BAO (Suing as the mother of TG) v GOG (Children's Appeal Case E057 of 2025) [2025] KEHC 14639 (KLR) (16 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14639 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CHILDREN'S APPEAL CASE E057 OF 2025

DK KEMEI, J

OCTOBER 16, 2025

BETWEEN

BAO (SUING AS THE MOTHER OF TG) .... APPLICANT

AND

GOG .... RESPONDENT

RULING

1. The Appellant/Applicant has filed a notice of motion dated 15/8/2025 seeking the following prayers.

   a) Spent.

   b) Spent.

   c) That upon the hearing and determination of the application, an order of stay be extended pending the hearing and determination of the appeal.

   d) That the cost of this application be provided for.

   e) That this Honorable court be pleased to grant any other orders it deems fit and just.

2. The application is supported by grounds set out thereunder and the supporting affidavit of the Appellant/Applicant sworn on even date. The Appellant/Applicant's gravamen is inter alia; that the Applicant's application herein may be defeated unless the matter is heard at the earliest and prayers sought granted; that on or about 7/8/2025, Hon. Douglas Ogoti (SPM) delivered ruling wherein he ordered and decreed that the Respondent shall have access to the minor during the alternative weekends from Friday 5.00 PM to Sunday 5.00 PM; half terms and public holidays shall be alternated; and the 1st half of all school holidays shall be alternated and the Respondent shall begin; that the Honourable Court stated that the said access is subject to a prior and adequate arrangements put in place by the parties, but the modalities of making such prior and adequate arrangements were not set out; that the applicant is dissatisfied with the ruling and orders therein and has filed an appeal against the same; that

in the absence of the said modalities of making such prior and adequate arrangements for granting access to the minor, and considering that the parties are not in talking terms, compliance with the said orders becomes untenable and difficult; that considering the previous behaviours of the Respondent of storming the residence and workplace of the Appellant in the pretext of accessing the minor, the Appellant is apprehensive that she will be gravely prejudiced and her rights violated in the process while the Respondent is in the pretext of execution; that the Appellant is further apprehensive that the minor is of very tender age and being a girl, she requires closer attention of the mother and that releasing her for sleep overs in the environment which are not known will prejudice the minor and affect her; that the trial court marked the file as closed merely based on the application seeking interim orders without giving any direction on the plaint filed by the Respondent; that the Respondent is married to another woman whom he is living with and that she is apprehensive that she will not take care of a child from another woman in a proper way; that it is in the interest of justice and in the interest of the minor if the orders sought are granted.

3. The application was opposed by the Respondent who filed a replying affidavit dated 19/9/2025 wherein he averred inter alia; that he had earlier filed a plaint where he sought for orders of joint custody and access to the minor; that the trial court on 28/5/2025 granted him temporary access to the minor and gave directions thereon; that the court vide its ruling dated 7/8/2025 allowed his request for access to the minor save that the parties were to put in place prior and adequate arrangements; that he proposed to the Appellant the arrangements but that the Appellant did not respond thereto; that the Appellant had been disobeying the court orders regarding the issue of access to the minor; that he was compelled to file a contempt application against the Appellant herein and which has jolted the Appellant to rush to this court seeking for stay of execution; that the Appellant has not filed a proper appeal as she has not even sought leave to lodge appeal out of time; that the application should be dismissed with costs.

4. The Appellant filed a supplementary affidavit dated 29/9/2025 wherein she averred inter alia; that the Respondent was not denied access to the minor but that his behaviour in storming the Appellant's house and work place thereby showing that he was out to create drama than seeking access to the minor; that upon the delivery of the ruling by the trial court, the exparte orders earlier granted ceased to be in operational; that the issue of 840 Hotel was neither in the prayers sought by the Respondent nor was it mentioned in the final orders; that the order regarding prior arrangements meant that both parties were to agree thereon and was thus not unilateral; that the Respondent came up with his own arrangement without the input of the Appellant and thus the noncompliance thereof did not amount to contempt of court; that there is no active order for the minor to be availed at 840 Hotel; that the Respondent has constantly refused to agree to an engagement over some middle ground but is busy dictating terms and requiring her to comply failing which she must be held in contempt of court; that the appeal was properly filed on 19/8/2025 and thus there is an appeal on record; that both the application and appeal are merited.

5. The application was canvassed by way of written submissions. Both parties duly complied.

6. The Appellant submissions are dated 5/8/2025. Learned counsel heavily relied on the supporting affidavits of the Applicant and pointed out the fact that the issue relates to rights of a child which must be considered in the child's best interest as guaranteed by *the constitution* and Children's Act. Learned counsel further added that when the matter came up for mention on 24th September 2025, the Respondent made an oral application for him to be granted access to the minor pending the hearing and determination of the appeal and that the court allowed the parties to engage and that the parties identified 12 issues to help grant the Respondent access to the minor and that later the parties agreed on nine issues and three issues remained unresolved including the issue of caregiver to accompany the

minor as well as the upkeep money to be provided by the Respondent and access via video calls. That the parties later engaged and reached a consensus on the three issues by allowing the matter of upkeep money to be dealt with in the trial and compromise on the other two issues.

7. Learned counsel for the Applicant raised two issues for determination namely, firstly, whether the ruling delivered by the trial court on 7th August 2025 should be stayed and secondly, whether the Respondent should be granted access to the minor pending the hearing and determination of the Plaint dated 16th May 2025.

8. Learned counsel submitted that the issue of children must be taken care of by the court and went ahead to point out that *the Constitution* provides in Article 53(2) that 'a child's best interests are of paramount importance in every matter concerning the child.' Further, the *Children Act* at section 2 defines the best interest of the child the following terms:

> 'the principles that prime the child's right to survival, protection, participation and development above other considerations and includes the rights contemplated under Article 53 (1) of *the Constitution* and section 8 of this Act.'

9. As regards the first issue, it was submitted that stay of execution is provided for under Order 42 Rule 6 of the Civil Procedures Rules.That the impugned ruling was delivered on 7th August 2025 and it required the parties to put in place prior and adequate arrangements before the access could be granted as ordered. That Appellant was aggrieved with the ruling especially when the Respondent attempted to revise the ruling and have access in a manner only convenient to him without any prior and adequate arrangements with the Applicant.

10. Learned counsel for the Applicant sought reliance in the case of Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi, Civil Appeal No 326 of 2013 where it was held 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".

It was submitted that since the trial court delivered the final ruling and marked the matter as settled and file closed without hearing the plaint, it violated the right of the Appellant to be heard since a determination of an application seeking interim orders could not settle the case with finality without hearing the Appellant on her defense and counterclaim that had been filed in answer to the Respondent's suit in the trial court.

11. It was further submitted that the present application was filed expeditiously and that the Appellant did not delay in moving this honorable court. It was also submitted that the Applicant has established sufficient cause to the satisfaction of this court that it is in the interest of justice to grant the orders sought herein. Reliance was placed in the case of RWW v EKW [2019] KEHC 6523 (KLR) where it was held that:

> " 8. 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."

12. Learned counsel for the Applicant finally submitted that the execution should be stayed to protect the rights of the Appellant and preserve the best interest of the child. That the Appellant was never heard on her defense and counterclaim at the trial court that she urges this court to direct the trial court to proceed and hear the Plaint dated 16th May 2025 as it would embarrass justice if the execution is not stayed.

13. As regards the second issue, it was submitted that the Appellant is not opposed to the Respondent accessing the minor but however, it is the manner of access which is being contested considering what the Appellant had observed during the time when the Respondent accessed the minor.

14. It was further submitted that during the negotiation between parties, two issues among others which were raised by the Appellant and which the Respondent did not controvert were that the Respondent was giving the minor money and allowing her to have access to his phone while unsupervised and yet the two had dire and severe impacts on the minor.

15. Given the observations above, the Appellant submits that the Respondent should have a supervised access to the minor. It was the view of the Applicant that the same can be done by having a caregiver accompany the minor and when the minor cannot be dropped for one reason or the other, the Respondent can access the minor via phone call including video call.

16. The Appellant relied in the case of A M vs M A M [2012] eKLR where the court stated: -

> " 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."

17. Learned counsel also submitted that it is in the best interest of the minor herein that this Honorable court allows the prayers of granting supervised access to ensure that the settled stay of the minor is not interrupted and that the Respondent takes up his parental responsibility of care and maintenance of the minor while the minor is under the custody of the Appellant. It was also submitted that the Appellant/Applicant is not opposed to the Respondent being granted the rights to access the minor on the terms agreed between the parties or the terms ordered by this Honorable court.That the Respondent's right to the minor must be weighed against the best interest of the minor as was held in the case of of M A v R O O [2013] eKLR - H.C. CIVIL APPEAL NO.21 OF 2009 (High Court at Busia) where the court held thus:

> " This court agrees with the Respondent that his right as the biological father of the child should not in the circumstances be ignored. However, such right shall be subject to what constitutes the best interest of the child. As an adult, the right of the Respondent as the father of the child cannot be considered to be of paramount importance to that of the best interest of the child."

18. It was also submitted that should this court grant access to the Respondent, the same should be supervised by way of having the caregiver who is always with the minor accompany her to ensure that the Respondent does not expose the minor to activities and items that may be detrimental to the minor.

Hence, the execution of the ruling dated 7th August 2025 should be stayed and the Respondent given supervised access.

19. The Respondent's submissions are dated 8/10/2025. Learned counsel raised two issues for determination namely; whether the ruling delivered by the trial court on 7/8/2025 should be stayed and whether the Respondent should be granted access to the minor on an interim basis.

20. As regards the first issue, it was submitted that an order of stay if granted should be conditional as the Respondent is entitled to access the child who is his flesh and blood and that such right will be in the best interest of the child pursuant to the provisions of article 53 of *the constitution* and section 8 of the Children's Act. It was also submitted that the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules should be complied by the Appellant/Applicant. It was submitted that in children matters, the best interest of the child is an overriding consideration. Learned counsel urged the court to frown upon the Appellant's clamour for stay with a view to deny the Respondent his right of access to the minor. Further, it was submitted that the Applicant has not shown the substantial loss to be suffered if the stay is not granted and further that the Applicant has not furnished any security for the due performance of the decree which will be ultimately binding upon the Applicant.

21. It was also submitted that the Applicant has acted with impunity by refusing to obey court orders and further refusing to respond to the issue of arrangements as directed by the trial court and then denying the Respondent access to the child.

22. As regards the second issue, learned counsel for the Respondent submitted that the Respondent did have access to the minor as from 28/5/2025 to 7/8/2025 before the Applicant started denying the Respondent access to the minor. That the new issues now raised in this appeal should have been raised before the trial court. That if the Applicant's new concern is about a caregiver to accompany the child, the Respondent already has one who could take care of the child and that it should not be that it is the Applicant to provide the said caregiver. It was urged that this court should resort to the provisions of section 134(1) and 135(1)(e) of the *Children Act* 2012 to issue an access order requiring the custodian of the child to permit visitation, periodic stays or other forms of contact as it deems fit so as to promote the welfare of the subject minor. It was finally submitted that allowing the Respondent access to the minor will enable the child to interact with her parents which will provide significant social, psychological and health benefits and will go a long way in ensuring equal parental responsibility. It was urged that the Applicant's application dated 15/8/2025 should be dismissed.

23. I have considered the application, rival affidavits, submissions and authorities cited. It is not in dispute that the Respondent had moved the trial court at Bondo vide Children Case No. E003 of 2025 wherein he had sought a raft of prayers in the Plaint and that he filed an application dated 16/5/2025 where he sought for some interlocutory reliefs. It is also not in dispute that the trial court vide the impugned ruling dated 7/8/2025 allowed the Respondent's said application in terms of prayers 3(a), (b), (d) and (e) thereof with a rider that the parties were to have prior and adequate arrangements put in place. It is not in dispute that the parties have been unable to agree on the rider aforesaid and that they are currently in a gridlock situation regarding compliance with the trial court's orders. It is also not in dispute that prior to the trial court issuing its final orders, it had issued interim orders which were then in place prior to the determination of the Respondent's application dated 16/5/2025 and that the parties were required to abide by the latest orders of the trial court. It is not in dispute that the trial court's direction that the parties to have prior and adequate arrangements in place while complying with the orders has placed the parties on a warpath so to speak and which has generated the present appeal. It is also not in dispute that the parties have not approached the trial court for review of its orders. It is also not in dispute that the rival claims by the parties must be seen within the prism of the best interest of the subject minor. It is also not in dispute that even as the parties herein litigate in these

matters, they must be cognizant of the fact that the interest of their own child must be of paramount interest. That being the position, I find the issue for determination is whether the Applicant should be granted an order of stay pending appeal.

24. Stay of execution pending an appeal is found under Order 42 Rule 6(2) of the Civil Procedure Rules which provide that no order of stay of execution shall be made under sub rule (1) unless:

    i) Substantial loss may result to the Applicant unless the order is made.

    ii) The application has been made without unreasonable delay.

    iii) The Applicant has given such security as the court orders for the due performance of the decree or order as may ultimately be binding on him/her.

25. The Appellant/Applicant who is seeking orders of stay of execution of decree pending appeal is under obligation to ensure that she satisfies the above conditions provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules. Indeed, an order of stay of execution is meant to preserve or protect the subject matter of the dispute so that the appeal is not rendered nugatory in the end. In the case of RWW v EKW [2019] KEHC 6523 (KLR) it was held that:

    > " 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 Appeal if successful, is not rendered nugatory."

    The Appellant therefore bore the responsibility of providing the requisite security for the due performance of the decree. However, the matters in issue appear delicate in the sense that the subject of the dispute is their own biological child in which everyone of them has a constitutional obligation to take care as provided for under Article 53 of *the Constitution*. This peculiar circumstance warrants this court not to strictly adhere to the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules in a bid to ensure that the best interest of the child are taken into consideration. It is not in dispute that children matters are delicate in view of their nature. In the case of A. M vs M A M [2012] eKLR stated: -

    > " 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 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."

26. In all cases where parties seek for stay of execution pending appeal, Applicants are required to satisfy the above three conditions imposed by Order 42 Rule 6 (2) of the Civil Procedure Rules. However, in the present circumstances of the parties, the subject of the dispute is their own biological child. Already, the parties are litigating on the issue of custody and maintenance of the said child before Bondo Law Courts in Children Case No. E003 of 2025. Since the subject of the dispute relates to a child the rule of thumb is that cases involving children must be handled with care and to ensure that the best interest of the child are met since the same is always an overriding consideration. Hence, the parties herein need not put a lot of premium on the aforesaid conditions for stay. Likewise, this court is under obligation to ensure that it must consider the best interest of the child in dispute while coming up with a determination in the matter. Under Article 53 (2) *the Constitution* dictates that a child's best

interest are of paramount importance in every matter concerning the child. Section 2 of the Children's Act provides as follows:

> 'the principles that prime the child's right to survival, protection, participation and development above other considerations and includes the rights contemplated under Article 53(1) of *the Constitution* and Section 8 of this Act.'

Again, Section 8 (1) of the Children's Act provides as follows:

> " In all action 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 the primary consideration."

27. The child in issue is at the centre of the dispute. The trial court vide its ruling dated 7/8/2025 gave out directions regarding the issue of access to the said child by the parties with the central issue being that the Appellant being the mother would remain with the child and the Respondent was to arrange with the Appellant on the modalities of access to the said child. Whereas the Appellant is of the view that the Respondent is out to access the child by his own ways, the Respondent maintains that as a father of the child he too is entitled to access the child and to bond with her. It must be noted that the Respondent's right to the minor must be weighed against the best interest of the child. The court in the case of M A v R O O [2023] eKLR – H.C. Civil Appeal No. 21 of 2009 (High Court at Busia) when the court held thus:

> This court agrees with the Respondent that his right s the biological father of the child should not in the circumstances be ignored. However, such right shall be subject to what constitutes the best interest of the child. As an adult, the right of the Respondent as the father of the child cannot be considered to be of paramount importance to that of the best interest of the child. individuals."

28. Having considered the rival claims as juxtaposed with the foregoing authorities, it is necessary to revisit the prayers that had been sought by the Respondent in the trial court and which were granted by the trial court on the 7/8/2025. The Respondent's application dated 16/5/2025 had sought several prayers more particularly vide prayer 3 thereof which were inter alia; that the trial court be pleased to issue interim orders and that the Appellant maintains the physical custody of the minor while the Respondent be granted access as follows:

    a) That on alternative weekends from Friday 5.00 pm to Sunday 5.00 pm;

    b) That half-terms and public holidays shall be alternated;

    c) That virtually through phone calls, video calls in the evening or any other medium taking account of the minor's daily routine;

    d) That the 1st half of all school holidays shall be alternated and the Plaintiff/Applicant shall begin; and

    e) That the Plaintiff/Applicant shall have access to the minor while the Defendant/Respondent is out of town.

The trial court after considering the matter on merit granted prayers (a), (b), (d) and (e) and that the parties were directed to make prior and adequate arrangements. This rider by the trial court seems to have become a bottleneck to the parties in their quest to comply with the orders. Apparently, the trial court prior to determining the said application had granted interim orders aforesaid and which

were complied by the parties until the final order of 7/8/2025. The Appellant maintains that the Respondent has come up with his own proposals towards actualizing access to the child and which the Appellant is opposed. When the parties appeared before this court, they were directed to try and mediate in the matter and that they later came back and indicated to the court that they had come up with twelve issues and that they managed to reach a consensus on nine of the issues while three are still outstanding. It is also instructive that the parties herein have not yet approached the lower court for review of the orders dated 7/8/2025 as they have not been able to reach a consensus. The Appellant has come up with a proposal that should the Respondent wish to access the minor, the said access should be properly supervised by having a care giver who has been with the minor accompany her so as to ensure that the Respondent does not expose the minor to activities and items that may be detrimental to the said minor. The Respondent on his part has retorted that the Appellant should not deny him access to his child because the child requires the company of her father while she grows up. It is the view of the Respondent that due to the inability to reach an agreement on the access, that the parties should revert to the orders that had been issued by the trial court prior to the ruling of 7/8/2025.

29. From the rival contentions aforesaid, it is clear to me that the parties herein do not have a problem per se with the order on access to the child save only that the order by the trial court as it requires amendment to capture the sentiments of the parties. It is instructive that the parties have not yet moved the trial court for orders of review of the orders dated 7/8/2025. This court does not have the jurisdiction to review the order at this stage because the appeal is yet to be canvassed and that this court is only concerned with the question whether an order of stay of execution of the decree should be granted pending the appeal.

30. As the issue of stay is likely to affect the parties' right of access to the minor, and since the Appellant is not opposed to the issue of access per se save that the same be supervised, I find that it is in the best interest of the child not to grant an order of stay of execution of the decree pending appeal. It is appropriate for the parties to continue with the status quo obtaining at the moment until they approach the lower court for review of the order regarding the need by the parties to have prior and adequate arrangements. I find that no prejudice will be suffered by the Appellant if the order of stay of execution pending appeal is not granted at this stage.

31. In view of the foregoing observations, the Appellant's application dated 15/8/2025 lacks merit. The same is dismissed with no orders as to costs. The parties are hereby directed to proceed and seek review of orders as appropriate in the trial court even as they arrange to prosecute the pending appeal.

DATED AND DELIVERED AT SIAYA THIS 16TH DAY OF OCTOBER 2025.

D. KEMEI

JUDGE

In the presence of:

Brenda Adhiambo Omondi.......Appellant

N/A Odeny........for the Appellant/Applicant

Orende..................for the Respondent

Kimaiyo....................Court Assistant