



REPUBLIC OF KENYA



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

**EWK v RST (Civil Appeal E105 of 2024)
[2025] KEHC 17219 (KLR) (Family) (24 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17219 (KLR)

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

**FAMILY
CIVIL APPEAL E105 OF 2024**

**CJ KENDAGOR, J
NOVEMBER 24, 2025**

BETWEEN

EWK APPELLANT

AND

RST RESPONDENT

*(Being an Appeal from the Ruling/Orders of Hon. Jackie Kibosia
(PM) delivered on 16th August, 2024 involving MCCC/984/2018)*

RULING

1. The background of this case is that Respondent lodged a custody and maintenance case at the Chief Magistrate’s Nairobi Children Court against the Appellant. At the time of filing, the case was presented in the matter of B.E.K. and B.N. The parties entered into a Mediation Settlement Agreement that related to three children, making an addition of one B.K.M.
2. The case at the Children’s Court was marked as settled upon the adoption of the Mediation Settlement Agreement. It was reopened after the Respondent filed an application dated 5th February, 2024 that sought orders against the Appellant/Applicant to show cause why he had not paid fees and the children’s maintenance in terms of the agreement.
3. The Appellant raised a Preliminary Objection regarding the issues of paternity of B.K.M., the extension of parental responsibility and that the orders in force failed to give regard to the fact that he has a parallel family. The trial Court dismissed this Preliminary Objection and ordered the Appellant to settle all outstanding arrears within 30 days. Failure to comply would result in the issuance of a warrant for arrest. Additionally, the trial Court ordered the Appellant to adhere to the terms of the Mediation Settlement Agreement.



4. The Appellant was dissatisfied with the Trial Magistrate's decision of 16th August, 2024 and filed the current appeal. The appeal is pending hearing and determination. The record of appeal has been filed.
5. As there was no stay order, a warrant of arrest in execution has been issued by the Children's Court.
6. The Appellant has presently moved the Court via an application dated 19th August, 2025 which seeks the following orders;
 - I. Spent
 - II. Spent
 - III. That pending the hearing and determination of the appeal, the court lifts the warrant of arrest and sets aside all execution proceedings and or order to commit the Applicant/Appellant to civil jail.
7. The Respondent opposed the application via a replying affidavit dated 2nd September, 2025.

Appellant's case

8. The Appellant argues that the orders that were issued by the trial Court that are the subject of the appeal are punitive and made without consideration that he has a parallel family.
9. The Appellant further argues that the parental responsibility agreement was in respect of two of the children who are now above the age of majority and did not extend to the child BKM, whom he claims is not his biological child.
10. In his submissions, the Appellant states that he has met the conditions for the granting of the stay order and submits that the application is not similar to that which was determined earlier.

Respondent's case

11. The Respondent argues that the Appellant is forum shopping and misleading the Court.
12. According to the Respondent, the Appellant is in contempt for not complying with the orders issued by the Children's Court. She claims that the Appellant is focused on prolonging the litigation process unnecessarily and demonstrates no genuine interest in caring for the children.

Analysis and determination

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

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

14. The Applicant's application dated 30th August, 2024 that was determined via a ruling dated 17th June, 2025 sought the following orders;
 - i. That the application be certified as urgent and be heard on priority during the vacation;
 - ii. Stay of execution of the Judgment/decreed entered in MCCC/984/2018 pursuant to the Respondent's application dated 5th February, 2024 and or any further proceedings or any subsequent orders therefrom pending hearing and determination of the application;



- iii. That the the warrant of arrest be lifted and all execution proceedings be set aside and or order to commit the Applicant/Appellant to civil jail pending the hearing and determination of the appeal;
 - iv. Costs of the application.
15. This Court found no merit in that application and dismissed the same with costs.
 16. In that ruling, this Court also pointed out that there was no application for stay of execution pending appeal before it, as the Appellant had approached the Court via Order 22, Rule 22 of the [Civil Procedure Rules](#), which pertains to stay of execution by a Court to which a decree has been sent for execution. This differs from a stay of execution pending appeal, which is based on Order 42, Rule 6 of the [Civil Procedure Rules](#).
 17. The present application is still not anchored on Order 42, Rule 2.
 18. The current application in prayer 3 also seeks a final order that would serve as a consideration of the appeal, should it be allowed at this stage.
 19. It is evident that the Appellant was prompted to move the Court by the warrant of arrest issued by the trial Court. To avoid a protracted back-and-forth process with numerous applications in this children’s matter, this Court will now consider whether the Appellant has fulfilled the conditions for a stay pending appeal.
 20. The three-pillar test for stay of execution pending appeal is as follows;
 - i. Whether the appellant has demonstrated that execution would result in substantial loss;
 - ii. That the appellant has moved the court without undue delay;
 - iii. That the appellant has provided security for performance.
 21. The application was brought without undue delay.
 22. The appeal arises out of maintenance costs that accrue from the Mediation Settlement Agreement. In children matters, a hierarchy of loss is created that looks at the ‘economic loss’ to be suffered by the appellant vis-à-vis the loss to be sustained by the child. There is no extraordinary loss described by the Appellant that he will suffer if the stay order is not granted. On the other hand, there is evidence that the Appellant paid maintenance support only after being prompted to do so during the execution process.
 23. The Appellant has not provided any security for the performance of the maintenance order.
 24. 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.”

25. 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.”

26. 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...*”

27. From the evidence before the Court, the Appellant merely asserts that he is committed to fulfilling his parental responsibilities and obligations to provide for the children. He makes no specific commitment on how he intends to fulfil this duty. There is evidence that the only payment made in 2024 was made after the execution process was initiated.

28. The Applicant has made three applications regarding the stay, including one before the trial Court, which I have reviewed. None of these applications included any commitment towards security for performance.

29. Order 42, Rule 6 (2) (b) provided as follows;

“No order for stay of execution shall be made under sub rule (1) unless;

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”.

30. After reviewing the details and circumstances of the case presented to this court, I opine that in order to protect the children’s best interests, a conditional stay of execution order should be granted.

31. Disposition;

i. The Appellant is ordered to make a partial payment of Kshs. 300,000/= to the Respondent as part of the maintenance order, within 21 days. If the Appellant fails to meet this conditional requirement within the specified timeframe, the stay order will automatically lapse.

ii. The appeal shall be heard and determined on a priority basis.



iii. The costs of the application shall be in the cause.

32. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS
ONLINE PLATFORM ON THIS 24TH DAY OF NOVEMBER, 2025.**

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mr. Wachakana, Advocate for Appellant

Ms. Nelima Walubengo, Advocate for Respondent

