KSC v JKP (Civil Appeal E145 of 2025)
[2025] KEHC 13739 (KLR) (Family) (23 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13739 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL E145 OF 2025

CJ KENDAGOR, J

SEPTEMBER 23, 2025

BETWEEN

KSC ..... APPELLANT

AND

JKP ..... RESPONDENT

RULING

1. The parties herein are the parents to RSSC and PSKC (Minors). The minors are school going children, but the parties do not agree on the choice of school for the Minors. The Applicant wants to enroll the minors at R.A while the Respondent prefers P.S. Due to the impasse, the Applicant sued at the lower Court seeking the Court's intervention.

2. At the lower Court, the Applicant argued that the minors should not be enrolled in P.S because minor RSSC has previously suffered sexual abuse at the hands of a teacher at his previous school K.C. He argued that enrolling the minors in P.S would expose them to re-abuse and mental trauma since K.C and P.S have frequent weekly interactions in respect of several extra-curricular activities.

3. The trial Court delivered a ruling on 31st July, 2025, wherein it directed the minors to attend P.S. The trial magistrate directed the Respondent to secure vacancies for the minors at P.S within 7 days and provide the admission documents to the Applicant, who was directed to pay the school fees and all related school expenses.

4. The Applicant was dissatisfied with the said ruling and filed an application dated 2nd August, 2025, seeking to review the order. The subordinate Court delivered its ruling (the Impugned Ruling) on 13th August, 2025, dismissing the Applicant's application seeking to review the Court's earlier order sending the children to P.S.

5. The Applicant was dissatisfied by the ruling and appealed to this Court vide a Memorandum of Appeal dated 30th August, 2025. He listed the following Grounds of Appeal;

    1. That the learned Magistrate erred in law and in fact in disregarding the entirety of the uncontroverted evidence tendered by the Appellant, thereby arriving at an erroneous conclusion in both fact and law.

    2. That the learned Magistrate erred in law by misapprehending, misapplying, and/or disregarding principles of law, to wit, the best interests of a child, and making a decision that contravenes the best interests of the minors.

    3. That the learned magistrate erred in fact and in law by disregarding uncontroverted evidence placed before the Court and instead advancing his own line of reasoning to conclude that, in the absence of a criminal investigation in a complaint of sexual abuse by a child, the duty to safeguard a child from sexual abuse must meet the standards of proof required in criminal proceedings.

    4. The learned magistrate erred in law in concluding that, in the absence of a criminal prosecution, concerns of sexual abuse of a child are irrelevant, and should be ignored and disregarded.

    5. That the learned Magistrate erred in fact and in law by failing to apply Section 8 and 22 of the Children's Act, which require the Court to treat the best interests of the child as paramount and to ensure that every child is protected from abuse.

    6. That the learned Magistrate erred in fact and law by failing to consider the facts tendered and arguments raised by the Appellant and the already available evidence regarding the choice of school for the minors, thus offending the best interest principle.

    7. That the learned Magistrate erred in fact and law by failing to give proper weight to the arguments by the Appellant and incontestable evidence on record in line with the best interests of the Minors.

6. He asked the Court to allow the appeal and set aside the entire decision of the subordinate Court delivered in 13th August, 2025. He sought an order directing him to enroll the minors at R.A. He also sought an order directing P.S to refund to him any and all monies paid by him to the school.

7. Alongside the Appeal, the Applicant brought the instant application dated 30th August, 2025 seeking the following orders;

    a. Spent.

    b. Spent.

    c. This Honourable Court be pleased to issue an order staying the execution of the order in Children's Case No. E1122 of 2021 (formerly MCCC No. E518 of 2021) KSC Vs JKP, ordering the minors RSSC and PSKC to attend P.S pending the hearing and determination of this appeal.

    d. This Honourable Court be pleased to issue an order for the urgent hearing and disposal of this appeal, considering the risk and jeopardy to the Minor's education.

    e. The costs of and incidental to this application be provided for.

8. The grounds of the Application are enlisted on its face and supported by an affidavit dated 30th August, 2025 and sworn by the Applicant. The Applicant averred that minor RSSC had suffered sexual abuse at the hands of a teacher at his previous school K.C, and that enrolling him in P.S would expose him to re-abuse and mental trauma since K.C and P.S have frequent weekly interactions in respect of several extra-curricular activities. He averred that R.A does not interact with K.C at all, and that both minors have vocally expressed their desire to attend R.A for many months.

9. The Respondent filed a replying affidavit dated 9th September, 2025. She averred that the safeguarding risk alleged is speculative and remote. She stated that the referenced teacher is an early years/ kindergarten teacher at K.C on a different campus/phase and there is no evidence of any association with P.S or any realistic prospect of contact, even during inter-school fixtures. She averred that P.S had reassured them of support and the safety measures it would take to protect RSSC. She stated P.S requires that parents give consent for children to participate in sports as such every measure can be taken to ensure that RSSC does not interact with a specific school or teacher.

10. The Applicant subsequently filed a supplementary affidavit dated 11th September, 2025, whose contents I have carefully considered. The Respondent also filed a further affidavit dated 15th September, 2025, whose contents I have carefully considered.

11. The Application was argued orally and the parties also filed written submissions.

Applicant's written Submissions

12. The Applicant submitted that the Court should grant him the orders sought in the instant application, arguing that he has met the conditions for grant of the orders. He argued that the minors will suffer substantial loss if the stay is not granted and that the stay order sought would be in the best interests of the minors. His main argument is that minor RSSC was sexually abused while attending K.C, which frequently interacts with P.S. He submitted that it is not in the best interest for the minors to continue to attend P.S, because RSSC will be re-traumatized as there is a possibility of having to go to K.C to participate in the school activities.

Respondent's written Submissions

13. The Respondent submitted that the Application should be dismissed, arguing that the Applicant has not met the standard for granting of the stay. She also argued that an order of stay is not in the best interest of the children. She argued that the issues raised in the application are weighty, and that if the orders prayed for are to be granted, the same amount to determination of the appeal. Instead, she argued that the Court should dismiss the application and determine the appeal expeditiously. She also argued that P.S has given strong assurances on the protection of the minor and that the Applicant's safeguarding concerns are speculative.

Issues for Determination

14. Having considered the grounds listed in the application, the respective affidavits filed by the parties, and their submissions, I am of the view that there is only one issue for determination;

    a. What is the best interest of the Children in the lens of the application now before the court.

15. The application is seeking stay of execution orders. The law governing applications for stay of execution is Order 42 Rule 6 of the Civil Procedure Rules. The Rule provides that for stay of execution to issue; the Applicant must prove that he is likely to suffer substantial loss should the prayer be rejected; that the

application for stay has been made without unreasonable delay and that, security for due performance of the decree has been provided.

16. The Court in RWW vs. EKW [2019] eKLR addressed its mind to the purpose of a stay of execution order pending appeal and stated as follows;

> " The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs."

17. Courts have created a special jurisprudence on stay of execution in children matters. The prevailing jurisprudence is that the threshold for granting a stay of execution in children matters is slightly different from the threshold applicable in ordinary disputes. The special rule is that courts in children matters are required to exercise extreme caution before granting stay of execution orders. This was restated in BRO v WJNW (Suing as Mother and next friend of DJO (Minor) [2020] eKLR, where the court held as follows;

> " 38. It is trite that in children matters, courts should exercise extreme caution before granting stay of execution orders. This is because issues of maintenance do affect the welfare and livelihood of a minor. To allow stay will imply stoppage of some sphere of life e.g a child will not eat, dress drink or have shelter. The orders sought against the minor's mother have a direct negative effect to the welfare of the minor whose interest ranks first in priority to those of the parents."

18. This special jurisprudence was recently advanced by the court in Akello v Wamuri (Miscellaneous Civil Application E122 of 2022) [2024] KEHC 3610 (KLR) (8 March 2024) (Ruling), where the Court observed as follows;

> " 26. 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.
>
> 27. It is now trite that, in applications for stay in respect of decrees or orders made in matters involving children, the welfare of the children in question be given utmost consideration."

19. This principle was also alluded to by the Court in Bhutt vs. Bhutt, Mombasa HCCC NO. 8 of 2014 (O.S.) where the Court observed 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 an overriding consideration of the best interest of the child in accordance with the injunction of Article 53(2) of the *Constitution*..."

20. Lastly, Courts have held that an Applicant for stay of execution in children matters ought to demonstrate that the minors will suffer substantial loss if the stay is not granted. This was alluded to

in Akello v Wamuri (Miscellaneous Civil Application E122 of 2022) [2024] KEHC 3610 (KLR) (8 March 2024) (Ruling), where the Court held as follows;

> " On the ground of substantial loss, the applicant has not demonstrated on what loss he will suffer if the stay is not granted, in any case the substantial loss that he should demonstrate is how the minors will suffer substantial loss which in this case, none has been availed."

21. In view of the above authorities, this Court is being invited to analyze the evidence on record and determine whether the minors will suffer substantial harm if the stay is not granted. The authorities also require the Court to be mindful of the overriding consideration of the best interest of the child, and to give utmost consideration to the welfare of the children.

22. The Applicant claimed that the Minors should not be enrolled to P.S, because RSSC previously suffered sexual abuse in K.C which frequently interacts with the P.S. He argues that enrolling him in P.S would expose him to re-abuse and mental trauma, since K.C and P.S have frequent weekly interactions in respect of several extra-curricular activities. The Respondent, on the other hand, argued that these concerns are speculative and remote and that P.S had reassured them of support and safety measures it would take to protect RSSC.

23. I will first determine whether the Applicant's fears and concerns are speculative and remote. From the affidavits, both parties agree that RSSC had a previous sexual abuse at K.C. In addition, the Respondent also agreed that K.C and P.S interact during co-curricular activities. The Respondent, however, claimed that such interactions are not enough reason to conclude that the minor will interact with the teacher who assaulted him. The Applicant, on the other hand, contended that the mere interaction with the former school during the school event could trigger memories of the past abuse.

24. I have carefully considered the arguments on both sides. This Court appreciates that issues of sexual abuse ordinarily attract trauma and sometimes, long-term psychological impact on the victim of the sexual assault. In my view, I find that the minor's interaction with K.C and its students and staff members in tournaments is likely to trigger memories of the past abuse stated to have occurred. For this reason, I find that the Applicant's fears and concerns are neither speculative nor remote.

25. The second issue for consideration is whether P.S has offered satisfactory safeguards to address the Applicant's fears and concerns. I have seen the email by P.S with a view to ascertaining whether the school has offered safeguards as alleged by the Respondent. In the said email, written by the head teacher of the institution and addressed to the parties herein, the School did not offer tangible solutions. Instead, it invited the parties to arrange a meeting with their officials to help the school "understand any concerns that you may have, discuss suitable support strategies, and ensure we are aligned with your expectations in managing the situation."

26. In my perspective, the aforementioned correspondence does not delineate concrete strategies that the Institution intends to employ in order to safeguard the minor from situations that could result in trauma attributable to his previous experience with K.C.

27. The Respondent claimed that inter-school fixtures at P.S requires express parental consent, and that she was prepared to ensure that minor RSSC does not attend fixtures against K.C. She attached a copy of the forms, which I have carefully studied. The form gives the parents the ultimate discretion to decide whether their child will take part in sporting fixtures across the academic year around Nairobi.

28. I have also carefully considered whether the use of the consent forms offers a sufficient remedy to the prevailing concerns. In my view, the practical implication of their utilization is that the minor RSSC would be excluded from participating in every extracurricular activity involving K.C. I agree

with the Applicant that such exclusions would likely lead to feelings of isolation, especially when his peers participate in these activities, and that this could cause further emotional distress. In my view, it will certainly not be in the best interest of the minor to exclude him from every extracurricular activity involving K.C. Doing so would limit his choices for extracurricular activities and his right to compete in such tournaments.

29. Based on the above reasons, I find that the current safeguards being offered by P.S do not adequately address the concerns raised by the Applicant. I also find that, in the current circumstances, the consent forms cannot be used to remedy the situation, without prejudicing the minor's best interest. In the end, I find that the Applicant has demonstrated that the minor RSSC is likely to suffer substantial harm if the stay is not granted. This analysis is a very limited review of the evidence on record, and has nothing to do with the prospects of the Appeal.

30. I am also satisfied that the application was made without delay. The lower Court delivered the ruling on 13th August, 2025 and the instant application was filed on 30th August, 2025. On security for Performance, this Court notes that the impugned ruling did not contain a monetary value.

31. The Court is mindful that the minors should not sit at home as they wait for the Appeal to be heard and determined. I have reviewed the documents filed by the parties with a view to ascertaining where else the minors should be enrolled as the appeal is heard and determined. The records show that on 17th April, 2025, Hon. Dr. Alice Macharia, issued an interim order allowing the Applicant to pay a non-refundable deposit of USD 12,400 to R.A in order to secure space for the minors in R.A as the application was pending hearing and determination before the Children Court. The Applicant averred that this deposit included the minor's first term's fees from August 2025 to January 2026.

32. I appreciate that the transfer of the minors at this time might cause some disruptions to their academic lives. However, in my view, the benefits of the transfer from P.S to R.A outweigh the cost of the disruptions, and the transfer is beneficial in the long run.

33. In the end, I find that the application for stay of execution is merited and is hereby allowed. The Appeal will be heard on a priority basis.

Disposition

34. The Application for stay is allowed.

35. As there is an alternative that has been secured, the parties are to enroll the minors in R.A.

36. The minors to attend school at R.A till the Appeal is heard and determined.

37. The parties are to establish a plan for a smooth transition for the children, including arrangements for psychosocial support to help them cope.

38. The parties should also further consider mediation as an alternative dispute resolution mechanism to help mend the strained relations, allowing them to focus more on the main issue, which is the best interest of the children.

39. This being a children's matter, I make no order as to costs.

40. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 23RD DAY OF SEPTEMBER, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Ms. Amayo and Ms. Kamau, Advocates for the Applicant

Mr. Malenya, Advocate for the Respondent

KSC, Applicant - present

JKP, Respondent - present