



**NNK v CMK (Civil Appeal E141 of 2024)  
[2025] KEHC 18651 (KLR) (Family) (18 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18651 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPEAL E141 OF 2024  
H NAMISI, J  
DECEMBER 18, 2025**

**BETWEEN**

**NNK ..... APPLICANT**

**AND**

**CMK ..... RESPONDENT**

**RULING**

1. Before the Court is Notice of Motion dated 28 October 2024, seeking the following orders:
  - i. Spent;
  - ii. Spent;
  - iii. That there be a stay of execution of the judgement and decree of Hon. Jackie Kibosia, SRM delivered on 1 October 2024 at Milimani Children’s Court in MCCC 1196 of 2018 pending the inter partes hearing and determination of this application and appeal;
  - iv. That the cost of the Application be in the cause.
2. The genesis of this dispute dates back to 2018 when the Respondent instituted proceedings in the Children’s Court seeking maintenance and school fees. The matter has had a chequered history, involving a Mediation Settlement Agreement dated 22 March 2019, which the Applicant avers he has substantially complied with, but which the Respondent contends has been breached.
3. Following the delivery of the impugned judgment on 1 October 2024, the Applicant filed a Memorandum of Appeal raising nine grounds of appeal, principally challenging the jurisdiction of the Children’s Court to extend parental responsibility to a 28-year-old adult and alleging that the trial



magistrate erred in law and fact. The Applicant concurrently filed the instant application for stay of execution to preserve the res and the utility of the appeal.

4. The trial court's judgment, inter alia, extended parental responsibility over the subject, KNK, and ordered the Applicant to contribute towards his school fees at an aviation college, notwithstanding that the Subject had attained the age of majority, being 28 years old at the material time.
5. The Applicant's case is predicated on the premise that the execution of the judgment would cause him substantial loss, render his appeal nugatory, and violate his fundamental rights given his current medical condition. His case is supported by a Supporting Affidavit, Further Affidavit, and a Further Affidavit in Response to the Replying Affidavit.
6. The Applicant deposes that he is a retiree with no stable income, relying primarily on subsistence farming to meet his financial obligations and medical expenses. He avers that the Respondent has threatened to execute the decree, which involves the payment of significant sums for aviation fees. He expresses a well-founded apprehension that his inability to raise the decretal sum immediately will lead to his committal to civil jail, a process he describes as punitive and detrimental to his health.
7. He further contends that he has a dependent minor child, aged 10 years, who relies entirely on him for school fees and upkeep. He annexed the minor's Birth Certificate and school fee structures to demonstrate this obligation. He argues that his incarceration would leave this minor destitute, thereby shifting the burden of substantial loss to an innocent third party.
8. In a significant development captured in his Further Affidavit of 15 January 2025, the Applicant reveals that he is suffering from a serious medical condition. He produced a medical report dated 29 November 2024, indicating a diagnosis of Benign Prostatic Hyperplasia (BPH) with a PSA level of 19.146ng/ml.
9. The Applicant underwent surgery (Transurethral Resection of the Prostate - TURP) at Kutus Modern Hospital on 4 December 2024 and was discharged on 9 December 2024. His discharge summary prescribes a regimen of medication and strict avoidance of strenuous activity. The Applicant submits that committal to civil jail in his post-operative state would be life-threatening and would deny him the necessary specialized medical care, constituting irreparable harm.
10. The Applicant forcefully challenges the factual basis of the maintenance order. He asserts that the Subject is 28 years old and thus an adult capable of self-sustenance. He refutes the Respondent's claim that the Subject dropped out of university due to lack of fees, providing evidence that the Subject took a voluntary leave of absence from [Particulars withheld] University and remains a registered student there. The Applicant argues that forcing him to pay for a new, expensive aviation course for a 28-year-old, while he has already contributed to the university education, is unjust.
11. Contrary to the Respondent's claims of neglect, the Applicant provided a detailed schedule of payments in his Further Affidavit. This schedule catalogues payments totalling Kshs. 1,368,295/= made between April 2019 and October 2022, including a lump sum of Kshs. 500,000/= paid via bank transfer on 4 March 2020.
12. The Respondent opposes the application through a Replying Affidavit sworn on 7 May 2025 and Submissions dated 23 June 2025, arguing that the best interests of the "child" (the Subject) supersede the Applicant's financial or medical concerns.
13. The Respondent argues that despite the Subject's age, he remains a child of the family who is dependent on his parents for his education. She contends that staying the execution would disrupt his aviation training, which she characterizes as a critical component of his future welfare. The Respondent relies



on the best interests of the child principle enshrined in Article 53 of *the Constitution*, arguing that this principle extends to completing the education of dependent children regardless of age.

14. The Respondent dismisses the Applicant's plea of poverty. She alleges that he is a man of means who owns a lucrative fish farm, a coffee farm, and a 'muguka' plantation, in addition to rental properties and engineering businesses. She argues that the Applicant's refusal to pay is not due to inability but is a deliberate attempt to evade responsibility.
15. The Respondent disputes the Applicant's payment figures, asserting that he has only paid Kshs. 379,030/= out of the agreed Kshs. 1,300,000/= under the 2019 Mediation Agreement. She annexed select M-Pesa receipts to support her tally.
16. Citing *DOB vs DMA eKLR* and *ZMO vs EIM KEHC 5590 (KLR)*, the Respondent submits that maintenance orders should generally not be stayed pending appeal because doing so inflicts immediate hardship on the beneficiary. She argues that the Applicant has failed to demonstrate substantial loss as defined in *James Wangalwa & Another vs Agnes Naliaka Cheseto eKLR*, noting that mere payment of money does not constitute substantial loss if the debt is due.
17. The Application was canvassed by way of submissions.

### **Analysis & Determination**

18. Upon a comprehensive review of the record and the applicable jurisprudence, the following issues frame the determination of this application:
  - i. Whether the Applicant has satisfied the tripartite test for a stay of execution under Order 42 Rule 6(2) of the Civil Procedure Rules.
  - ii. Whether the Applicant's medical condition constitutes a special circumstance warranting protection from civil jail.
  - iii. Whether the subject's age (28 years) and the nature of the education (aviation vs. university) render the appeal arguable and arguably nugatory if execution proceeds.
  - iv. Whether the "Best Interests of the Child" principle applies strictly to a 28-year-old adult student in the context of a stay of execution.
19. The jurisdiction of this Court to grant a stay of execution pending appeal is discretionary but must be exercised judicially. The enabling provision, Order 42 Rule 6(2) of the Civil Procedure Rules, sets out strict parameters.
20. The first and arguably most critical limb of Order 42 Rule 6(2) is the requirement that the applicant must satisfy the court that substantial loss may result to the applicant unless the order is made. The term 'substantial loss' is not defined in the statute, but case law has provided ample guidance. In the locus classicus case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR), Gikonyo J. expounded on this concept, stating:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed... does not in itself amount to substantial loss... The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal.”



21. Furthermore, in *Kenya Shell Limited vs Benjamin Karuga Kibiru & Another* [1986] KLR 410, the Court of Appeal established the principle that in money decrees, substantial loss is often linked to the inability of the respondent to refund the decretal sum if the appeal succeeds. The Court held:

“There was no evidence of substantial loss to the applicant... It is a money decree. An intended appeal does not automatically operate as a stay... However, if there is no evidence that the respondent would be unable to repay the sum if the appeal succeeds, stay may be refused.”
22. The decree in question is a money decree requiring the payment of school fees for an aviation course. Aviation fees are notoriously high, often running into millions of shillings. The Applicant argues that paying these fees immediately would cripple him financially, as he is a retiree relying on farming.
23. While the Respondent alleges the Applicant is wealthy, she has not proffered any evidence of her own financial capacity to refund these significant sums should the Applicant succeed in his appeal. In *Kenya Hotel Properties Limited vs Willesden Properties Limited* (Civil Application No. Nai 322 of 2006), the Court of Appeal emphasized that where there is doubt about the respondent’s ability to refund, the appeal would be rendered nugatory.
24. If the Applicant is compelled to pay millions for the Subject’s aviation fees now, and the appellate court later rules that a parent has no legal obligation to maintain a 28-year-old adult, the Applicant would have suffered a loss that is irreversible if the Respondent cannot refund the money. This fits the definition of rendering the appeal nugatory.
25. However, the most compelling argument for substantial loss in this case is not merely financial; it is physical and existential. The Applicant has provided uncontroverted evidence of a diagnosis of Benign Prostatic Hyperplasia (BPH) and a recent TURP surgery in December 2024. Execution of the decree via committal to civil jail—which the Respondent admits has been the modus operandi for enforcement in this matter—poses a grave threat to the Applicant’s health.
26. In *Midwa vs Midwa* [2002] 2 EA 453, the Court of Appeal dealt with a case where a lower court had ignored the medical condition (HIV status) of a party when making orders. The Court held that ignoring such a condition was a misdirection and that court orders should not be instruments of cruelty.
27. The Applicant is a 67-year-old man recovering from surgery. Incarcerating him in civil jail would likely exacerbate his condition, expose him to infection, and deny him the gradual resumption of activities prescribed by his surgeon. This Court finds that the potential deterioration of the Applicant’s health and the risk to his life constitute substantial loss of the highest order. The right to health (Article 43) and dignity (Article 28) supersedes the immediate collection of a civil debt.
28. While Order 42 Rule 6 does not explicitly require an arguable appeal, the substantial loss analysis often intertwines with the likelihood of success. If the appeal is frivolous, a stay serves no purpose. Conversely, if the appeal raises weighty legal questions, the Court is more inclined to preserve the status quo.
29. The core legal question in the substantive appeal is: To what extent does parental responsibility extend beyond the age of 18?



30. Section 2 of the *Children Act* defines a child as "any human being under the age of eighteen years". Generally, parental responsibility ceases at 18. However, Section 35(1) of the Act allows for extension:
- Parental responsibility in respect of a child may be extended by an order of the Court after the date on which the child attains the age of eighteen years if the Court is satisfied... that special circumstances exist with regard to the welfare of the child that would necessitate the making of such extension.
31. Crucially, Section 35(2) lists special circumstances as cases where the child has special needs arising from severe disability or developmental disorder. It does not explicitly list education, unlike the repealed *Children Act* of 2001 (Section 28), which had broader discretion.
32. However, Section 111(2) of the 2022 Act allows a person over 18 to apply for maintenance if they are
- "involved in education and training which will extend beyond the person's eighteenth birthday".
33. The tension between Section 35, which seems to limit extension to disability, and Section 111, which allows maintenance for education, creates a triable issue of law. Does Section 111 allow for open-ended maintenance for a 28-year-old?
34. The courts have been cautious about creating a class of 'perpetual students'. In *CM v SWA KEHC 1900 (KLR)*, the High Court held:
- "Such child can successfully apply to the court to compel...source child becomes an adult who ought to fend for himself or herself."
35. In the instant case, the Subject is 28 years old. He was previously at JKUAT. The Applicant argues the Subject dropped out voluntarily; the Respondent says he is still enrolled but now wants aviation fees. Aviation training is a new and distinct qualification from the JKUAT degree. Whether a parent can be compelled to fund a second or alternative high-cost course for a 28-year-old is a serious legal question.
36. The Respondent relies heavily on Article 53 of *The Constitution* ("Best interests of the child"). However, strictly speaking, Article 53 applies to children (under 18). The Subject herein is an adult. While he may be a 'child of the family' in a sociological sense, he is not a child in the constitutional sense.
37. The best interests test for an adult student is a balancing act. It balances the student's desire for education against the parent's ability to pay and the parent's other obligations. Here, the Applicant has a minor child (10 years old) who is a child under Article 53.
38. The Court must not prioritize the tertiary education of an adult child to the detriment of the basic needs of a minor child. Diverting the Applicant's limited resources (he claims to be a retiree) to pay aviation fees for a 28-year-old could materially deprive the 10-year-old minor. The law prioritizes the minor. This factor weighs heavily in favour of granting the stay.
39. Order 42 Rule 6(2)(a) requires that the application be made without unreasonable delay. The impugned judgement was delivered on 1 October 2024. The current application was filed on 28 October 2024, within 28 days of the judgment. This is prompt and timely. There is no unreasonable delay.
40. Order 42 Rule 6(2)(b) requires the applicant to give security for the due performance of the decree. The Applicant has not explicitly offered security in his motion, but he has averred that he owns land, on which he farms and has made substantial payments in the past (over Kshs. 1.3 million alleged).



41. The purpose of security is to ensure the Respondent is not left with a hollow judgment. Given the Applicant's medical condition, he is unlikely to be a flight risk. However, to balance the equities, and considering the Respondent's claim that arrears exist, it is appropriate to order a conditional deposit.
42. In *Arun C. Sharma vs Ashana Raikundalia t/a A. Raikundalia & Co. Advocates & 2 Others* [2014] eKLR the Court held that security is not meant to punish the applicant but to secure the decree. A deposit of a portion of the decretal sum or a bank guarantee is standard practice.
43. It is necessary to address the specific prayer regarding the stay of warrants of arrest. The Applicant's medical evidence indicates he had a tumour removed from his prostate in December 2024.
44. Section 38 of the *Civil Procedure Act* governs execution. Section 43 of the Act provides for release on grounds of illness. It states:
  1. At any time after a warrant for the arrest of a judgment-debtor has been issued the court may cancel it on the ground of his serious illness.
45. While the Applicant has not formally applied under Section 43, the principles are applicable to the stay application. Committing a post-operative patient to civil jail would likely violate Article 29 (freedom from inhuman treatment) and Article 43 (right to health) of *The Constitution*.
46. Based on the foregoing analysis, the balance of convenience tilts in favour of the Applicant. The prejudice to the 28-year-old, a delay in aviation studies, is out-weighable by the prejudice to the Applicant, which is loss of liberty, health deterioration, and financial ruin.
47. Consequently, the application merits the exercise of this Court's discretion.
48. Accordingly, I find merit in the Notice of Motion dated 28 October 2024 and grant the following orders:
  - i. An order of stay of execution of the Judgment and Decree of the Hon. Jackie Kibosia (SRM) delivered on 1 October 2024 in Milimani Children's Court Case No. 1196 of 2018 is hereby granted pending the hearing and determination of the Appeal herein.
  - ii. As a condition for the stay in Order (i) above, the Appellant/Applicant shall deposit the sum of Kshs. 250,000/= (Two Hundred and Fifty Thousand Kenya Shillings) into a joint interest-earning account in the names of the Advocates for both parties within forty-five (45) days from the date of this Ruling. Failure to deposit the said security within the stipulated time shall result in the automatic lapse of the stay orders granted herein.
  - iii. The Applicant shall file and serve the Record of Appeal (if not already filed) within thirty (30) days of this Ruling. The Appeal shall be set down for directions on priority basis.
  - iv. The costs of this Application shall abide the outcome of the Appeal.

**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 Ogao h/b Otieno

for the Respondent: No appearance

Court Assistant: Lucy Mwangi

