



REPUBLIC OF KENYA



**KENYA LAW**  
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**MNM v EKM (Civil Appeal E027 of 2025)  
[2025] KEHC 14099 (KLR) (Family) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14099 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY  
CIVIL APPEAL E027 OF 2025**

**H NAMISI, J**

**OCTOBER 9, 2025**

**BETWEEN**

**MNM ..... APPLICANT**

**AND**

**EKM ..... RESPONDENT**

**RULING**

1. Before the Court is a Notice of Motion dated 19 February 2025, in which the Applicant seeks the following orders:
  - i. Spent;
  - ii. That this Honourable Court be pleased to issue an order for stay of execution of Ruling and Order of the Children’s Court at Milimani in Children’s Case No. E076 of 2025 dated 19 February 2025 by Hon. A.N. Sisenda pending the hearing and determination of the instant application and appeal;
  - iii. That this Honourable Court do suspend or vary the Court Order issued on 19 February 2025 directing the Respondent to be in custody of the minor pending the hearing of this appeal;
  - iv. That the Honourable Court do grant stay of proceedings of the Children Case No. E076 of 2025 at Milimani Children Court pending the hearing of this Application;
  - v. That this Honourable Court do grant stay of proceedings of the Children Case No. E076 of 2025 in Milimani Children Court pending the hearing of this appeal;
  - vi. That this Honourable Court do order for a fresh comprehensive Children’s Officer’s Report by an independent children Officer from Nyayo House;



- vii. That the status quo in regards to the actual custody of the subject minor herein who is currently under the care and control of the Appellant/Applicant/mother be maintained, pending the hearing and determination of the instant application;
- viii. That the costs of this Application be provided for.
2. The Application is predicated on the grounds set out on the face of it and supported by the Supporting Affidavit sworn on 19 February 2025 and the Supplementary Affidavit sworn on 28 April 2025.
3. The Application is opposed by the Respondent through his Replying Affidavit sworn on 25 February 2025.
4. Both parties have filed comprehensive submissions, which this Court has carefully considered.

### **Brief Background**

5. This matter is a poignant illustration of a parental dispute spiralling into a complex web of conflicting narratives and parallel legal proceedings. The subject of this unfortunate contest is an innocent 3-year-old girl. It is not in dispute that the parties are the child's biological parents. It is also common ground that from the time of her birth until the events of December 2024, the child was under the continuous and primary care of the Applicant, her mother.
6. The genesis of the conflict is the handover of the minor on 24 December 2024, an event for which the parties present two starkly irreconcilable accounts.
7. The Applicant's version is that the Respondent requested to have the child for the Christmas holiday, from 24 December to 26 December 2024, a request which the Applicant acceded to. She avers that upon the expiry of the agreed period, the Respondent refused to return the child, thereby unlawfully retaining custody. She annexed screenshots of call logs and text messages which, she contends, show her persistent efforts to secure the child's return.
8. The Respondent, on the other hand, paints a grimly different picture. He vehemently denies that there was any access agreement. His position is that on the evening of 24 December 2024, the Applicant brought the child to his place of work, which was closed for the holidays, and abandoned her there. The Respondent claims that he was alerted by the security personnel and found his daughter shaken and traumatized. He characterises this act as one of child neglect and cruelty, which prompted him to report the matter to the JKIA Police Station on 27 December 2024.
9. This singular, disputed event triggered a cascade of events. The Applicant, seeking the return of the child, reported the matter to the Kasarani Children's Office, which issued summons for the Respondent to appear. The Respondent, in turn, reported the alleged abandonment to the Embakasi Children's Office. Subsequently, the two parties initiated duelling court proceedings. The Respondent was first to the courthouse, filing Nairobi Children's Case No. E076 of 2025 on 15 January 2025 seeking custody orders. On 16 January 2025, the court directed that a comprehensive Children's Officer's report be filed. A few days later, on 21 January 2025, the Applicant filed Nairobi Children Case No. E104 of 2025, seeking the return of the child. The court, in that instance, ordered the Respondent to produce the child in court on 17 February 2025.
10. Upon production of the child on 17 February 2025, the Respondent successfully raised a Preliminary Objection in case No. E104 of 2025 on the ground of sub judice, leading to its dismissal. However, the learned Magistrate observed that the child appeared unwell with a chronic cough. Exercising his inherent jurisdiction in the best interests of the child, the Magistrate granted the Applicant temporary



custody of one night to enable her seek treatment for the child. The Applicant complied, taking the child to Avenue Healthcare for treatment.

11. The following day, 18 February 2025, the matter proceeded for directions before Hon. Sisenda in the primary suit, E076 of 2025. It is on this date that the court issued the impugned order, directing that the child be handed back to the Respondent forthwith. It is this order, which effectively reversed the temporary order of Hon. Munene and altered the status quo that had existed for the first 3 years of the child's life, that has precipitated the instant application for stay.

### **Analysis & Determination**

12. I have carefully read the Application, Affidavits and submissions. the legal framework for granting a stay of execution pending appeal is well settled. Order 42 Rule 6(2) of the Civil Procedure Rules provides that no such order shall be made unless the court is satisfied as to three conditions.
13. On the first limb, there is no dispute. The impugned orders were made on 18 February 2025, and the Application herein was filed the very next day. The application was, therefore, made without any delay.
14. The second limb requires the Court to be satisfied that the appeal is arguable. An arguable appeal is not one that must necessarily succeed, but one that raises a bona fide, substantive question of law or fact for the appellate court's consideration. It must not be frivolous. In the instant case, the Applicant's intended appeal challenges the trial court's application of the tender years doctrine, its assessment of what constitutes "exceptional circumstances" and its reliance on a contested and incomplete Children's Officer's Report. Given that the child is a 3-year-old girl, the legal presumption in favour of maternal custody is potent. The decision of the trial court to depart from this principle, based on a single, hotly disputed allegation undoubtedly presents a substantial and arguable point of law.
15. The third limb is that of substantial loss. In a children's matter, however, the currency of loss is not monetary. It is measured in the potential for profound, and often irreversible, psychological, emotional, and developmental harm to the child. The paramountcy principle, elevated to a constitutional command by Article 53 (2) of *The Constitution*, dictates that a child's best interests are of paramount importance in every matter concerning a child. This principle is echoed in Section 8 of the *Children Act*. This constitutional imperative does not merely supplement procedural rules like Order 41. It infuses and transforms them. Therefore, this Court must filter the test of substantial loss through the overriding lens of the child's best interests.
16. As was aptly held in *MNN-V S- MOK & Another (2017) eKLR* and cited with approval in *In re ABE (Minor) [2021] KEHC 13552 (KLR)*, the Court must be satisfied that the stay being sought is in the best interests of the child, not the parents. The Court stated thus:

“...in determining an application for stay of execution in cases involving Children, the general principles for the grant of stay of execution under 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 Article 53(2) of *the Constitution*.”

17. In this case, the child, for the entirety of her 3 years, has known only the Applicant as her primary caregiver and her home as the Applicant's residence. To abruptly uproot her from this environment and place her in the full-time care of her father, with whom her contact has been less consistent, based on a single, contested event, poses a palpable risk of emotional distress, confusion and insecurity. The Respondent's argument that he has enrolled her in school is noted. However, at the tender age of 3, a child's emotional security and attachment to a primary caregiver are arguably more foundational to her well being than the commencement of formal schooling. The potential disruption to the child's



established life and primary attachment constitutes a risk of substantial loss that this Court cannot ignore.

18. The Application, having satisfied the conditions for grant of stay of execution pending appeal, is, therefore, meritorious. I make the following orders:
- i. That a stay of execution of the order of Hon. A. N. Sisenda issued on 18 February 2025 in Nairobi Children's Case No. E076 of 2025, is hereby granted pending the hearing and determination of this appeal;
  - ii. That consequently, the status quo ante that existed immediately prior to the said order of 18 February 2025 is hereby restored. Accordingly, interim custody, care and control of the child, AKM, shall forthwith revert to the Applicant.
  - iii. That the Appellant/Applicant shall file and serve the Record of Appeal within 30 days of the date hereof.
  - iv. That the costs of this application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 9 DAY OF OCTOBER 2025**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

for the Applicant: Ms. Shumila

for the Respondent: N/A

Court Assistant: Lucy Mwangi

