

4) That costs of this application be allowed to the Appellant/Applicant.

2. The application is supported by the grounds on the face of the said application and the Supporting affidavit of **Judith Jepkorir Kutto**, dated 3rd February 2025.
3. She deposed that she is aggrieved by the judgment delivered in this Appeal on 23rd December 2024 by the Hon Justice Reuben Nyakundi upholding the judgment of the Trial Court in **Eldoret CM Children Case No.76/2017** and that she has preferred an Appeal at the Court of Appeal Eldoret vide Notice of Appeal dated 23rd January 2025 as per the draft Memorandum of Appeal.
4. She further deposed that the Lower Court file **Eldoret CM Children Case No. 76/2017** is due for Notice to Show Cause in execution of the lower Court judgment and that execution is imminent against her if stay of Execution is not granted at this stage pending the hearing and determination of this Application and the Appeal.
5. She maintained that she has an appeal which is properly founded and arguable with a high likelihood of success and if stay of execution and subsequent proceedings is not granted, she stands a chance of being sent to prison for non-payment of maintenance which she has lodged an Appeal against.

6. In the end, she urged that the statutory period for launching an Appeal does not include the holidays and Court vacation, hence the Notice of Appeal is properly before Court.

Replying Affidavit

7. The Application is opposed by the Respondent vide his Replying Affidavit sworn on 7th July 2025.

8. He deposed that the application is *res judicata*, Hon. Justice Nyakundi having dismissed the entire appeal after hearing the parties on merit and that Hon. Justice Nyakundi having pronounced himself on merits of the issue of stay of execution of the impugned judgment, this court is *functus officio* being a court of concurrent jurisdiction and further that the appeal having been dismissed as aforestated, it is trite law that a negative order is incapable of being stayed.

9. He further deposed that the notice of appeal having been filed out of time (more than the stipulated statutory 14 days) without leave, then the intended appeal is a non-starter.

10. The Respondent deposes that the instant application is calculated at absolving the Applicant from providing for their children which flies right in the face of the provisions of **Section 8** of the **Children's Act, 2022** and **Article 53(2)** of the **Constitution, 2010** on the best interest of the subjects and shared parental responsibility, and that the same is a gimmick by the Appellant/Applicant to compromise the Notice to Show Cause issued by the trial court and therefore the Applicant is before court with unclean

hands, she having never complied with the decree in force at the expense of their children.

11.The Respondent contended that the orders sought do not serve the best interest of our children as the same are geared at absolving the Appellant from her legal obligations as a parent to the detriment of the subjects herein and that their children stand to be greatly prejudiced by the issuance of the orders sought since the timelines within which the intended appeal will be concluded is unpredictable hence forcing him to continue providing for their children solely.

12.The Respondent maintained should the Court of Appeal find in favour of the Appellant, the amount paid by the Applicant is capable of being reimbursed being a monetary decree. In the circumstances, the stay sought ought not issue.

13.The Respondent further deposed that the allegations that the Applicant stands to suffer prejudice should her application not be allowed are a far cry from the truth as he has had to solely shoulder all the basic needs of their children contrary to the legal provisions on shared parental responsibility.

14.He contended that he sees no prejudice to be suffered by the Applicant from the orders in force as the same are in the best interest of their children. He urged that being the biological mother of the minors herein, the Applicant ought to perform her parental responsibility over them in

order to promote their welfare which is the most paramount in law and of first consideration.

15.The Respondent contended that the allegations contained in the supporting affidavit are calculated at conjuring an unwarranted sympathy of this court at the expense of their children.

16.The Respondent deposed that it is evident from the evidence of the Applicant as per her supporting affidavit that she has never provided for their children since judgment was delivered by the trial court which confirms that indeed the Appellant does not have the welfare of their children at heart.

17.That she has not even indicated the parental responsibility she is willing to shoulder towards the children pending her intended appeal. The Respondent urged that the Applicant has a legal obligation to provide for our children whether or not their relationship subsists.

18.In the end, he deposed that this honourable court has unfettered discretion to dismiss the misguided application now before it in the best interest of their children which discretion he urged the Court to exercise.

Supplementary Affidavit

19.The Applicant through her Counsel **Mr. Kiplagat J Misoy** also filed a Supplementary Affidavit dated 28th July 2025 in which he deposed that the Applicant has filed and served a Record of Appeal in Eldoret **Court of**

Appeal No. E017 of 2025 and that the said Appeal is due for hearing and determination.

Submissions

20.The Application was canvassed vide written Submissions. The Applicant filed Submissions dated 28th July 2025 whereas the Respondent filed Submission dated 4th July 2025.

Applicant's Submissions

21.Counsel for the Applicant submitted that the application is fortified on grounds that the Appeal raises serious fundamental legal issues touching on maintenance and custody of the minors and that unless the orders sought in the application are granted, the Applicant will be subjected to execution of the decree sought to be challenged at the Court of Appeal.

22.Counsel added that the Appeal against the judgment of Honourable Justice Nyakundi has already been served upon the Respondent and is awaiting directions and fixing of a hearing date and urged that if execution proceeds at this stage, the Appeal will be rendered nugatory.

23.That the Applicant has demonstrated by way of an Affidavit that indeed the Appeal raises fundamental questions of law on custody of the minors and maintenance and it is therefore an Appeal which is arguable and is not frivolous.

24.Counsel further submitted that the impending execution risks making the appeal futile or useless if the appeal is heard after execution has already

taken place. Counsel urged that this therefore requires the Court's discretion to grant stay pending appeal in order to prevent the same from being rendered nugatory.

25. Counsel urged that the Court should at this stage is engaged in " a delicate balancing act" in reconciling the rights of the Appellant to have the appeal considered without being rendered nugatory and that of the Respondent's claims for maintenance and custody.

26. Counsel contended that the Applicant will be subjected to substantial loss if execution is carried out. The lower Court directed the Applicant to pay monthly contributions of Kshs.6000/= per month, which amount will have accumulated substantially by the time the appeal will be heard and determined. According to Counsel, this will be a significant loss to the Applicant should the orders fail to issue pending appeal.

Respondent's Submissions

27. On whether the instant application is merited, Counsel for the Respondent submitted that it is not in dispute that the judgment delivered on 23rd December 2024 which is sought to be stayed is a dismissal hence a negative order. Counsel urged that it is trite law that a negative order is incapable of being stayed. Counsel further urged that from the above, the application is legally untenable hence a candidate for dismissal.

28. Regarding the best interests of the subjects, Counsel submitted that the subjects in this appeal have been in the hands of their father, the Respondent since March of 2017. Counsel urged that he has diligently

taken good care of them after being abandoned by their mother, the Appellant. Counsel submitted that her prayer seeking to be absolved from her parental responsibility over them contravenes the legal provisions on shared parental responsibility by parents, particularly **Article 53(2) of the Constitution, 2010**.

29. Counsel observed that the Appellant who is gainfully employed on a permanent basis as a teacher by the Teachers' Service Commission has not demonstrated her inability to meet the upkeep ordered by the trial court.

Determination

30. It is imperative at this time to point out that parties are bound by their pleadings, and issues for determination arise from the pleadings. From a cursory perusal of the Applicant's Application it is clear that the same seeks stay of execution and stay of proceedings in **Eldoret Chief Magistrate's Court Children Case No. 76 of 2017**.

31. From the parties' pleadings on record it is evident that the appeal against the decision of the trial court in **Eldoret Chief Magistrate's Court Children Case No. 76 of 2017** was already heard and determined by Hon. Justice R. Nyakundi and a judgement delivered on 23rd December 2024.

32. Because the Application seeks for orders that have not only been substantially heard and determined by a Judge whose jurisdiction is equal and concurrent to this court's, then not only is the Application *res judicata* but this Court is also *functus officio*.

33. The doctrine of *functus officio* was considered by the Supreme Court in the case of **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others** [2013] eKLR, and the court cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, *“The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law”* (2005) 122 SALJ 832 which reads: -

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

34. Further, **Section 99** of the **Civil Procedure Act** provides exceptions to the doctrine of *functus officio* in the following terms-

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

35. Whereas under the provisions of **Section 99** of the **Civil Procedure Act** the doctrine of *functus officio* does not bar a Court from entertaining a case it has already decided in the circumstances therein outlined, it is clear that it prevents the court from revisiting the matter on a merit-based re-engagement once final judgment has been entered and a decree issued as is the case herein. It follows therefore that the said provisions of **Section 99** of the **Civil Procedure Act** do not apply to the application.

36. In light of my conclusions as herein above, it is my finding that the Application is misconceived, is incompetent, it lacks merit and it amounts to an abuse of Court process. It is therefore now hereby dismissed. This being a children's case, there with no order as to costs.

Read dated and Signed at ELDORET on 20th February 2026

E. OMINDE
JUDGE