



REPUBLIC OF KENYA



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

**MBA v NJM (Civil Appeal E100 of 2024)  
[2025] KEHC 10016 (KLR) (Family) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10016 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPEAL E100 OF 2024  
PM NYAUNDI, J  
JULY 10, 2025**

**BETWEEN**

**MBA ..... APPLICANT**

**AND**

**NJM ..... RESPONDENT**

**RULING**

1. The applicant and the respondent are the father and mother of RBML and ABML who are twins born on April 9, 2019. The Respondent filed for divorce, custody of the children, provision of maintenance and medical care for the children, collection of her personal belongings, refund of past maintenance and medical expenses and mutah in the Kadhis Court. The marriage was dissolved and the Respondent was granted custody of the minors.
2. On 4<sup>th</sup> November 2023, the Applicant took the children from the respondent . He later refused to return the children on the allegation that they were sexually molested. The Respondent who was the plaintiff in Nairobi Milimani Children’s Case No. 2017 of 2023 filed an application for actual custody and maintenance pending hearing and determination of the suit.
3. On 9<sup>th</sup> August 2024, Hon. Charity Oluoch CM delivered a ruling in the following terms;
  - a. The parties shall have joint legal custody of the minors.
  - b. The defendant/respondent shall continue to have actual custody, care and control of the minors.
  - c. The plaintiff/applicant shall have access to the minors on alternate weekends from Friday 5:00 pm to Sunday 4:00 pm and the second half of school holidays, starting with the current school holidays.



- d. The parties shall agree on the picking up and dropping off point through their advocates.
  - e. The parents and minors shall undergo therapy at a facility to be agreed on by the parties. They shall share costs of such therapy on a 50:50 basis.
  - f. The defendant/ respondent shall cater for educational and medical needs of the minors.
  - g. Each parent shall provide food, clothing and shelter when having actual custody of the minors.
4. The applicant was aggrieved by this ruling and filed an appeal before this court. He filed a Notice of Motion dated 22<sup>nd</sup> August 2024 seeking the following orders:-
1. Spent.
  2. Spent.
  3. That pending the hearing and determination of the appeal, this Honourable Court be pleased to stay of execution of part of the ruling and decree that grants the Respondent unsupervised access on alternate weekends from Friday 5:00 pm to Sunday 4:00 and joint actual custody during the second half of the school holidays of Hon.C.C Oluoch (Chief Magistrate) in Children Case No. 2017 of 2023 made on 9<sup>th</sup> August 2024.
  4. That in the alternative, this Honourable Court be pleased to vary, modify and/or set aside part of the order made by Hon. C.C. Oluoch (Chief Magistrate) in Children Case No. 2017 of 2023 made on 9<sup>th</sup> August 2024 to the following extent:That the Respondent do have access to the children in a public open place on alternate weekends on Saturdays and Sundays.That the Respondent be allowed unsupervised day access to the children after the children have undergone therapy.That the court does appoint a 3<sup>rd</sup> party to supervise the same.
  5. That this Honourable Court do make such further orders as it may deem just and fit in the circumstances.
  6. That the costs of this application be provided for.
5. The Application was premised upon Article 53 (2) of the *Constitution*, Section 3, 3A of the *Civil Procedure Act* and Order 22 Rule 22, Order 42 rule 6, Order 45 rule 1, Order 51 rule 1 of the *Civil Procedure Rules*, Sections 8,29 (1)(2)&(3), 99 (a), First schedule of 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.
6. The applicant is aggrieved the trial magistrate gave unsupervised access and joint custody during half of the school holidays despite him presenting evidence that the children were molested by the respondent's brother while they were with their mother. That the Respondent has been away from the children for over nine months and there is need for supervision. He argued that the trial magistrate did not consider that the children are 4 years old and they ought to be accompanied during the visits to their mother. He averred that the respondent has previously on several occasions abandoned the minors. He argued that if the stay orders are not issued, the minors stand to be highly prejudiced as they are not emotionally ready to spend longer periods with the Respondent. He is also apprehensive that the children will be exposed to the respondent's brother who molested the children. He produced P3 forms and assessments from two different doctors.He urged the court to grant the orders prayed for.

### **Response.**

7. The Respondent filed a Replying Affidavit sworn on 27<sup>th</sup> September 2024. She averred that the allegations of molestation have not been proved by the applicant. She argued that the applicant has



personal vendetta against her brother. She denied abandoning the minors at any time. She argued that she is an equal parent and is therefore entitled to have access of the children. That children of tender years ought to live with their mother and she is capable of taking care of them.

8. In her supplementary affidavit dated 29<sup>th</sup> April 2025, she avers that on 22<sup>nd</sup> August 2023, she wrote a letter to the doctor who wrote the medical reports which were presented by the applicant in this court. The doctor wrote a reply on 22<sup>nd</sup> August 2023. The doctor signed the report and confirmed that he did not interact with the minors. According to her, she has been framed because the urine samples were delivered to the hospital by a rider and that the applicant is trying to use every other means to deny her custody of the children.

### **Applicant's Submissions**

9. 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 substantial loss because children's emotional, mental and overall wellbeing will be prejudiced if they have unsupervised access because the minors were sexually molested before. He argued that the minor's should be supervised by an authorized officer when they are visiting their mother.

### **Respondent's Submissions**

11. The respondent submitted that the allegations of molestation and drug administration are unfounded. She argued that the Respondent is intent on denying her access of the children. She argued that the applicant has an issue with her living the children with her mother while on the other hand, the Respondent lives with his mother and the children. That the grounds of appeal that were raised by the applicant are weighty and cannot be determined at this point. The fact that they have accused each other of misconduct is not a ground for stay. She sought to rely on the decision In Nakuru Civil Appeal No. 29 of 2020 [\*PNC v NMC\*](#).
12. Relying on the decisions in Mombasa Civil Appeal No. 32 of 207 MAA v ABS and Nakuru Children's Appeal No. E06 of 2020 AWK vs JS, the Respondent submitted that the children were of tender years and considering that they are females, they should be under her care.

### **Analysis and Determination.**

13. 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 9<sup>th</sup> August 2024. The Applicant argues that the Respondent's access to the minors should be supervised. It is not for the court at this stage to delve into the merits of otherwise of the intended appeal. All that this court is required to do is to determine whether the appeal will be rendered nugatory and if the applicant will suffer substantial loss.
14. It is important to note at the outset this matter concerns the welfare and well-being of the children.
15. [\*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."



16. 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)

17. 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).

18. I reiterate that in making a decision on this matter this court will be guided solely by the best interests of the children. The wishes and desires of the parents are secondary.

19. 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.

20. In the case of *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi*, Civil Appeal No 326 of 2013 it was stated that:-

“to my mind, the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;

- a. Whether the applicant has established that he/she has a prima facie arguable case.
- b. Whether the application was filed expeditiously and
- c. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought”.

21. The applicant is expected 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 that they were molested by the Respondent’s brother. The trial court in delivering its ruling took note that that the allegations raised by the applicant were pending before another court and therefore, did not dwell on those allegations. The trial court did not find a reason to deny the Respondent custody of the minors.

22. I have seen the P3 form, medical reports and tests produced by the applicant. There is a court that is hearing the matter and will make a determination.

23. The parties herein are the biological parents of the subject minors. It is in the best interests of the minors to have regular access to both parents. No parent has superior rights over the other and both ought to be allowed interaction with the minors. The only exception is if there exists a real threat that the children will be exposed to imminent harm. I find no evidence that the Respondent possess a threat



to the minors. I am not persuaded that there is need to interfere with the interim orders made by the Court.

24. I reiterate that the orders of 9<sup>th</sup> August 2024 are merely interim orders. The parties should pursue the determination of the suit in the lower court rather than appealing interim orders. For the foregoing reasons I am not inclined to review the orders made by the Children Court. The trial court should proceed and hear the matter to conclusion.
25. The application is therefore dismissed in its entirety. This being a family matter each side will meet its own costs.
26. If the Applicant elects to proceed with the appeal, he will file and serve record of appeal within 60 days. Mention on October 15, 2025 to confirm compliance and take further directions.

It is so ordered.

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 10<sup>th</sup> DAY OF JULY, 2025.**

**P. M NYAUNDI**

**HIGH COURT JUDGE**

In the presence of:

Ms. Lynn Ng'ang'a for Appellant

Fardosa Court Assistant

