



**COO v POO (Civil Appeal E068 of 2025)  
[2025] KEHC 18656 (KLR) (Family) (18 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18656 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPEAL E068 OF 2025  
H NAMISI, J  
DECEMBER 18, 2025**

**BETWEEN**

**COO ..... APPLICANT**

**AND**

**POO ..... RESPONDENT**

**RULING**

1. Before the Court is Notice of Motion dated 7 May 2025, seeking the following orders:
  - i. Spent;
  - ii. That pending the hearing and determination of this Application, the Honourable Court be pleased to issue an interim order staying the execution and/or enforcement of the judgement/decree issued on 15 April 2025 of the Children’s Court in Nairobi Children’s Case No. XXXX of 2023;
  - iii. That pending the hearing and determination of this Application, the Honourable Court be pleased to issue an interim Order directing that the child, AOO, shall reside with the Applicant as he attends school;
  - iv. That this Honourable Court be pleased to issue an order directing that the children, AOO and SBO, be interviewed by the Court at a date and time to be fixed by the Honourable Court;
  - v. That pending the hearing and determination of the substantive appeal, the Honourable Court be pleased to issue an interim order staying the execution and/or enforcement of the judgement/decree issued on 15 April 2025 by the Children’s Court in Nairobi Children Case No. XXXX of 2023;



- vi. That pending AO the hearing and determination of the Appeal, the Honourable Court be pleased to issue an order directing that the children, AO and O, shall reside with the Applicant as he attends school;
  - vii. That the Honourable Court be pleased to grant such further or other orders as it may deem fit and just in the interests of justice and to secure the best interest and welfare of the children.
2. The Application is supported by the Affidavit sworn by the Applicant as well as Further Affidavit sworn on 10 June 2025.
  3. The immediate catalyst for this Application is the judgement delivered on 15 April 2025 by the Hon. R. Gitau, Senior Resident Magistrate, in which the actual physical custody of the minors was granted to the Respondent. The Applicant was awarded access rights and ordered to pay school fees for the second minor, A.O, alongside a monthly upkeep of Kshs 30,000/=.

### **Brief Background**

4. The parties were formerly married and are the biological parents of the two minors. The first minor, born on 13 January 2008, is aged 17 years and currently a student at Kanga High School (boarding). The second minor, born on 19 November 2010, is aged 15 years old and enrolled at St. XXX School, Lavington. He is a day scholar.
5. The marriage between the parties irretrievably broke down, leading to divorce proceedings in 2019. Following the separation, custody arrangements appear to have been fluid and contentious. The Applicant claims to have been the primary custodian providing a stable environment, while the Respondent asserts that she has been the sole consistent parent, particularly during the Applicant's alleged periods of imprisonment.
6. The Applicant instituted the suit in the Children's Court in December 2023, seeking joint legal custody and actual custody of the minors. The Respondent counterclaimed for shared custody and maintenance.
7. In his case, the Applicant argued that he had shared custody previously and was fully paying school fees for the second born. He proposed a shared parenting arrangement where he would live with the second born (A.O) during school days to facilitate transport to St. XXX School, while the Respondent would have access on alternate weekends. He admitted to being incarcerated between May 2021 and November 2023 but claimed he was now available.
8. The Respondent opposed the Applicant having custody, citing his criminal history. She testified that when the Applicant was in prison, she paid the fees and cared for the children. She proposed a week-on-week shared custody arrangement or that she retains full custody. She argued that paying fees did not amount to parenting.
9. In its judgement, the trial court analysed the principles of custody under section 103 and 95 of the *Children Act*. The trial court found the Respondent's evidence regarding the Applicant's incarceration credible, as the Applicant admitted to being in jail from 2021 to 2023. The court held that stability had only so far, been offered by the Respondent. The court rejected the week-on-week proposal as disruptive and granted physical custody to the Respondent. The Applicant was granted access on alternate weekends and half the school holidays. Regarding maintenance, the Applicant was ordered to pay school fees for the second born and a monthly upkeep of Kshs 30,000/=. The Respondent was to pay fees for the first born and provide housing.



10. The Applicant alleges that following the judgment, the minor, A.O., expressed a strong desire to reside with him to avoid the commute from Imara Daima to Lavington. The Applicant, thus, filed the appeal and the instant Application. The Respondent alleges that the Applicant has failed to pay the decreed maintenance of Kshs 30,000/= and has filed for execution.

### **Applicant's Case**

11. The Applicant avers that he resides on Riara Road, Lavington, which is less than 10 minutes from St. XXX School, while the Respondent resides in Imara Daima. The minor is an IGCSE student. The commute from Imara Daima involves public transport since the school bus does not serve that route. This causes fatigue and disrupts studies, constituting substantial loss.
12. According to the Applicant, the child has consistently expressed a wish to live with the Applicant during the school term. The Applicant pays the school fees and argues that the monthly maintenance order of Kshs 30,000/- was made suo moto and is unjust given that he shoulders the educational burden.

### **The Respondent's Case**

13. The Respondent opposed the Application through a Replying Affidavit sworn on 21 May 2025. The Respondent's opposition is anchored on the character of the Applicant. She deposes that in 2011, the Applicant was arrested for desertion and detailed at the Industrial Area and Garissa Prisons. Between 2016 – 2018, the Applicant was detained at Kitui Maximum Prison for 20 months. In 2021 – 2023, the Applicant was jailed at Kamiti Maximum Prison. The Respondent argues that she was the sole custodian during these periods.
14. The Respondent denies that the Applicant lives in Lavington, alleging that he lives in Embakasi/ Utawala, with another family and that the Lavington claim is a fabrication to deceive the Court. The Respondent claims that the Applicant is a danger to the minors due to his antecedents and alleges that the Applicant sends unauthorised persons to pick the child from school.
15. The Respondent notes that the Applicant has refused to pay the Kshs 30,000/- maintenance as ordered.

### **Analysis & Determination**

16. Having considered the Application, Affidavits and submissions, the following issues are for determination herein:
  - i. Whether the Applicant has satisfied the conditions under Order 42 Rule 6 of the Civil Procedure Rules to warrant a stay of execution of the judgment;
  - ii. Whether the Best Interests of the Child necessitate a variation of the custody arrangement pending the appeal, particularly regarding the minor A.O.'s residence during the school term;
  - iii. To what extent the allegations of the Applicant's criminal history versus the Respondent's alleged political activities influence the interim orders
17. The power of this Court to grant stay of execution pending appeal is anchored in Order 42 Rule 6(2) Civil Procedure Rules. It provides:
  - (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
- 18. The principles flowing from this provision are well settled. An applicant must satisfy the above tripartite test. It is a foundational tenet of civil procedure that these three conditions are not alternative to be selected from: they are conjunctive and cumulative. An applicant does not have the luxury of satisfying one or two of the conditions and hope for a favourable outcome. This principle was succinctly stated by Mutai, J in ENK v SAN (Family Appeal E018 of 2024) KEHC 7217 (KLR)
- 19. The first limb of the test requires the application to have been made without unreasonable delay. In this instance, the judgement was delivered on 15 April 2025. The present application was filed on 7 May 2025, 21 days later. By any standard of civil litigation, this is prompt. I find that there has been no unreasonable delay.
- 20. On the second limb, substantial loss, is the crux of the application. The Applicant argues that substantial loss will be occasioned to the minor, A.O, if the stay is not granted. In *Silverstein v Chesoni* 1 KLR 867, the Court held that substantial loss is the cornerstone of stay jurisdiction. In *James Wangalwa & Another v Agnes Naliaka Cheseto* eKLR, the court emphasized that execution being a lawful process does not inherently cause loss; specific prejudice must be shown.
- 21. The concept of substantial loss is not static: its meaning and application must be interpreted within the specific context of the litigation. In ordinary commercial or civil disputes, substantial loss is typically assessed by considering whether the appeal, if successful, would be rendered nugatory. This involves an evaluation of whether the Respondent would be able to refund the decretal amount if the Appellant's appeal succeeds.
- 22. However, in children's matters, the interpretive lens is fundamentally altered by *The Constitution*. Article 53(2) elevates the best interests of the child to a position of paramount importance in every matter concerning the child. Consequently, when a court is called upon to determine substantial loss in the context of a child maintenance order, the focus must shift. The primary consideration is not the financial inconvenience or hardship of the parent, but the immediate, tangible, and potentially irreversible loss of welfare, stability and provision that the child would suffer if the maintenance order is stayed. The parent's inconvenience is secondary. This principle was aptly captured in ENK v SAN [2024] KEHC 7217 (KLR).
- 23. Viewed through this prism, the Applicant's argument collapses. While this Court takes judicial notice of the geography of Nairobi, and the notorious heavy traffic congestion along Mombasa Road, the Court is alive to the fact that the Applicant has not successfully rebutted the Respondent's claim that he does not reside in Lavington. Indeed, for the minor who is preparing for IGCSE examinations, this is critical academic juncture. Subjecting the minor to 3 to 4 hours of daily travel is not merely an inconvenience; it is detrimental to his educational potential. If the appeal takes a year to determine, and the child fails his exams due to fatigue in the interim, that loss is irreparable. It is substantial loss in its purest form. This notwithstanding, the Tenancy Agreement having been expunged, there is no credible evidence before this Court to prove that the Applicant resides in Lavington as averred. At the moment, it is a case of he said, she said. This Court cannot engage in guessing games, when the fate of the minor's custody is at stake.
- 24. Under Order 42 Rule 6(2)(b), a stay shall not be granted unless the applicant has given such security as the court orders for due performance of the decree. Although the Applicant herein has stated his willingness to abide by any security orders, the Applicant comes to this Court seeking an equitable relief



but with unclean hands. The Respondent argues, and the Applicant has admitted, that despite paying school fees, the Applicant has not adhered to the order of monthly maintenance. The Applicant, in turn, argues that the order was made suo moto.

25. Even if the Applicant had surmounted the procedural hurdles of Order 42 Rule 6, which he has not, his Application would still fail when weighed against the supreme constitutional principle that governs the dispute, Article 53(2). In the specific context of staying maintenance orders, the judicial attitude is clear and consistent. In *ZMO vs EIM* [2013] eKLR, the Court pronounces what has become a guiding dictum:

“As a matter of principle, grant of stay of execution of maintenance orders in children’s cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about it. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute.”

26. The welfare of the children cannot be held in abeyance pending the outcome of an appeal. The proper course for the Applicant is to comply with the orders of the trial court while diligently prosecuting his appeal.
27. In the premise, this Court finds that the Applicant’s Notice of Motion dated 7 May 2025 is wholly devoid of merit. Accordingly, the following orders shall issue:
- i. The Notice of Motion dated 7 May 2025 is dismissed;
  - ii. The costs of the Application shall be in the cause.

**DATED AND DELIVERED AT NAIROBI THIS 18 DAY OF DECEMBER 2025**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For the Applicant: Ms Dulo h/b Ms. Mauno

For the Respondent: Mr. Odhiambo

Court Assistant: Lucy Mwangi

