Bhundia v Gili (Civil Appeal E282 of 2025) [2026] KEHC 77 (KLR) (16 January 2026) (Ruling)

Neutral citation: [2026] KEHC 77 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E282 OF 2025

JRA WANANDA, J

JANUARY 16, 2026

BETWEEN

NIKETA ATUL BHUNDIA ..... APPELLANT

AND

JAGRAJ SINGH GILI ..... RESPONDENT

RULING

1. The parties are said to have entered into a marriage on 11/12/2021 and cohabited in Nairobi but later divorced on 28/04/2025. During the marriage, they were blessed with 2 children, a boy aged 2 years and a girl aged 7 months. The genesis of this Appeal and by extension, the Application herein, is the Ruling delivered in Eldoret MCCHCC/E126/2025 on the 11/11/2025 wherein the Magistrate's Court declined to set aside a consent order, and issued interlocutory orders touching on access and custody of the couple's two children, aged 2 years and 7 months, respectively, pending hearing and determination of the suit, which orders the Appellant is aggrieved with.

2. The subject of this Ruling is the Appellant's Notice of Motion dated 14/11/2025 filed through Messrs Owuondo & Obinchu Co. Advocates, and which seeks orders as follows:

    i. That pending the hearing and determination of this Appeal, this Honourable Court be pleased to issue a stay of execution of the orders made by Hon. Kimani Mukabi, Principal Magistrate, on 11th November 2025 in Case No. MCCHCC/E126/2025.

    ii. That pending the hearing and determination of this Appeal, this Honourable Court be pleased to issue a stay of execution and further proceedings in Case No. MCCHCC/E126/2025.

    iii. That the orders issued by the trial Magistrate on the 11th November 2025 be varied, reviewed or set aside.

    iv. That the costs of this application be in the Appeal.

v. That the Honourable Court be pleased to grant such further or other relief as it may deem just and expedient.

3. The Application is supported by the Affidavit sworn by the Appellant, in which she deponed that aggrieved by the Ruling, she filed this Appeal which raises substantial questions of law and good chances of success. She stated that the law is well-settled that children of tender age (under 10 years) should ordinarily remain with their mother unless exceptional circumstances are proven, and that the burden is on the father to prove such exceptional circumstances and this burden was not discharged in the Court below. She deponed that if the impugned orders are executed pending Appeal, irreparable harm will result to the child who is 2 years old and has been in her care continuously since birth, and that separation from her at this crucial developmental stage will cause him severe psychological and emotional trauma which cannot be undone even if the appeal succeeds. She stated that the 2 years old has already been separated from her since late August 2005 when the Respondent unilaterally took him to Nairobi, which separation has been extremely distressing for both the child and herself and that forcing continued separation pending Appeal, which may last several months, will compound the harm to the child. She contended that by separating the siblings, the 7-months old girl is deprived of her brother's presence and companionship during her formative months, and that the Appellant is suffering immense pain and anguish from being separated from her 2 years old son which forced separation violates her parental rights, and the bond between mother and child. She also contended that the order requiring her to relocate to Nairobi violates her constitutional rights to freedom of movement and residence and right to dignity, that she has established her life in Eldoret where she has family support, accommodation and community connections, and that being forced to uproot her life and relocate to Nairobi is a violation of her rights. She further deponed that the harm to herself and the children cannot be adequately compensated by damages as the psychological trauma and lost time with her son can never be recovered. She observed that preserving the status quo by staying execution would mean the 2 years old boy returns to her custody pending appeal, and the 7 months old girl also remains with her in Eldoret, while the Respondent is granted reasonable access to both children. According to her, this is the arrangement that will serve the children's best interests, and which the balance of convenience overwhelmingly favours considering the provisions of Article 53(2) of the Constitution.

4. The Application is opposed by the Respondent who relies on his lengthy Replying Affidavit sworn on 20/11/2025, and filed through Messrs Bowry & Co. Advocates. In the Affidavit, he deponed, as a preliminary matter, that the signature purported to be that of the Appellant has been digitally inserted, and the Affidavit was therefore not signed before a Commissioner for Oaths as required by law. He also deponed that the individual who purported to commission the Affidavit has not taken out a practicing certificate for 2025 and therefore lacked the legal capacity to attest the Affidavit. He thus contended that the Affidavit is incurably defective and should be struck out.

5. He reiterated that the couple got married on 2021 and cohabited in Nairobi but later divorced in 2025 upon irretrievable breakdown of the marriage, and that the dispute arose as a result of the Appellant's unilateral departure from Nairobi on 4/04/2025 with both minors without the Respondent's knowledge or consent. He deponed further that before the Appellant's departure, he was actively involved in the children's day to day care, including their emotional, physical and educational needs, and that in the months preceding the departure, the Appellant had already begun restricting his access to the children, notwithstanding that they were living in the same house. He contended that the Appellant's relocation to Eldoret and her refusal to engage in establishing a co-parenting arrangement disrupted the children's established routine, particularly in respect to the 2 years old boy who was attending school in Nairobi, and that it is upon these grounds that he filed the primary suit, together with an Application seeking interim access orders. He stated that on 29/07/2025

when the matter came up before the Magistrate's Court, the Appellant and her Advocate raised no objection to grant of the interim access to the Respondent, and the Court thus granted the same by allowing the Respondent access to the boy for half the school days and alternate weekends with daily video calls.

6. He contended that despite the said orders, the Appellant refused to release the minor to the Appellant when he travelled to Eldoret on 9/08/2025 to collect him for half of the school holidays, and refused to even allow the Appellant to see the minor on the pretext that the minor was unwell but on the same day, the Appellant posted a Whatsap status showing the minor as healthy and active and observing a cultural tradition symbolising a bond of love between the minors as brother and sister, which was even one of the reasons the Appellant had travelled to Eldoret as it was an important milestone. He deponed that the Appellant then filed an Application 2 days later seeking to set aside the consent orders, which was subsequently dismissed, and which dismissal forms the basis for this Appeal. The Appellant then gave a chronology of events to demonstrate that the Appellant has committed various further acts geared towards denying him access to the children and thus defying the Court orders. He stated that, for instance, the Appellant had enrolled the 2 years old boy in a new school in Eldoret, and also, without the Respondent's knowledge and consent, unilaterally removed the 7 months old girl from a playschool he had been enrolled, that on 23/08/2025 when he travelled to Eldoret, the boy exhibited the uncharacteristic of behaviour of clinging to the Respondent, and crying and demanding to go home with him, which behaviour the boy had never exhibited before, and that during this period, the Respondent also noticed some bruises on the boy's thighs. He deponed that due to these matters, he decided to take the boy with him back to Nairobi and notified the Appellant accordingly. He exhibited and supplied a photograph of the alleged bruises on the boy's thigh and also a recording of a video allegedly capturing the boy informing him that the Appellant has been beating him.

7. He also deponed that he reported to the Children's Office the circumstances of his return with the child to Nairobi but that the Appellant claims that he abducted the boy. He also deponed that owing to the boy's ill-health when he took him from Eldoret, he has been taking the boy to a paediatrician for medical attention which the Appellant however dismisses as alarmist and claims that the boy is fine. The Respondent further stated that he has since re-enrolled the boy in the same playschool he used to attend before the Appellant removed him. He also stated that on 16/09/2025, the lower Court ordered the immediate return of the boy to the Appellant despite his medical condition, emotional distress and unexplained bruises, and despite the boy having just settled back into the playschool, and that when he consulted the Children's office, he was advised not to forcefully return the boy to Eldoret. He added that he then filed an Affidavit informing the lower Court of the circumstances prevailing, but the Appellant filed an Application seeking a finding of contempt of Court against the Respondent, upon which he returned the boy to the Appellant fearing imprisonment, and that since then, the Appellant has denied him any meaningful engagement with the minor. He then urged that although there is a presumption that children of tender years should remain with their mothers, this principle is not absolute, and in exceptional circumstances, can be disregarded in favour of applying the "best interest of the child" principle. According to him, the lower Court, in its said Ruling of 16/09/2025, had applied the general rule but in its subsequent Ruling of 11/11/2025, after carefully evaluating the matter, applied the "exceptional circumstances" principle upon finding that the Appellant had been cruel to the boy. He made various other allegations against the Appellant and added that the boy broke down and cried when on 27/09/2025 she saw the Appellant at the Eldoret airport and realized that he was being returned to the Appellant

8. Pending determination of the Application, I issued an interim order staying the Magistrate's Court's impugned orders of 11/11/2025. Further, this being a case concerning children's custody and welfare, and thus appreciating the need to expeditiously dispose of the same, and also considering the extensive

nature of the Affidavits filed, the Advocates graciously accepted the Court's proposal that they do not file written Submissions, and thus allow the Court to proceed to deliver a Ruling on the basis of the pleadings already on record. I will now therefore proceed to determine the matter.

Determination

9. The issues that arise for determination herein are evidently the following;

    a. Whether the Application is fatally defective for being supported by a defective Affidavit.

    b. Whether an order of stay of execution should be issued in respect to the lower Court's Ruling delivered on 11/11/2025 pending determination of this Appeal.

10. Regarding the issue of the defective Affidavit, the matters alleged are that the signature thereon purported to be that of the Appellant has been digitally inserted, and the Affidavit was therefore not signed before a Commissioner for Oaths as required by law. Secondly, it has been contended that the individual who purported to commission the Affidavit has not taken out a practicing certificate for 2025 and therefore lacked the legal capacity to attest the Affidavit. I am unable to make a conclusive determination on these matters on the mere basis of allegations made in an Affidavit as in my opinion, they would require further inquiry and interrogation. Further evidence may need to be taken on how and in what manner the signature was appended on the Affidavit, and as for whether an Advocate has renewed his annual Practicing Certificate, I do not think the Law Society of Kenya (LSK) website can, by itself alone, serve as a conclusive watertight determinant on whether an Advocate has renewed his Practicing Certificate. I am aware of cases where wrong status or standing has been erroneously attributed to Advocates, and such wrong status corrected after complaints.

11. On the issue of stay pending Appeal, I must reiterate that in determining matters involving the welfare of children, including an Application for stay of execution as herein, the "best interest" of the child is what is paramount. This is expressly provided under Article 53(2) of the Constitution and also in Section 8(1)(a) of the Children Act as follows:

    Article 53(2) of the Constitution

    "A child's best interests are of paramount importance in every matter concerning the child."

    Section 8(1)(a) of the Children Act

    "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;"

12. On the other hand, the principles applicable in handling Applications for stay of execution in children's matters were well set out by Murithi J in the case of Bhutt v. Bhutt, Mombasa HCCC NO. 8 of 2014 (O.S.) to be 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 overriding consideration of the best interest of the child in accordance with Article 53 (2) of the Constitution."

13. Generally, the principles guiding grant of stay of execution pending Appeal are well settled. In this respect, Order 42 Rule 6(2) of the Civil Procedure Rules provides 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."

14. From the foregoing, it is clear that an applicant for stay of execution pending appeal must satisfy 3 conditions, namely, (a) he will suffer substantial loss unless the order is granted, (b) the Application has been made without unreasonable delay, and (c) willingness to deposit security for the due performance of any orders so stayed.

15. On the first condition, namely, whether the Appeal was filed timeously, the impugned Ruling was delivered on 11/11/2025, while this Appeal was filed on 14/11/2025 simultaneously with the instant Application. The Application was therefore obviously filed without delay.

16. The second condition is whether there shall be any "substantial loss" should the order not be granted. As to what encompasses "substantial loss", F. Gikonyo J, in the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, stated as follows:

> " ..... 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

17. It is important to always recall that in children's matters, the interests of the child supersede those of the parents. The "substantial loss", which prevails over and above that of the parent, is therefore that of the child. The Court must thus look beyond the possible "loss" to be suffered by the parent and consider the "loss" that may be suffered by the child. In regard thereto, in the case of LDT v PAO [2021] eKLR, R. Ngetich J, stated as follows:

> " 18. 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. I however note that the applicant averred that he will suffer great prejudice as he will be condemned to pay school fees twice if an order of stay is not granted.
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> .....
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> 20. The best interest of a child is superior to rights and wishes of parents; they should incorporate the welfare of the child in its widest sense. ....."

18. In this case, there is no dispute that by the consent order recorded before the lower Court on 29/07/2025, the Appellant was allowed to retain custody of both minors and the Respondent was given access to the minors in the following terms:

> " a) That pending the inter-parties hearing and determination of this application, the plaintiff/applicant is hereby granted interim access to the minor RAVRAJ SINGH GILLR (SG) every alternate weekend from Friday 5.00pm as well half of the school holidays.
>
> "b) THAT pending the inter-parties Hearing and determination of this application, the plaintiff/applicant is hereby granted access to the minor ROOHI KAUR GILL (RGK) for at least four (4) hours every alternate weekend and daily video calls at scheduled times to be agreed by the parties.
>
> ..... ."

19. It is therefore clear that as at that date, both minors were in the physical custody of the Appellant in Eldoret. The Respondent contends that the Appellant obtained such physical custody irregularly in that she unilaterally relocated from Nairobi and "sneaked away" the minors without the Respondent's consent or authority. On the other hand, the Appellant has disowned the consent order claiming that the same was purportedly entered into without her instructions or authority. Be that as it may, the order was only to operate in the interim.

20. It is also not in dispute that circumstances subsequently changed and the boy ended up in the custody of the Respondent who took him with him back to Nairobi. The Respondent's explanation for this change of circumstances is that the boy clung to him when he came to Eldoret to visit in line with the access granted to him, and refused to leave the Respondent crying that he wanted to go home with him. The Respondent also claimed that the child was emotionally disturbed and also bore signs of physical injuries allegedly inflicted upon him by the Appellant. According to the Respondent therefore, this is why he decided to take the boy with him to Nairobi. This is what prompted the Appellant to return to Court with an Application seeking that the consent order be set side, and the boy be restored to her custody.

21. It is also not in dispute the lower Court, in determining the said Application on 11/11/2025, and although it declined to set aside the consent order, made the following further orders which the Appellant has now appealed against:

> "
>
> " i) That pending the hearing and determination of this suit, the Plaintiff is hereby given actual and legal custody of the minor RSG, while the Defendant is hereby given actual and legal custody of the minor RGK.
>
> "ii) The Defendant shall have unlimited access to the minor RSG and the Plaintiff shall have unlimited access to the minor RGK pending the hearing and determination of this matter. In this context and as previously ordered, access to be half of the school holidays and alternative weekends during school going days for either party for the 2 minors.
>
> "iii) While upholding the sanctity of the family unit and to avoid travel hardship and expenses, the Plaintiff is directed to facilitate the relocation of the 2 minors together with the Defendant to Nairobi where he shall source for

then spacious, clean, secure and suitable accommodation within his means of earning within the next 30 days.

"iv) Pending the hearing and determination of this matter, the Plaintiff shall also enroll back the minor RSG back to the Playschool he was previously enrolled in Nairobi come new school term of year 2026.

"v) All the pending applications before this court to be heard together with the main suit to avoid undue delay in this matter.

"....."

22. In summary therefore, the Magistrate Court gave custody of the 2 years old boy back to the father residing in Nairobi. The mother was to therefore release back the 2 years old boy to the father's custody in Nairobi. The mother was however given custody of the 7 month's old girl but on the condition was that she had to relocate back to Nairobi although not compelled to return to live with the father. For this purpose, the father was to provide a suitable accommodation in Nairobi to the mother and the 7 month's old girl. Each parent was then given "unlimited" access to the other child in the custody of the other parent. Needless to state, all these orders were still only interim in nature pending determination of the suit.

23. I agree with the Magistrate's Court that by secretly sneaking the two minors from Nairobi to Eldoret without consultations with the Respondent (the minors' father), the Appellant's actions and conduct did not at all endear her to the Court. Hers was a display of bad faith and such conduct cannot, at all, be tolerated. This was a unilateral extra- judicial act and is what is the genesis of all the problems herein in the first place. It is therefore contradictory that she would now find it necessary to seek judicial recourse from the same law that she chose to disregard in the first place. However, the Respondent, in attempting to undo the Appellant's actions, also fell into the same pitfall of employing extra-judicial tactics to regain custody of one of the minors, the 2 years old boy, by similarly also "sneaking" him back to Nairobi with him. This action by the Respondent was made worse by the fact at the time that the Respondent took the boy back, he was fully aware there was a subsisting Court consent order allowing the Appellant (their mother), in the interim, to retain custody of both minors. It had to take the threat of a finding of contempt of Court for the Respondent to realize the consequences of his actions and to his credit, he then swiftly restored custody of the boy back to the Appellant.

24. It will thus be noted that both the Appellant and the Respondent deserve strong reprimand for their extra-judicial actions. Be that as it may, at the end of the day, decisions touching on children's welfare are made, not for the parents' convenience, but on the basis of the children's "best interests". To this extent, the parents' grievances can be dealt with separately but the Court will, in making a decision, be guided by the "best interests" of the children.

25. In this case, the mere act of separation and divorce by the parents has obviously already had a negative impact on the minors. They might not comprehend what has happened to the family unit they used to know but certainly they have noticed a breakdown in the family unit and the hostility between the parents. This is a sad eventuality but we have to live with it as it is one of the negative consequences of the transformations of the modern world. We have inevitably come to accept that the marriage institution is no longer what it used to be, and innocent children everyday find themselves caught up in supremacy battles between parents, either during pendency of the marriage or post-divorce. What Courts can do is simply to protect the children finding themselves in such circumstances from harm by attempting to mitigate the impact of the effects of the fallout between their parents. As aforesaid, this is the essence of the "best interest of the child" principle.

26. Considering that the dispute herein is still under active litigation before the lower Court and what the Appeal is therefore challenging are only interlocutory orders, and also considering that the Appeal is also yet to be heard, I will restrain myself from delving into or commenting on the merits and/or demerits of the parties' respective cases. All I will do is to identify the position that best cushions the two minors from the adverse effects of the battle between their parents pending hearing and determination of the Appeal.

27. As it stands, both minors are currently under the physical custody of the Appellant (mother), which position I retained when I issued a temporary stay of execution of the orders made by the lower Court on 15/11/2025. That status quo therefore still prevails as at now. Doing the best I can, I am of the opinion that it will best to retain this position for now. The children, particularly the 2 years old boy, has been bandied around, left, right, centre, and he, too, I am sure is now left confused. Within a space of only about 7 months, he has been taken away from his father in Nairobi and relocated to Eldoret under the mother's custody, relocated back to Nairobi to the father, and again back to the mother in Eldoret. He has in the process, been separated from his younger sister, restored back to her and again taken away. Should the primary suit succeed after full trial, the situation shall again change as the Respondent may again be dispossessed of custody of the minors in Nairobi which may again be restored back to the Appellant in Eldoret. This "ping pong" state of affairs cannot be a good one for the minors. My take is thus that more harm is likely to be caused to the children by executing the Magistrate's Court's orders of 11/11/2025 than staying the orders pending determination of the Appeal or even primary suit, which determination the Magistrate's Court can fast-track.

28. Implementation of the Magistrate's Court orders of 11/11/2025 to satisfaction may also prove a challenge and thus create further conflicts in the interim. Determining terms such as "unlimited access" and provision of "spacious, clean, secure and suitable accommodation" may also pose a challenge in interpretation. Execution of an order which for all intents and purposes leaves the Appellant with no other portion but, in the interim, to relocate back to Nairobi, may also raise questions of violation of her constitutional rights of choice of residence. I can therefore, as an off-shoot of execution of the orders of 11/11/2025, foresee the likelihood of a number of further interlocutory rival Applications, including on contempt of Court, being filed by the parties and the Magistrate's Court may thus find itself swamped with such Applications instead of being allowed to focus on finalizing the suit.

29. For the foregoing reasons, I believe that I have said enough to indicate that the Appellant has demonstrated the possibility of the minors suffering "substantial loss" that may not be compensated in any way should this Appeal or the primary suit succeed, and that the "balance of convenience" favours granting the prayer for stay pending Appeal.

30. In respect to the prayer for stay of proceedings, F. Gikonyo J, in the case of Kenya Wildlife Services v Jane Mutembi [2019] eKLR, captured the law thereon in the following terms:

> " stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall right to fair trial. Therefore, the test for stay of proceedings is high and stringent."

31. In this case, I have already found that there is need for the Magistrate's Court to fast-track hearing of the primary suit. It follows therefore that the prayer for stay of proceedings does not attract this Court's favour. Further, in recognition of the principle that the discretion to order stay of proceedings ought to be exercised sparingly, and only in exceptional cases, I do not find this to be such exceptional case.

Final Orders

32. The upshot of my findings above is therefore as follows:

    i. The Appellant's Notice of Motion dated 18/07/2024 is hereby allowed but only in terms of prayer (1) thereof. Consequently, pending determination of this Appeal, an order of stay of execution of the orders made on 11/11/2025 in Eldoret MCCHCC/E126/2025 is hereby issued.

    ii. Considering the nature of the dispute and the continued destabilization of the minors and also uncertainty on the part of the parents, the Magistrate's Court is encouraged to fast-track the hearing and determination of the suit.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 16 TH DAY OF JANUARY 2026

....

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Mr. Obinchu for the Appellant/Applicant

Ms. Mamburi for the Respondent

Court Assistant: Brian Kimathi