FHJ v ASA (Civil Appeal E095 of 2025)
[2025] KEHC 14273 (KLR) (Civ) (6 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14273 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E095 OF 2025

CJ KENDAGOR, J

OCTOBER 6, 2025

BETWEEN

FHJ .... APPLICANT

AND

ASA .... RESPONDENT

RULING

1. The parties herein are the parents of M.A.B (the Minor). The Applicant sued the Respondent at the lower Court seeking legal custody, care, and control of the Minor. The matter went to full hearing where the Court heard the parties. The Court also issued a Production Order and interviewed the Minor on 23rd April, 2025. The Court delivered a Judgment on 13th June, 2025 in which it gave the Respondent actual custody of the Minor. It also gave the Applicant unlimited access to the Minor in school within the school calendar, on alternative weekends from Friday afternoon to Monday morning, alternative midterms, and half of the holiday with alternating Christmas.

2. The Applicant was dissatisfied with the Judgment and appealed to this Court vide a Memorandum of Appeal dated 16th June, 2025. She listed the following grounds of appeal;

    1. The learned trial Magistrate erred in fact and in law by making a finding that the Appellant as the biological mother of the child is not fit to take care of the minor, without giving any sufficient reasons, and ignored the evidence adduced by the Appellant that she is the one who has since birth of the child been living with and taking care of the child and is fit and capable of providing care, protection and love to the minor and granted actual custody to the Respondent.

    2. The learned trial magistrate erred in fact and in law by failing to analyze and to appreciate evidence on record, the pleadings of the Respondent as well as the submissions of the

Appellant, where he averred in his Defense and Counterclaim that the minor was to reside at his parent's home since he did not have a place of abode and misdirected herself by giving the custody of the minor child to the Respondent who was to leave her in the care of third parties yet the Appellant is sound and fit to care for the minor.

3. The trial magistrate erred in fact and in law by making a finding that the Appellant had not given any sufficient evidence to show that she is capable of taking care of the minor, yet she is a person of good standing in society, and has been the one taking care of the minor since her birth and ignored evidence on record that the Respondent has failed to produce any evidence and or witnesses to support his allegation that the Appellant was unfit to take care of the minor despite several adjournments to the Respondents to produce his witnesses.

4. That learned trial magistrate erred in fact and in law and misdirected herself by relying on the interview she did with the minor in camera in the absence of the parties and or their advocates, and making a finding that the minor was not happy in the Appellant's home, citing that "the minor was scared of sleeping in her bedroom at night due to having monsters under the bed at night," using it as a ground to give custody to the Respondent yet she had not conducted a vior dior examination in the presence of the parties to assess the ability of the minor to give any credible evidence in court.

5. The trial Magistrate erred in fact and in law and misdirected herself by conducting an interview of the minor in the absence of all the parties and their advocates using a questionnaire that had been filed by the Respondent and which was doctored to arrive at particular findings making the interview unfair, irregular, and impartial yet she relied on the said interview to grant custody of the minor child to the Respondent.

6. The learned trial magistrate erred in fact and in law by ignoring in its entirety the evidence of the Appellant that the minor was being subjected to physical assault and bullying by her step siblings at the father's house each time she went on visitation and hence it was not in the best interests of the child to have her actual custody granted to the Respondent.

7. The learned trial magistrate erred in fact and in law by granting custody to the Respondent on grounds that she was bored in her mother's house being an only child and would be happy at the Respondent's house since there were other children and ignoring the evidence on record that it is those other children who bullied and injured her each time she went to visit her father.

8. The learned trial magistrate misdirected herself by assuming that the minor child was unhappy at her mother's house since she was an only child which assumption is speculative and unsubstantiated and not based on any facts or evidence and she ignored the fact that the minor goes to school and has contact with teachers, caregivers, and other children, and whenever she was home from school the Appellant was always at home to care and fend for her.

9. The learned trial magistrate erred in fact and in law by granting the Respondent custody of the minor, yet the Respondent lives with another wife who had not sworn an affidavit and or given any evidence that she was willing to take care of the minor yet the child is a child of tender years who needs the love, care, and protection of her mother.

10. The learned trial magistrate erred in fact and in law by denying the Appellant the custody of her daughter of tender years yet there were no special circumstances adduced before the Court that showed that the Appellant was unfit and or unable to take care of the child, and it is in the best interest of a girl of such tender years to be taken care of and natured by her biological mother.

11. The learned trial magistrate erred in fact and in law by misdirecting herself and used bias against the Appellant which was explicit even during the hearing of the case where she completely declined to hear an application by the Appellant dated 8th November, 2024 on its merits where it was asserted by the Appellant that the child was being physically assaulted at the Respondent's house and subjected to toxic cigarette fumes an exposed to male strangers, despite their being cogent and credible evidence to prove the same and insisted that the application be withdrawn to have the main suit proceed, and completely ignored the Appellant's evidence and granted custody to the Respondent.

12. The decision of the trial magistrate was not impartial and was laced with bias since she relied on an interview she conducted using a questionnaire filed by the Respondent that was not grounded in law, and she misdirected herself by relying on answers to the said questions to make her determination to grant the Respondent custody of the child.

3. She requested the Court to allow the appeal and set aside the judgment of the lower court. She prayed that she be granted the actual custody of the minor and that the Respondent be ordered to continue paying for the child maintenance as he was ordered by an order that was issued by Hon. M.W. Kibe on the 3rd November, 2022 or as the Court may deem fit.

4. Alongside the Appeal, the Applicant filed the instant application dated 16th June, 2025 in which she sought the following orders;

   1. Spent.

   2. Spent.

   3. That this Honourable Court be pleased to issue an interim order of stay of execution of the judgment and orders issued on the 13th of June 2025 by Hon. Alice Wangari Macharia in Children Cause No. E858 of 2022 at the Children's Court in Milimani Nairobi pending the hearing and determination of this appeal.

   4. That actual custody of the minor child be granted to the Appellant/Applicant pending hearing and determination of the appeal.

   5. That the Respondent to continue paying fees and maintenance as was directed by the lower court by an order dated 3rd November, 2022 that was issued by Hon. M.W. Kibe.

5. The grounds of the Application were enumerated on its face and supported by an affidavit dated 16th June, 2025 and a Supplementary affidavit dated 25th June, 2025, both sworn by the Applicant. She averred that the Minor will suffer psychological trauma and physical harm if a stay of execution is not granted. She stated that the Respondent lives with third parties and thus the minor will not have proper and sufficient attention in her absence. She stated that the Minor has suffered different injuries each time she went for visitation. She also stated that the Respondent has been exposing the Minor to cigarette smoke and the Minor comes with chest problems and coughs each time she visits the Respondent.

6. The Respondent filed a Replying affidavit dated 23rd June, 2025 and a Supplementary affidavit dated 30th June, 2025, opposing the application. He denied the assertions that the Minor got injured while visiting him during the pendency of the lower court case. He averred that the photos of injuries relied upon by the Applicant were from an incident that occurred in August, 2020 when they were still married and cohabiting. He stated that the photographs annexed in the application as annexure "FHJA-3 and FHJA-5" are not authentic and are questionable and the same should not be relied upon

and/or admitted by this court as evidence. He also averred that the minor has not attended school for five (5) consecutive days and attached a copy of the school's confirmation letter.

Applicant's written Submissions

7. The Applicant submitted that the Court should allow the application and grant the orders, arguing that she has met the legal threshold for the grant of the orders sought. She argued that she has provided cogent and credible evidence showing that the child will suffer substantial loss unless the order is made. She also argued that there is an immediate risk of execution of the trial court judgment if a stay is not granted, and that the loss to the child would be irreversible if the intended appeal were successful. Lastly, she argued that the application has been made without unreasonable delay.

Respondent's written Submissions

8. The Respondent submitted that the Court should not grant the orders sought, arguing that the application lacks merit and is not in the best interest of the child. He argued that the application does not meet the legal threshold for the grant of stay, submitting that the Applicant has not shown that the minor will suffer substantial loss if the orders are enforced. He argued that the allegations made, ranging from supposed risk of harm, emotional trauma, and concerns about his household, are speculative, unsubstantiated, and not supported by credible evidence. He submitted that the best interests of the Minor will be best served by declining the application for stay of execution.

Issues for Determination

9. 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. Whether the Applicant has met the threshold for grant of stay of execution orders.

10. 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.

11. 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."

12. 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.

13. 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.

14. 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*...."

15. 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.

16. In view of the above authorities, this Court is being invited to analyze the evidence on record and determine whether the Minor will suffer substantial loss 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 child.

17. The Applicant claimed that the Minor is likely to suffer psychological trauma and physical harm if the stay is not granted. She argued that, if the Respondent is allowed to take the immediate custody of the child, the Minor will have suffered substantial loss by the time the Appeal is heard and determined. I shall first determine whether the Applicant has demonstrated, through evidence, that the minor is likely to suffer substantial loss if the stay is not granted.

18. One of the issues raised by the Applicant is that the Respondent is a cigarette smoker and smokes in the presence of the Minor. She stated that the Minor comes back with chest problems and coughs each time she visits the Respondent. She produced a photograph marked as FHJA-5, alleging that it is a photograph of the Respondent smoking cigarettes in the presence of the minor. On the other hand, the Respondent claimed that the said photograph is not authentic and should not be admitted into evidence.

19. This Court is particularly concerned by the Applicant's claims that the Minor comes back with chest problems and coughs each time she visits the Respondent. She attributes this to the Respondent's

alleged smoking habits. This Court takes these claims very seriously because the health of the minor is a paramount consideration and forms the basis of her well-being.

20. However, the Applicant did not adduce any documentary evidence to prove her claims. There was no medical report documenting that the Minor had previously sought treatment for chest problems and coughs after her visitations to the Respondent. That piece of evidence would have helped this Court to ascertain that indeed the minor has suffered such health complains. It would also have helped this Court assess whether the alleged health complications could be linked to the Respondent's alleged smoking habits.

21. The Applicant also raised the issue that the Minor comes back with different injuries each time she goes for visitation to the Respondent. She attached photographs marked as FHJA-3 to show the said injuries. I have seen the said photographs. They show a child with something on her face which looks like a facial injury. I also noted that the photographs are undated. On the other hand, the Respondent claimed that the injuries appearing in photograph FHJA-3 occurred on 5th August, 2020, when the minor was approximately one-year old, and during which the parties were still married and cohabiting.

22. I perused the Applicant's Supplementary affidavit to see her response to the Respondent's claims that the said injuries happened on 5th August, 2020. I note that the Applicant did not state the date when the injuries in FHJA-3 occurred. She did not even give a rough estimate of the month and the year of the injuries. The Court assumes that the Applicant should have been in a better position to reveal the date of the photos, because she is the one who tendered them to the Court and probably knows better how and when the photographs were taken.

23. Based on this analysis, this Court cannot tell the date of the injuries and it thus cannot determine whether indeed the injuries happened long ago in 2020 as alleged by the Respondent or whether they happened more recently and more so in the pendency of the lower court case as alleged by the Applicant.

24. In my view, the Applicant has failed to substantiate her claims against the Respondent. Therefore, I find that the Applicant's claim that the Minor will suffer substantial loss if the stay is not granted is unsubstantiated. The Application thus fails, and is hereby dismissed.

Disposition

25. The Applicant's application dated 16th June, 2025 is hereby dismissed.

26. The Appeal to be heard on a priority basis.

27. No orders as to costs.

28. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 6TH DAY OF OCTOBER, 2025.

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C. KENDAGOR

JUDGE

Court Assistant: Beryl

Ms. Ashioya, Advocate for the Applicant

Mr. Taariq Soud, Advocate for the Respondent