



**LBN v KK (Civil Appeal E040 of 2025)
[2025] KEHC 17197 (KLR) (Family) (24 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17197 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E040 OF 2025
CJ KENDAGOR, J
NOVEMBER 24, 2025**

BETWEEN

LBN APPELLANT

AND

KK RESPONDENT

*(Being an Appeal from the Judgment of Honourable Jackie Kibosia,
Principal Magistrate in Children’s Court at Nairobi in Children’s
Case No.877 of 2019 dated and delivered on 16th February, 2024)*

RULING

1. The parties herein are the parents of T.K, K.K, and K.K (Minors). The Applicant sued the Respondent at the lower Court seeking custody of the Minors and monthly maintenance from the Respondent. The Respondent filed a counter-claim seeking shared care and control, and equal contribution to the maintenance of the Minors from the Applicant. The Court delivered a judgment on 16th February, 2024, granting the Respondent actual custody and the Applicant unlimited access. It also ordered the Applicant to pay a monthly contribution of Kshs 180,000/= towards the maintenance of the Minors.
2. The Applicant was dissatisfied with the judgment and sought its review through an application dated 30th September, 2024. At the same time, the Respondent brought an application dated 4th October, 2024, asking the Applicant to Show Cause why warrants of arrest should not be issued against her for failing to pay the Kshs.180,000/= for child Maintenance.
3. The Court delivered a ruling on 4th March, 2025, in which it dismissed the Applicant’s application for Review. The Court held that parental responsibility had been fairly distributed and there was no need to disturb the earlier finding. On the other hand, it found that the Applicant had not made any



contribution towards the Minors' upkeep since the delivery of the judgment, and thus allowed the Respondent's Notice to Show Cause.

4. The Applicant was dissatisfied with the Ruling and appealed to this Court vide a Memorandum of Appeal dated 17th March, 2025. She listed the following Grounds of Appeal;
 1. That Learned Magistrate erred in law and misdirected herself in the manner that she framed the issues for determination.
 2. The Learned Magistrate erred in law and misdirected herself when she failed to appreciate that the Appellant had material evidence in relation to the alleged earning capacity that informed the erroneous judgment and the entire suit.
 3. The Learned Magistrate erred in law and misdirected herself when she failed to appreciate that the material evidence showed that there was no evidence submitted to ascertain that the Appellant was able to afford maintenance of Kshs.180,000/=.
 4. The Learned Magistrate erred in law and misdirected herself by failing to find that the evidence produced by the Appellant as well as the misapprehension of facts was enough to review and set-aside the Judgment, Decree, and proceedings of the entire suit.
 5. The Learned Magistrate erred in law and misdirected herself in finding that the Respondent only sought for maintenance for one month yet the amount in question is Kshs.180,000/= despite the Appellant not having a pay-slip or evidence of earning such an amount.
 6. The Learned Magistrate erred in law in dismissing the Appellant's application for review in its entirety.
 7. The Learned Magistrate erred in law in failing to consider the Appellant's submissions and materials provided.
5. She asks this Court to allow the appeal and set aside the entire Ruling of the Hon. Magistrate delivered on 4th March, 2025, and, in its place, dismiss the Notice to Show Cause or allow the prayers sought in the Appellant's application for review dated 30th September, 2024.
6. Simultaneously, the Applicant brought the instant application dated 17th March, 2025, wherein she seeks the following orders;
 1. Spent.
 2. Spent.
 3. That there be a stay of execution of the Order issued in Milimani MCCC/877/2019 Lorna Bonareri Nyatome Vs Kigen Kandie on 4th of March 2025 pending the interpartes hearing and determination of this Appeal.
 4. That each party bears their own cost.
7. The grounds of the application are enumerated on its face and supported by an affidavit sworn by the Applicant. She stated that she has a strong appeal with high chances of success and that it would be fair and just for the stay orders to be issued. She averred that she is apprehensive that warrants of arrest will be taken out by the Respondent, thereby causing her irreparable harm. She averred that she has moved the Court immediately upon learning of the Ruling and that there is no prejudice that will be suffered by the Respondent.



8. The Respondent filed a replying affidavit dated 1st April, 2025, in which he opposed the application. He stated that if the application is allowed, he will suffer prejudice on account of the Applicant's non-compliance as he has been patiently waiting for over a year since date of the judgment to execute it. He averred that the application constitutes an abuse of Court process and ought to be dismissed. He also averred that it is in the interests of justice and the children's best interests that the application be dismissed.
9. The application was canvassed by way of written submissions. The Applicant filed her submissions dated 6th November, 2025, and the Court has carefully considered the same. The Respondent did not file his submissions.

Issues for Determination

10. Having considered the grounds of the application, response from the Respondent, and submissions, I find that the only issue for determination is
 - a. Whether the Applicant has met the threshold for grant of stay of execution.
11. The principles governing the grant of an order for stay pending appeal are set out in Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules which provides as follows:

42(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order...

 - (2) 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.
12. Courts have set the conditions that an Applicant has to satisfy to get a stay of execution pending an appeal. In *Francis Muthusi Malombe & 7 others v Daniel Kaloki Malombe & 9 others* [2022] eKLR, the Court discussed the import of Order 42 Rule 6 (i) of the Civil Procedure Rule, and held as follows;
 35. I have already cited the provisions of Order 42 Rule 6 (i) of the Civil Procedure Rule above. It is clear from the cited Rule that in the 1st instance, the court appealed from may for "sufficient cause" order stay of execution. Granted that a stay of execution is discretionary matter, this court must be satisfied that the following conditions are met by the applicant: -
 - (i) He/she must show a good cause.
 - (ii) He/she must show that a substantial loss may result unless the stay is granted.
 - (iii) He must show that there is no unreasonable delay in filing the application for stay.
 - (iv) Such security as the court may order for due performance of such decree or order as may ultimately be binding on him.



13. The Court in *H&M Savings & Credit Co-operative Society Limited & 3 others v Mugambi* [2023] KEHC 3114 (KLR) interpreted the above provisions as follows;

“Bearing in mind that the respondent is entitled to enjoy the fruits of its judgment, an appellant must, as a threshold issue, demonstrate that they will suffer substantial loss. It is only then that the court will consider whether security should be provided. In order to do so, the appellant must prove the likelihood of substantial loss by putting forth facts which so demonstrate or from which the court may draw an appropriate inference. Once it establishes a prima facie case, then the evidential burden shifts to the respondent to show that it is capable of assuaging any loss that may be suffered if the decree is reversed/stayed”.

14. Similarly, the Court in *John Gachanja Mundia v Francis Muriira alias Francis Muthika and another* HC MRU Civil Application No 42 of 2015 [2016] eKLR observed as follows:

“Therefore, stay of execution is a matter of the discretion of the Court. But for the court to postpone the right of the judgment holder to immediate enjoyment of the fruits of his judgment, the Applicant must show that the Respondent cannot make a refund of the decretal sum; as that would certainly reduce a successful appellant to merely a holder of a barren success, thus, a pious explorer in the judicial process. I must, however, restate the law, that is; the onus of proving substantial loss would occur falls on the shoulders of the Applicant. He must not throw or shift it to the Respondent to state his financial ability before the Applicant has shown a prima facie case on reasonable facts that there is some financial limitation on the part of the Respondent. It is only after the legal burden is discharged by the Applicant that the Respondent will be called upon to discharge his evidential burden or provide affidavit of means.

15. I have looked at the deposition of the Appellant against the aforesaid principles, and I find that apart from narrating the litigation history of the matter and the fact that she has filed an arguable appeal, she says nothing about whether she will suffer substantial loss if the stay is not granted. In this case, the affidavit is devoid of facts showing how the Applicant will suffer substantial loss. In conclusion, I am not convinced that the Applicant has made out a case for the grant of an order for stay.

16. The application dated 17th March, 2025 is dismissed with no order as to costs.

17. It is so ordered.

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

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Ms Kiiru, Advocate for the Appellant

No attendance for Respondent

