



**CS (Suing as the next friend and mother of Children JAZS and BPAPS) v POO & another (Civil Appeal E038 of 2025) [2025] KEHC 18265 (KLR) (Family) (1 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18265 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPEAL E038 OF 2025  
CJ KENDAGOR, J  
DECEMBER 1, 2025**

**BETWEEN**

**CS (SUING AS THE NEXT FRIEND AND MOTHER OF CHILDREN JAZS AND BPAPS) ..... APPELLANT**

**AND**

**POO ..... 1<sup>ST</sup> RESPONDENT  
IMMIGRATION SERVICES ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the orders of Hon. R.W. Gitau issued on 6th March, 2025 in Nairobi Chief Magistrate’s Court, Children Cause No. E2334 of 2024)*

**JUDGMENT**

1. The Appellant and the 1<sup>st</sup> Respondent are the biological parents of JAZS and BPAPS (the Minors). The Appellant is a German Citizen, while the 1<sup>st</sup> Respondent holds dual citizenship for Kenya and Germany. The Appellant filed a children’s case against the 1<sup>st</sup> Respondent in the Nairobi Children’s Court, in which she sought custody orders in her favor with access to the 1<sup>st</sup> Respondent. She also sought orders for leave to travel and relocate with the children. The pleadings indicate that, at the material time, she resided in Nairobi, Kenya, with the minors, while the 1<sup>st</sup> Respondent resides in Germany.
2. Before the case could be heard and determined at the lower Court, the Appellant left Kenya for Abidjan, Cote d’Ivoire on 28<sup>th</sup> February, 2025, with the minors, without the 1<sup>st</sup> Respondent’s consent. The 1<sup>st</sup> Respondent got to know about the travel later and brought a Notice of Motion dated 6<sup>th</sup> March, 2025 asking the Court to compel the Appellant return the minors to Kenya and bring them to Court.



3. The trial Court heard the application on the same day and heard both sides. It delivered a ruling against the Appellant, directing her to produce the minors within 7 days from that day failure to which a warrant of arrest to issue against her would be effected through Interpol.
4. The Appellant was dissatisfied with the orders and appealed to this Court vide a Memorandum of Appeal dated 7<sup>th</sup> March, 2025. She listed the following Grounds of Appeal;
  1. That the Magistrate, without any legal basis, criminalized, post facto, the lawful departure of the Appellant, who is a German citizen, and her two minor children from Kenya, despite the absence of any travel ban or legal restriction preventing such travel as of the 27/2/2025.
  2. That the Magistrate issued orders on the 6/3/2025 based on an application that was served on the Appellant at 6:49 AM on the same date. The matter was scheduled for mention and the application was not listed for hearing or directions, nor was it prosecuted by any of the parties.
  3. That the Magistrate, suo moto, prosecuted the application dated 6/3/2025 and rendered a determination on it without allowing the parties to be heard, thereby denying the Appellant the right to fair hearing and natural justice.
  4. That the Magistrate meted out orders that are manifestly harsh and excessive against the Appellant and her two children by issuing a draconian order that effectively calls for the Appellant's arrest through INTERPOL when no offence or crime had been committed.
  5. That the Magistrate's order is ambiguous as it does not specify where the children, now lawfully in Abidjan, should be produced and was issued without an opportunity for explanation or a hearing, thereby unfairly prejudicing the Appellant.
  6. That the Magistrate's order is overreach and ultra vires. The Children, who are German citizens, had already lawfully left the Kenyan jurisdiction on the 27/2/2025, and the Magistrate did not have jurisdiction over them as of the 6/3/2025.
  7. That the Magistrate flouted the rules of natural justice and, without being moved by either party, issued an order that amounts to a repatriation order of foreign citizens now domiciled in a foreign jurisdiction.
5. She asked the Court to set aside the orders issued by the lower Court on 6<sup>th</sup> March, 2025. She also asked the Court to remit the Notice of Motion dated 6/3/2025 filed in Nairobi Children Case No. E2334 of 2024, and all further proceedings therein, for hearing on merits before any other Magistrate other than Hon. Rose Gitau, Resident Magistrate.
6. The Appeal was canvassed by way of written submissions.

### **Appellant's written Submissions**

7. The Appellant submitted that the lower Court was wrong in issuing the said orders against her. She argued that her exit from Kenya was lawful because there was no restraining order, no travel ban, nor any legal restriction whatsoever as at the date she left, barring her and the minors from leaving Kenya. She opined that the 1<sup>st</sup> Respondent did not file an application to restrain her from leaving the Kenyan jurisdiction and the magistrate did not make any such order. She submitted that there was no wrongdoing on her part and that the magistrate's insistence that she should have sought consent from the 1<sup>st</sup> Respondent before leaving Kenya is untenable.



## Issues for Determination

8. Having considered the Grounds of Appeal and the Appellant's written submissions, I find that the singular issue that arises for disposal is
  - a. Whether the trial Court was justified in issuing the subject orders against the Appellant.
9. The role of this Court as the first appellate Court is well-settled. It is trite law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it is required to bear in mind that it had neither seen nor heard the witnesses. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”
10. The said principle was restated in *Okeno vs. Republic* (1972) EA 32, where the East Africa Court of Appeal stated as follows;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”
11. Based on these authorities, this Court is being required to undertake a wholesome review of the 1<sup>st</sup> Respondent's Notice of Motion dated 6<sup>th</sup> March, 2025, and come up with its conclusion. In other words, the Court is being invited to relook at the merits of the said Notice of Motion to determine whether the lower Court was justified in determining the application the way it did.
12. As a way of background, I shall reproduce the contents of the said Notice of Motion to set the context. In the said application, the 1<sup>st</sup> Respondent sought the following orders;
  1. That this matter be certified urgent and be heard ex-parte in the first instance.
  2. That this Honourable Court be pleased to issue a Production Order against the Plaintiff/1<sup>st</sup> Respondent directing the Plaintiff/1<sup>st</sup> Respondent to immediately present, avail, and produce the Minors, before this Honourable Court upon service of this application and in default, Warrants of Arrest to issue for her committal to civil jail to compel her obedience to the Court Order.



3. That the Director of Immigration be compelled to provide details of how the Minors were taken out of the jurisdiction of this Honourable Court and out of the Kenyan borders without the requisite parental consent, without leave of this Honourable Court and without any Court orders.
4. That pending the hearing and determination of this Application, the custody of the Minors be vested in the Defendant/Applicant per the Custody Agreements for each minor, each dated 21.12.2020 and duly registered by the Bezirksamt/District office Steglitz/Zehlendorf in Berlin on 30.12.2020 to enable the children have the warmth, care, and stability of their own home in Germany and of the love and affection of their father.
5. That the stoppage orders be issued against the Plaintiff/1<sup>st</sup> Respondent barring the Minors from travelling to any country apart from Kenya and Germany and compelling the Kenyan Immigration Department at the airports to decline to stamp out the children to any other countries apart from Germany.
6. That an Order of committal be made against the Plaintiff/1<sup>st</sup> Respondent to civil jail for such period as this Honourable Court may deem fit for willfully, forcefully, and illegally taking the Minors out of the jurisdiction of this Honourable Court without parental consent and without the leave of Court or any Court orders thereby exposing the Minors to rave harm, risk, and danger while being smuggled out of Kenya to Abidjan, Cote d'Ivoire.
7. That in order to purge the Contempt of Court complained of, the Plaintiff/1<sup>st</sup> Respondent to further pay a fine of such amount as the Court may deem proper as punishment for disobedience of Court orders.
8. That the orders of this Honourable Court be served through diplomatic channels and the same be enforced by and through the Kenya National Police Service and the International Criminal Police Organization- INTERPOL.
9. That the Court do make any other orders as it deems fit to prevent the ends of justice from being defeated.
10. That the costs of these contempt proceedings be borne by the Plaintiff/1<sup>st</sup> Respondent.
13. The grounds of the application were outlined on its face and supported by the 1<sup>st</sup> Respondent's affidavit sworn by him and dated 6<sup>th</sup> March, 2025. In a nutshell, the 1<sup>st</sup> Respondent stated that the Appellant took the minors out of the country without his consent or a Court order. He stated that by the time the Appellant notified him of her departure, she had already left the country for Abidjan. He supported his claims with several annexures and documents. The application was argued orally before the lower Court on the same day.
14. The Appellant's response to the said application can be deduced from her advocate's oral response when the parties were arguing the application. She stated that she did not commit an illegality. She stated that her employment contract expired on 28<sup>th</sup> February, 2025, and that her stay in Kenya upon the expiry of her employment contract would have jeopardized her immigrant status as well as her new employment offer at Abidjan. She stated that she wrote to the Appellant's advocates informing them of her untenable situation and copied the same communication to the lower Court.
15. In response, the 1<sup>st</sup> Respondent stated that he had not been informed about the said predicament and that there was no evidence to show that the Appellant had given him prior communication about the



departure for Abidjan on 28<sup>th</sup> February, 2025. He stated that he received the communication from the Appellant's advocates after the fact- after the Appellant had left with the minors.

### **Whether the trial Court was justified in issuing the subject orders against the Appellant**

16. This Court cannot lose sight of the fact that this matter relates to the welfare of minors. It is a trite law that in matters concerning the welfare of children, Courts are required to give priority to the best interests of the child. This position is well-anchored in Article 53 (2) of *the Constitution* of Kenya, 2010 which provides that "(2) A child's best interest are of paramount importance in every matter concerning the child."

17. This constitutional principal has further been substantiated by Section 8 (1) of the *Children Act* 2022, which provides that;

"(8)(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies-

a. The best interests of the child shall be the primary consideration;"

18. Courts have consistently held that it is a child's best interests to have stability and predictability in his/her life. The Court in *AB v HRJDP* [2023] KEHC 21056 (KLR) held as follows;

The minors currently reside outside of Kenya. They attend school and have undoubtedly formed relationships and friendships where they currently reside. The review orders made on September 10, 2010 effectively amounted to an order directing that the children be returned to Kenya from India where they reside with their mother. I do not find that there exist any special circumstances warranting the uprooting of the minors from the home they currently enjoy to a different country where they will have to adjust to new schools form new friendship and relationships. This cannot be in the best interests of the children who like all other children require stability and predictability in their lives.

19. The Court in *CKM v EMM* [2022] KEHC 15887 (KLR) took a similar position and maintained that children deserve stability in their lives, and that it cannot be in their best interests to have them shuttled from one country to the other. The Court observed as follows;

"It goes without saying and cannot be gainsaid that courts do not make orders in vain. Court orders must be obeyed by the persons to whom they are directed. However, the interest of the minors will trump any other consideration in this matter. The two (2) children herein are both of tender years being aged ten (10) years and seven (7) years respectively. The Applicant has enrolled them in school in the DRC and they are probably now adjusting to life in their new environment. The Applicant is the custodial parent. To have the warrant of arrest executed will obviously result in massive upheaval in the lives of the minors. It cannot be in the best interests of the minors to have them shuttled from one country to the other.....24. The minors in my view deserve stability in their lives".

20. Based on the evidence presented, this Court has determined that the Appellant has been the primary caregiver for the minors. Her decision to travel out of Kenya was motivated by a work opportunity. She stated that, without accepting this opportunity, she would not be able to provide for them, and their staying behind would harm their well-being. The Appellant took the minors out of the country on 28<sup>th</sup> February, 2025. There was no Court order prohibiting her from doing so.



21. I have also re-examined the facts around the minors' general welfare. The Appellant has demonstrated that she is capable of making arrangements to ensure their education, medical care, residency, and overall welfare. I note that the minors have been in Abidjan for almost 9 months. The Appellant submitted that the minors are now enrolled in their new schools, they have settled well, are forming new friendships, and are adapting well. Although there is no evidence of their current progress in their new schools, this Court presumes that the minors are now adjusting to life in their new environment, schools, and friendships. Against this, the execution of the orders issued by the lower Court would mean an immediate return of the minors to the country.
22. It is in minors' best interests to have and enjoy stability and predictability in their lives, and that such stability should only be disrupted in deserving cases. In my view, an immediate return of the minors to Kenya would obviously disrupt their current social lives and their education, and that has not been justified in this case. I have also considered the fact that one of the minors, BPAPS, is a special needs child.
23. In the end, I find that the orders made by the trial Court on 6<sup>th</sup> March, 2025, were inappropriate because there were no special circumstances warranting the immediate return of the minors to the country or the default arrest warrants against the Appellant.

### **Disposition**

24. I thus find merit in this appeal and the same is allowed.
25. The orders made by the Hon R.W. Gitau in her ruling of 6<sup>th</sup> March, 2025 are hereby set aside.
26. No orders as to costs.
27. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 1<sup>ST</sup> DAY OF DECEMBER, 2025.**

.....

**C. KENDAGOR**

**JUDGE**

In the presence of:

Court Assistant: Beryl

Ms Choiga, Advocate holding brief for Mukuni, Advocate for 1<sup>st</sup> Respondent

No appearance for Appellant

