



**LJK v CM (Civil Appeal E094 of 2024)
[2025] KEHC 9970 (KLR) (Family) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9970 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E094 OF 2024
PM NYAUNDI, J
JULY 10, 2025**

BETWEEN

LJK APPLICANT

AND

CM RESPONDENT

RULING

1. Before this court is the Notice of Motion application dated 20th August 2024 by which the Applicant LJK seeks the following orders:-
 1. Spent.
 2. That this Honourable Court be pleased to order a stay of execution of the Judgement and orders delivered virtually at Nairobi on 2nd August 2024 and decree dated 13th August 2024 of the Honourable Principal Mgristrate Hon. E. Muiiru (MS) pending the hearing and determination of the application and the subsequent appeal.
 3. That this Honourable Court be pleased to order and direct that the minors herein remain in the physical custody of the appellant herein pending the hearing and determination of the application and the subsequent appeal.
 4. Costs be awarded to the applicant.
2. The Application is premised upon Article 53 of the *Consitution of Kenya 2010*, Section 3A of the *Civil Procedure Act*, Order 42 of the *Civil Procedure Rules 2010*, the *Children’s Act 2022* and all other enabling provisions of the law and was supported by the Affidavit of even date sworn by the Applicant.



3. The applicant avers that the Respondent deserted their matrimonial home. During the pendency of the trial, he had the custody of the minors who are aged 12 years and 3 years old. At the end of the trial, in its judgment the court granted custody to the respondent. The Applicant argues that the Respondent lives far from the children's school and that she is an alcoholic. He avers that he provided a stable home for the children. That the judgment delivered by the trial court will cause physical, emotional and psychological trauma to the minors. When the judgment was delivered, he informed the minors who refused to go spend time with their mother. He has since enrolled them to go for therapy. He asked the court to allow the application.
4. In response, the Respondent CM opposed the application through a Replying Affidavit dated 13th September 2024. She argued that there is no proper appeal since the Applicant has not filed a memorandum of appeal. That the notice of appeal is inconsequential, unlawful and improper. She averred that the applicant did not tender any evidence before the trial court showing that she was unfit to be granted custody of the children. She argued that the minors are comfortable staying with her and the elder child has improved in school. She denied the allegation that the minors school is far from where she lives and stated that the school is 10 minutes away. That the applicant has already moved on and is living with another woman. She argued that she took the minors for therapy.

Background

5. The parties herein were involved in Nairobi Children Case No. E346 of 2024. The Applicant who was the plaintiff in the trial court filed a suit against the Respondent who was the Defendant seeking the following orders;
 - a. An order that the minors legal and actual custody, care and control be granted to the plaintiff.
 - b. That a joint parental responsibility order be issued directing both the plaintiff and the defendant to cater for the minor, each party to cater for the minors food, clothing, medical, education and shelter whenever each has custody.
 - c. Costs of the suit.
 - d. Any other relief that the court may deem fit to grant.
6. The Respondent who was the defendant filed a defence and counterclaim and sought the following orders;
 - i. That the plaintiff's suit against the defendant be dismissed with costs.
 - ii. Joint legal custody of the minors be granted to the defendant.
 - iii. Sole actual care and control of the minors with the defendant with structured access on alternative weekends and public holidays and half of school holidays.
 - iv. Medical expenses, school fees and school related expenses be borne by the plaintiff.
 - v. Costs of the suit.
7. The matter went for full hearing and on 2nd August 2023, Hon. E. Muiru, Principal Magistrate made the following orders;
 1. Both parties shall have joint legal custody of the minors.
 2. The Defendant is granted physical and actual custody of the minors.



3. The Plaintiff is granted access to the minors on alternate weekends during school term from Friday 5pm to Sunday 5 pm. The pick up and drop off shall be at Galleria Mall.
 4. The school holidays shall be shared equally with the plaintiff having the 1st half which shall subsequently be alternated.
 5. The public holidays and special holidays like Easter and Christmas shall be alternated yearly with the defendant going first.
 6. The plaintiff shall provide school fees and school related expenses at the minors current school. In the event of change of schools, parties shall discuss and agree.
 7. The plaintiff shall provide medical care for the children by providing a medical cover and/or cater for medical expenses.
 8. The defendant shall provide shelter, food and clothing and the plaintiff shall equally provide shelter, food and clothing during his access period.
 9. There shall be no orders as to costs.
 10. Either party is at liberty to apply.
 11. The Defendant to provide shelter and utilities thereto.
8. The Applicant was aggrieved by the court's orders and filed an appeal before this court.

Applicant's Submissions

9. The Applicant submitted that the principles of stay of execution were stated in the decision of *Bhutt v Bhutt* Mombasa HCCC No. 8 of 2014 (OS). He submitted that court should consider the best interest of the minors in applications for stay.
10. He argued that the minors stand to suffer loss because of change of environment which will also affect their education. That the Respondent used to consume alcohol in the presence of the minors which is improper.
11. He submitted that there was no delay since the judgment was delivered on 2nd August 2024 while the Notice of Appeal was filed on 14th August 2024.
12. He argued that he has offered security for due performance of the decree by complying with the court orders. He urged the court to allow stay of grant which is in the best interest of the minors. That no prejudice will be suffered by the Respondent because the minors have all along stayed with him. That the appeal has high chances of success.

Respondent's Submissions

13. The respondent submitted that the applicant has not demonstrated that the minors will suffer if the stay is not granted. That the ground relied on about the examination has been overtaken by events since the first born has already sat for her exams.
14. She further submitted that the applicant failed to prove to the trial court that she was an unfit mother not capable of taking care of the minors. She urged this court to dismiss the applicant's application because he had failed to demonstrate what prejudice would be suffered by the minors if the application for stay is not granted. She sought to rely on the decision of *BMM v PMM* [2024] KEHC 5657 (KLR).



Analysis and Determination.

15. 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 2nd August 2024.
16. The principles for granting stay of execution in children matters was well settled 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*.” (Own emphasis)
17. In exercising discretion in respect to stay of execution, Order 42 Rule 6(2) provide that the Court should be satisfied that:-
 - a. The applicant will suffer substantial loss if a stay is not granted;
 - b. The application for stay has been brought without undue delay; and
 - c. The applicant has provided security for the due performance of the decree.
18. 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.
19. In the absence of a Memorandum of Appeal I am unable to gauge the arguability of the intended appeal. The Applicant wishes to move the Court on the basis of an intention to appeal. Further so as to succeed he is require to demonstrate that the that the minors will suffer if a stay is not granted. The applicant averred that the children stand to suffer loss especially the first born who was to sit for exams. He averred that the children were in a conducive environment while living with him. The Respondent argued that the first born sat for exams and she is doing well at school. He also accused the Respondent of drinking alcohol in the presence of the children and exposing them to bad habits resulting to trauma. No evidence has been placed before this court .
20. The minors are female, they are currently staying with the respondent. There is nothing to show that they are at such a risk, the current arrangement need not be interfered with pending the hearing of the intended appeal.
21. From the foregoing, I find that the applicant has failed to demonstrate the substantial loss the minors will suffer if a stay order is not granted. This Court is enjoined to look at the best interest of the minors.
22. The application dated August 20, 2024 therefore lacks in merit and is dismissed. Costs shall be in the cause.
23. The Appeallant will file and serve record of Appeal within 45 days.
24. Mention before the Deputy Registrar on September 4, 2025 to confirm compliance and take further directions.

It is so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 10TH DAY OF JULY, 2025.



P. M NYAUNDI

HIGH COURT JUDGE

In the presence of:

Mwadumbo for Respondent

Fardosa - Court Assistant

