent filed an application dated 5th February, 2024 that sought orders against the Appellant/Applicant to show cause why he had not paid fees and the children’s maintenance in terms of the Agreement.
3. The Appellant raised a Preliminary Objection regarding the issues of paternity of BKM, the extension of parental responsibility and that the orders in force failed to give regard that he has a parallel family. The trial Court dismissed this Preliminary Objection and ordered the Appellant to settle all outstanding arrears within 30 days. Failure to comply would result in the issuance of a warrant for arrest. Additionally, the trial Court ordered the Appellant to adhere to the terms of the Mediation Settlement Agreement.
4. The Appellant was dissatisfied with the Trial Magistrate’s decision of 16th August, 2024 and filed the current appeal.



5. Additionally, the Appellant filed an application dated 30th August, 2024 which is the subject of this Ruling. The application seeks the following orders;
 - i. Spent
 - ii. Stay of execution of the Judgment/decree entered in *MCCC/984/2018* pursuant to the Respondent's application dated 5th February, 2024 and or any further proceedings or any subsequent orders therefrom pending hearing and determination of this application;
 - iii. That this Court lifts the warrant of arrest and set aside all execution proceedings and or order to commit the Applicant/Appellant to civil jail;
 - iv. Costs of the application.
6. The Application is supported by an Affidavit dated 30th August by the Applicant. The Respondent opposed the Application and filed a Replying Affidavit dated 12th February, 2025.
7. Both parties filed written submissions, outlining their respective positions. I have reviewed the pleadings, taking into account the arguments presented and the precedents relied on.

The Applicant's case

8. The Applicant argues that the trial Court issued the orders for execution in the lower Court file when he was in compliance by paying fees and sending the Respondent maintenance.
9. The Applicant also contended that the orders of maintenance failed to consider that he has parallel obligations and his financial hardship.
10. Furthermore, the Applicant argued that he is not the biological father of B.KM., and therefore, granting him parental responsibility over the child without a DNA test would deny him due process in the circumstances.

The Respondent's Case

11. The Respondent argues that the Application is defective because it cites repealed provisions of the law and also fails to attach the decree or order that is the subject of the Application.
12. The Respondent contends that the issue of the child BKM was included in the mediation settlement agreement that was adopted in Court, but she maintains that she has never made a claim for the child BKM as a subject in the case.
13. The Respondent asked the Court to dismiss the application due to its lack of clarity, lack of merit, and misleading nature.

Analysis and determination

14. I have considered the Application and find that the issues for determination are;
 - a. Whether the Application is fatally defective for being brought under the wrong provisions of the law;
 - b. Whether the Application has merit;
 - c. Who bears the costs of the Application.



15. The Respondent faulted the Applicant for citing repealed law in the Application. Although the Application is brought under the [Children Act 2001](#), which was repealed rather than the [Children Act 2022](#), this does not affect the matter as it relates to children. In line with Article 159 (2) of the [Constitution](#) and Sections 1A and 1B of the [Civil Procedure Act](#), this omission is not a fatal flaw and does not warrant dismissal on that ground alone.
16. I, however, agree with the Respondent that there is no clarity in what the Applicant is asking the Court to issue in prayer 2. The Applicant makes reference to the Judgment/Decree and simultaneously refers to the application dated 5th February, 2024. The Applicant failed to include the relevant order/ruling pertaining to the application now before the Court. This omission is significant because, without the order or ruling, the unclear details in what the Applicant refers to create ambiguity about the intended prayers.
17. I have read the other sections of the law quoted in the application. The stay of execution under Order 22 Rule 22, differs from the stay of execution and proceedings pending appeal under Order 42, Rule 6 of the [Civil Procedure Rules](#).
18. The applicant filed the motion under Order 22 Rule 22.
When court may stay execution [Order 22, Rule 22]
 - (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.
 - (2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.
 - (3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.
19. Even if the Court were to look at the application as seeking a stay of execution of the Judgment/Decree and a stay of the proceedings, prayer 2 was limited to the hearing and determination of the application itself. There was no prayer for a stay of execution or stay of proceedings pending the appeal. Given the specific request stated in the second prayer, this Court will not address the merits of the prayer as it is now moot.
20. In prayer 3 of the application, the Applicant has asked the Court to lift the warrant of arrest and to set aside all execution proceedings and or order that would lead to the commitment of the Applicant/Appellant to civil jail pending the hearing and determination of the Appeal. Additionally, the Memorandum of Appeal specifically seeks to have the Ruling issued on 16th August, 2024, along with all related consequential orders, set aside. The Applicant is also requesting an order for paternity testing related to the parental responsibility over BKM
21. Granting the orders requested in prayer 3 would effectively grant the reliefs to the Applicant by allowing the appeal in its entirety as if it had already been heard and determined to be successful, thus pre-empting the actual judicial hearing process that is yet to take place.



22. The upshot of the above is that the Application dated 30th August, 2024 is not merited and is dismissed with an order for costs in the cause.
23. The best interests of the children are of paramount concern, and in this matter, this is best addressed by ensuring that this appeal is heard and determined expeditiously.
24. The Appellant shall file the Record of Appeal within 30 days from today's date.
25. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 17TH DAY OF JUNE, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mr. Wachakana Advocate for the Applicant

Ms. Nelima Advocate for the Respondent

