GBA v WE (Civil Appeal E139 of 2023)
[2026] KEHC 523 (KLR) (Civ) (23 January 2026) (Ruling)

Neutral citation: [2026] KEHC 523 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E139 OF 2023

PM NYAUNDI, J

JANUARY 23, 2026

BETWEEN

GBA ..... APPELLANT

AND

WE ..... RESPONDENT

RULING

1. The parties are the biological parents of the minor subject of these proceedings who was born on 24th February 2020. Unable to agree on how to share parental responsibility, they sought a declaration of the Court. The trial Court pronounced itself in judgment delivered on 10th November 2023. The appellant dissatisfied presented the appeal and I rendered a judgment on 28th March 2025. There is however a twist to this otherwise straightforward tale, as while the appeal was pending the applicant made an application for review of the judgment delivered on 10th November 2023 before the trial Court and the Court delivered its ruling on 10th January 2025.

2. The ruling of 10th January 2025 pertained to 3 applications dated 12th March 2024, 10th June 2024 and 2nd September 2024. The Court declined to review orders on access and directed that the appellant pay the entire fees at [Particulars Withheld] school. Meanwhile the appeal proceeded to hearing in judgment delivered on 28th March 2025 I allowed the appeal on access and also directed that the appellant pay fees equal to that payable at [Particulars Withheld] with the respondent paying the balance.

3. Earlier the respondent's attempt to strike out the application for review in the trial Court was thwarted when the Court overruled the preliminary objection raised on the basis of Section 80 of the *Civil Procedure Act*. Neither the appellant nor the respondent challenged the ruling of 10th January 2025. The respondent has lodged a Notice of Appeal against my judgment of 28th March 2025.

4. The variance in the ruling of 10th January 2025 and 28th March 2025 are the subject of the 5 applications that this ruling relates to. The 1st Application is dated 12th May 2025 and the respondent seeks the following orders-

    a. Spent

    b. The Court do issue a stay of its judgment dated 28th March 2025 pending the inter partes hearing and determination of this application.

    c. That the Court's judgment of 28th March 2025 particularly on the aspects of access to the minor and payment of the minor's school fees be reviewed to align with the ruling of Hon. R. Gitau (R.M.) that was delivered on 10th January 2025 in MCCHCC/E1226/2022: GBA -vs- WE

    d. The costs of the application be in the cause.

5. It is averred that after the Court delivered its ruling, the appellant complied with the ruling and only shifted his stance after the delivery of the judgment herein contending that the judgment of this Court subsumed the ruling of the trial court and therefore the enforceable orders were those issued on 28th March 2025.

6. The respondent submits that the conflicting orders are creating anarchy and that the way to resolve this is to review the judgment so that it aligns with the ruling of the Magistrate's Court. No appeal has been preferred against that ruling.

7. On his part the appellant concedes that he complied with the ruling of the Court of 10th January 2025, but following the delivery of the judgment he elected to abandon the ruling and seek enforcement of the judgment.

8. This is the basis upon which he has presented 4 applications seeking to review the judgment, declare that the respondent is in contempt and compel her compliance with the judgment of the Court delivered on 28th March 2025. The 1st application is dated 23rd May 2025 in which he is essentially seeking a review of the judgment as the prayers are-

    a. Spent

    b. That the virtual access between the Appellant and the minor shall be between 1 and 8pm on school days

    c. That during holidays and weekends the Appellant shall virtual access to the minor at will.

    d. That the appellant shall have overnight access to the minor on alternate weekends during which he shall pick the minor from school on Friday and drop him in school on Monday morning

    e. That the appellant shall have overnight access to the minor for half of the school holidays.

    f. That the costs of the application be provided for.

9. The respondent opposes this application and urges that the Court having delivered a judgment is now functus officio and the recourse is for the appellant to revert to the trial court or appeal the decision of the Court.

10. The stance of the respondent has provoked 3 applications by the applicant to have the respondent to be held in contempt. The 1st Application is dated 3rd June 2025 and the contemnors acts are the refusal by the respondent to pay a portion of the fees and denial of access to the applicant of the minor on 31st

May 2025 and 24th May 2025. He further charges that the respondent has not facilitated his access to the minor virtually. He seeks that the Court interview the minor.

11. The 2nd Application is dated 16th June 2025 and the applicant is aggrieved that the respondent has denied him access both virtually and physically in contravention of the Court orders. The 3rd Application is dated 30th June 2025 and it is submitted that the respondent failed to make the minor available on 28th June 2025 and that a Children Officer should be appointed to be present when the applicant is picking up the minor.

12. The respondent has an alternative narration of facts. She has opposed all three applications and has sworn separate affidavits. Essentially, she avers that on one of the dates where it is alleged she denied access the child was actually unwell. Further she asserts that the operative orders are those of 10th January 2025.

13. In response to the application of 16th June 2025, the respondent dismisses this as based on an orchestration by the respondent. That with regards to the virtual access, it is the applicant's actions of calling the child at times that are not suitable that caused her to bar him. She had earlier advised him to call between 4pm- 5pm, yet he is calling past the child's bedtime.

14. In response to the application dated 30th June 2025, the applicant contends that like the other ones before it, it is frivolous, devoid of merit and an abuse of Court process. She submits that the allegations that a watchman came knocked and was ignored are not true. She submits that if the children officer is to be present then the officer should be present at the pick-up and the return of the minor.

15. The application was canvased via written submissions. The Submissions of the Applicant are dated 11th August 2025. He has also filed submissions dated 26th September 2025 opposing the respondent's application dated 13th May 2025.

16. I will dispense with the applications for contempt, for if the respondent is in contempt, then she has no right of audience. The applicant submits that the respondent is in contempt and relies on the decisions in R v KSL & 2 Others Ex patre Juliet Wanjiru Njoroge [2015] eKLR; Econet Wireless Kenya Limited v Minister for Information & Communication of Kenya & Anor and African Management Communication International Limited v John Mathenge Mugo [2016] eKLR for the assertion that the Court should move decisively to assert its authority by sanctioning parties who disobey court orders.

17. He asserts that he has demonstrated that her actions of 24th May 2025, 31st May 2025, 14th June 2025 and 28th June 2025 were in blatant disregard of the orders of the Court.

18. In Submissions dated 17th September 2025, the respondent counters the charge. She raises two issues. That the Court lacks jurisdiction and secondly the contradiction between the 2 orders, of the High Court and the trial Court. On jurisdiction reference is made to decision in HMK v FSA (Children's Case E035 of 2024) [2024] KEHC 13171 (KLR) (Family) (28 October 2024)

19. It is submitted that it is in the best interests of the child to vary the access order so as to clarify on the time for the virtual call and increase the physical access so as to accommodate the applicant's wish for an overnight stay with the minor. It is submitted that the actions of the respondent necessitate the reviewing of the access orders and reference made to the decision of the Supreme Court of California in Re Marriage of Burgess 13 Cal 4tg 25 (1996) and The South African decision in BMGS V MBS (2024) ZAGPPHC 24.

20. It is submitted that the conflict in the 2 rulings presented a 'compliance nightmare'. Further the application does not meet the legal threshold as the orders were not clear and unambiguous. Reference

is made to the decisions in Cecil Miller v Jackson Njeru & Another [2017] eKLR and Teachers Service Commission v Kenya National Union of Teachers & 2 Others [2013] eKLR.

21. It is not disputed that the applicant contemporaneously pursued an appeal and review of the trial court's decision. This is in contravention of the clear provisions of statute and interpretation by a plethora of court decisions. In Mputhia v M'Miriti [2025] KEHC 756 (KLR) elucidated this issue in great detail-

> (15) When the Judgement was delivered by the lower court, the Applicant had two options, either to appeal and if there were grounds laid out, to seek a review. Section 80 of the *Civil Procedure Act* is quite clear on this. It provides as follows:-
>
> > Review
> >
> > Any person who considers himself aggrieved—
> >
> > (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
> >
> > (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
>
> (16). Further order 45 Rule 1 of the Civil Procedure rules is to the effect that:-(1)Any person considering himself aggrieved—(a)by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or(b)by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.(2)A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.
>
> (17). It follows that the Applicant was entitled to have approached the court for review, instead of appealing against the judgment. However the applicant could not pursue both appeal and review on the same judgment. This position was affirmed in the case of Serephen Nyasani Menge v Rispah Onsase [2018] eKLR where it was held that:
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> > In my view a proper reading of Section 80 of the Act and Order 45 Rules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order.

22. The applicant seeks to have his cake and eat it. I do not agree with the respondent's submission that this Court lacks jurisdiction to hear and determine an application for contempt, especially when the orders in question are emanating from this Court. That interpretation is wrong. I also do not agree that the orders were ambiguous. The reason I will disallow the application is that the multiple applications by the applicant are a clear abuse of process. He is the one who initiated the process of reviewing the judgment of the trial court while pursuing an appeal.

23. The Court and especially in Children matters is not a boxing ring where parties are in a contest to technically knock out the other party. The primary and probably sole objective of a Court in a Children's matter is to give orders that advance the best interests of the Child. I do not find that the actions of the respondent viewed in the totality of the surrounding circumstances amount to contempt against the Court. The Court is not offended, it is aghast at the conduct of the parties and by so doing acknowledges the limits of our Court system as Courts are in essence an instrument that facilitates access to justice and not a theatre.

24. Having found that there is no contempt on the part of the respondent the question for determination is whether it is in the best interests of the minor to review the orders of 28th March 2025. The respondent applies that the orders be reviewed so as to align them to the decision of the Trial Court. This Court is superior to the trial Court. I am unable to find any legal authority on which the claim of the respondent can stand. In this case the action of the applicant may have embarrassed this Court as I proceeded to hear an appeal on a judgment that the trial Court reviewed. Neither of the parties applied to arrest my judgment. I can only assume that they both adopted a wait and see attitude. In the interim they complied with the ruling of 10th January 2025.

25. The applicant seeks to review the judgment so as to enhance his access to the minor. He is aggrieved by my decision. The option he has is to proceed to appeal against the judgment. He has not brought himself within Order 42 (6) of the Civil Procedure Rules.

26. In the end, all 5 applications are dismissed. I reiterate the Orders made on 28th March 2025 and for clarity set them out hereunder-

    a. The legal custody of the minor XFS to jointly vest in the Appellant and the Respondent.

    b. The Respondent to have actual custody, care and control of the minor.

    c. On access-

        a. The Appellant will have access to the minor on every Saturday from 9am to 4pm

        b. On other days of the week, the Appellant will have daily virtual access to the minor for upto 1 hour at a time to be agreed upon with the Respondent.

        c. The Appellant will provide the minor with the gadget that they will use for the virtual call.

        d. The Respondent will register the child at a school near her residence and the appellant will pay fees equivalent of the amount payable at [Particulars Withheld] primary School and the respondent will pay the difference. The fee is payable direct to the school in compliance with the school rules on payment of fees.

        e. The other orders of the Court in its judgment of 10th November 2023 are upheld.

        f. Each party will bear their own costs.

27. The matter will be mentioned on 11th February 2026 for Children Officer to attend Court so that parties can agree on how Children Officer will supervise compliance with orders of physical and virtual access.

28. The Appellant will serve the order on the Directorate of Children Services at Nyayo House, Nairobi

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF JANUARY 2026.

P. M. NYAUNDI

JUDGE

In the presence of:

Court Assistant Fardosa

Karuga for the Appellant.

Wesonga for Respondent.