RON v RN (Children's Appeal Case E030 of 2026)
[2026] KEHC 3120 (KLR) (9 March 2026) (Ruling)

Neutral citation: [2026] KEHC 3120 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CHILDREN'S APPEAL CASE E030 OF 2026

RN NYAKUNDI, J

MARCH 9, 2026

BETWEEN

RON ..... APPELLANT

AND

RN ..... RESPONDENT

RULING

1. The Appellant approached this Court on an appeal dated 25th February, 2026 against the directions and decree of the Children's Court presided by Hon. D. Sitati (SRM) dated and delivered on 24th February, 2026 in Eldoret MCCHCC No. E288 of 2025. The Appellant in the said appeal seeks reliefs and subsequently filed an application seeking orders that:

    a. Spent.

    b. That this application be heard and stay of execution of the magistrate's Court's Ruling/Decree dated 24th February, 2026 in MCCHCC/E288/2025 be granted ex-parte in the first instance pending inter-parties hearing and determination of this application.

    c. That there be stay of execution of the aforesaid Ruling/Order pending the hearing and determination of this appeal.

    d. That the costs of this application be provided for.

2. The application is based on grounds that the suit was filed on 14th December, 2025 by the Respondent seeking inter-alia the adoption of an order of the High Court of Botswana (Case No. MLHGB-000116-22) dated 1st February 2024 and immediate restoration of custody of the minors, LTR and P.E.S.R to the Respondent. That the Appellant/Applicant filed a defense dated 22nd December, 2025 and thereafter a Preliminary objection dated 23rd February, 2026. Upon the matter coming up for mention on 14th February, 2026 the Court directed that the Director Children's Officer

files a report on the status of the minors in this suit. That on the 24th February, 2026 the Court issued orders some of which are permanent in nature against the Appellant therefore condemning him unheard. Further that vide the directions and decree dated 24th February, 2026, the suit stands dismissed and the Appellant/Applicant contends that this is against the rules of natural justice.

3. The Appellant on that basis is apprehensive that the Respondent is at liberty and may proceed to execute the decree subject of the instant appeal at any time. That if execution of the said Ruling/ Decree is not stayed the Applicant will suffer substantial loss and the best interests of the minors will be compromised. Therefore, in the premise, it is only fair and just that there be stay of execution of the ruling/decree subject herein pending the inter-partes hearing and determination of the instant application and subsequently the preferred appeal, as the case would be.

4. The Respondent soon thereafter equally filed an application before this Court dated 27th February, 2026 in which she seeks orders as follows:

    a. Spent.

    b. The ex-parte orders of this Court of 26th February, 2026 be and is hereby set aside.

    c. In the alternative, the hearing of the main appeal be and is brought forward for hearing on 4th March, 2026.

    d. The mother who is currently in Kenya be and is granted custody over the weekend pending hearing and determination of this application.

    e. Any further orders as may be necessary to meet the ends of justice and the best interest of the children.

5. The application is anchored on grounds that the children in these proceedings, LTR (5 years old) and PESR (4 years old) were abducted by their father, the Respondent, and unlawfully brought into Kenya from Botswana in late 2023/early 2024. The abduction was preceded by the Respondent forging documents to falsely portray the mother as mentally unstable, on the basis of which he fraudulently obtained interim custody orders from the Botswana Court on 30 August 2023. While custody proceedings were still ongoing in Botswana, the Respondent surreptitiously crossed the border into Kenya with the children before his own application for leave to travel had even been determined. On 1st February 2024, the High Court of Botswana issued a definitive order finding that the Respondent had misled the Court and unlawfully removed the children, declared them children in need of care and protection, and vested legal custody in the mother/Applicant.

6. When the Applicant finally traced the children to Kenya and moved the Children's Court at Eldoret in December 2025, the Court adopted the Botswana order on 24th February 2026 after dismissing a last-minute Preliminary Objection filed by the Respondent. The Respondent then approached this Court on 25th February 2026 and obtained an ex parte stay of that ruling but in doing so, the Applicant contends that he committed a grave breach of the duty of candor owed to the Court. That he selectively relied on the August 2023 custody order while concealing from this Court the existence of the February 2024 Botswana order that had revoked it. He further concealed the fact that the matter had been heard inter partes at the Magistrate's Court on 24th February 2026, that he had actively participated in those proceedings, and that the ruling he now seeks to stay was one he had since appealed against all of which deprived this Court of the full picture before it granted the stay.

7. The Applicant therefore urges that the ex parte orders of 26th February 2026 be set aside on the ground that they were obtained through material non-disclosure, which under Kenyan law renders ex parte proceedings defective and liable to be discharged. Above all, the Applicant urges immediate

intervention in the best interests of the children, who have now been deprived of any contact with their mother for the past two years.

Appellant's Replying affidavit

8. In response to the application, the Respondent filed a replying affidavit sworn on 3rd March 2026 in which he deposed that the Applicant was being untruthful to the Court by characterizing the Botswana High Court order of 1st February 2024 as an inter partes order, when in fact the order itself states in its first paragraph that it is an ex parte order. He further deposed that the allegation that he abducted and unlawfully brought the children to Kenya was unfounded and a blatant fabrication designed to mislead the Court. He explained that he came to Kenya to further his studies and is currently pursuing a Master's degree in Orthopedic Surgery at Moi University School of Medicine. He stated that the divorce judgment in Botswana granted him primary custody of the children until they attain the age of 21 years, and that the Applicant had not appealed against that order. He added that upon being admitted to his postgraduate program, he went to Court and obtained permission to travel to Kenya with the children, following which he lawfully departed with them.

9. On the question of the forged documents, the Respondent denied ever fabricating any documents portraying the Applicant as mentally unstable. He averred that it was the Applicant herself who placed medical reports before the Botswana Court showing that she was mentally unstable, and that it was on the basis of those reports that the Court declined to grant her primary custody.

10. The Respondent further deposed that he had legal custody and Court permission to travel with the children at the time he left Botswana, and that his departure did not amount to abduction. He contended that the Applicant exploited his absence in Botswana to file proceedings ex parte and obtain orders which the Magistrate's Court in Eldoret then wrongfully adopted in MCCHCC/E288/2025. He raised a jurisdictional challenge, averring that even if the Magistrate's Court had jurisdiction to adopt foreign judgments which he disputed, such adoption would require a certificate of finality and could not extend to orders that are expressly ex parte on their face, as such orders violate fairness and public policy. He also raised a legal bar under the *Foreign Judgments (Reciprocal Enforcement) Act*, advising that Section 3(e) of that Act expressly excludes matters of custody or guardianship of children from its scope, rendering the adoption of the Botswana order unprocedural.

11. On the welfare of the children, the Respondent deposed that the children are enrolled at Testimony School in Eldoret, one of the leading private schools in Uasin Gishu County, and that a caretaker had been engaged to look after them during his hospital engagements. He annexed a children's report dated 13th February 2026 which, he stated, portrays the children as settled in school and emotionally, physically, and mentally stable. He urged that it would be against their best interests to be uprooted from an environment in which they had clearly settled. He concluded by acknowledging shared parental responsibility and humbly prayed that the Court devise a fair formula permitting the Applicant access to the children during school holidays for so long as he remains a student in Kenya, while opposing any order that would disrupt the children's education in the middle of a school term.

Appellant's written submissions

12. Learned Counsel Mr. Okari filed written submissions dated 5th March, 2026 in support of the Notice of Motion dated 25th February 2026 and the Replying Affidavit sworn by the Appellant/Respondent on 3rd March 2026, opposing the Applicant's application to set aside the ex parte orders.

13. By way of introduction, learned Counsel Mr. Okari submitted that the Appellant/Respondent challenges the legality of the proceedings before the subordinate Court in MCCHCC/E288/2025

and the orders made therein adopting a foreign judgment from Botswana relating to custody and maintenance. He submitted that the adoption order made by the Magistrate's Court is a nullity ab initio on two principal grounds: first, for want of jurisdiction on the part of the Magistrate's Court, and second, for being contrary to the express provisions of the *Foreign Judgments (Reciprocal Enforcement) Act*, Cap. 43.

14. On the question of jurisdiction, learned Counsel submitted that jurisdiction is everything and that without it a Court has no power to take a further step, relying on the decision in Owners of MV "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR. He submitted that the jurisdiction to adopt and enforce foreign judgments in Kenya is governed exclusively by the *Foreign Judgments (Reciprocal Enforcement) Act*, Cap. 43, and that Section 6(1) of the Act explicitly provides that an application to register a foreign judgment shall be made to the High Court. He accordingly submitted that the jurisdiction to register or adopt a foreign judgment is statutorily vested in the High Court of Kenya and not in the Magistrate's Court. He submitted that the Magistrate's Court, being a creature of statute, can only exercise jurisdiction expressly conferred upon it by law, and that the proceedings before it were incompetent from inception, rendering the resultant adoption order a nullity for want of jurisdiction. He relied on AZU v ZUM [2015] KEHC 6769 (KLR), where the High Court struck out a similar application to adopt a foreign decree from Tanzania on equivalent jurisdictional ground.

15. On the exclusion of custody and maintenance matters from the Act, learned Counsel Mr. Okari submitted that even if the matter had been brought before the proper forum the High Court the foreign judgment in question would still not be capable of adoption by reason of the express exclusions in Section 3(3) of the *Foreign Judgments (Reciprocal Enforcement) Act*, Cap. 43. He submitted that Section 3(3) unambiguously provides that the Act does not apply to judgments for the periodical payment of money as financial provision for a spouse or child, to judgments in matrimonial causes, or to judgments in proceedings in connection with the custody or guardianship of children. He submitted that the Botswana judgment sought to be adopted relates directly to matters of custody and maintenance, placing it squarely within the express statutory exclusions, and that it therefore cannot be registered or adopted in Kenya regardless of whether Botswana is or is not a reciprocating country. He relied on AZU v ZUM (supra), where Musyoka J held that the Act does not apply to judgments falling under Section 3(3)(c), (d) and (e), and on MAK v SNMM & another [2019] eKLR (Constitutional Petition No. 11 of 2018) and the Court of Appeal decision in AOG v SAJ & another [2011] KECA 398 (KLR), both of which affirmed that the Act does not extend to matters of the custody of children.

16. On the best interests of the child, learned Counsel submitted that while the principle is of paramount importance under Article 53(2) of *the Constitution* and Section 4(2) of the *Children Act*, 2022, it cannot be invoked to clothe a Court with jurisdiction it does not possess. He submitted that the proper forum for determining custody and maintenance matters in Kenya is the Children's Court established under the *Children Act*, or the High Court in appropriate circumstances, and that such matters must be determined on their merits based on evidence tendered before a Kenyan Court. He further submitted that adopting a foreign custody order without a fresh inquiry into the child's best interests in Kenya would amount to an abdication of the Court's constitutional duty, citing MAK v SNMM for the proposition that the Court must conduct a substantive inquiry rather than a mere adoption of a foreign decree.

17. On the appropriate forum, learned Counsel submitted that the correct course of action is for the Respondent/Applicant to file fresh proceedings before the Children's Court, which has the requisite jurisdiction to hear and determine matters relating to custody and maintenance. He submitted that such proceedings would enable the Court to conduct a proper inquiry into the welfare of the children

taking into account their current circumstances in Kenya, and would ensure that any orders made are genuinely in the children's best interests as required by law.

18. In conclusion, learned Counsel Mr. Okari urged this Honorable Court to allow the Appellant/ Respondent's prayers in the application of 25th February 2026; to declare the proceedings in MCCHCC/E288/2025 and the orders made on 24th February 2026 a nullity ab initio; to strike out the Applicant's Notice of Motion of 27th February 2026 with costs; and to stay any consequential orders arising from the impugned adoption order.

Respondent's written submissions in opposition to the appeal.

19. By way of background, learned Counsel Mr. Ochiel submitted that the matter concerns the Children's Court order adopting the High Court of Botswana at Lobatse order of 1st February 2024, which was issued after hearing both parties. He submitted that the case involves two minor children of tender years, LTR aged five years and PESR aged four years who were abducted by their father, the Appellant, and unlawfully brought into Kenya in late 2023 and early 2024. He submitted that following the parties' separation, the Appellant went to Court in Botswana seeking custody but forged documents falsely portraying the Respondent as mentally unstable, on the basis of which he fraudulently obtained interim custody orders on 30th August 2023. He further submitted that while the custody proceedings were still ongoing in Botswana, the Appellant applied for leave to take the children to Kenya, but that on the return date his own advocate confirmed to the Botswana Court that the Appellant had already crossed the border with the children. He submitted that on 1st February 2024, the Botswana High Court issued an order declaring that the Appellant had misled the Court using falsified information, declared the children to be in need of care and protection under the laws of Botswana, the African Charter on the Rights and Welfare of the Child, and The Hague Convention on International Child Abduction, granted legal custody to the Respondent, and revoked the order of 30th August 2023. He submitted that despite these orders, the Respondent searched in vain for her children for two years before eventually establishing that they were in Kenya, whereupon she filed proceedings at the Children's Court in Eldoret on 14th December 2025 seeking, among other reliefs, the adoption of the Botswana order, a declaration of unlawful removal, restoration of custody, and a permanent injunction. He submitted that the Appellant, rather than putting the documents he now relies upon before the Children's Court, had opted to oppose the enforcement proceedings by way of a Preliminary Objection, which was heard and dismissed on 24th February 2026, following which the Court adopted the Botswana order.

20. On the conduct of the Appellant before this Court, learned Counsel Mr. Ochiel submitted that the Appellant's approach mirrored his earlier conduct before the Botswana Court once again concealing material facts in a bid to mislead a Court of law. He submitted that in moving this Court ex parte on 25th February 2026, the Appellant failed to disclose the Botswana High Court order of 1st February 2024, the Children's Court order of 18th December 2025, the Children's Court judgment of 24th February 2026, and the Decree of the same date. He relied on Okoiti v Kinyua & 2 others [2018] KEELRC 1750 (KLR) for the proposition that the test for recalling an ex parte order is whether it was obtained without full disclosure of material facts or through misrepresentation, and on Owners of MV "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR) for the absolute duty of candour owed to the Court by any party moving ex parte. He submitted that under Kenyan law, such concealment renders the proceedings defective and the orders liable to be discharged. He additionally submitted that some of the documents now being relied upon by the Appellant in this appeal were never produced before the Children's Court and therefore cannot properly form the basis of the appeal.

21. On the threshold for setting aside the Botswana order, learned Counsel submitted that the Appellant has failed to satisfy any of the grounds stipulated under Section 10(2) of the *Foreign Judgments (Reciprocal Enforcement) Act*, Cap. 43 for setting aside a registered foreign judgment. He enumerated the applicable grounds under that provision which include lack of jurisdiction in the original Court, fraud, absence of due service, contravention of public policy, subsequent irreconcilable judgments, and others and submitted that the Appellant had not demonstrated that any of those grounds is met. He relied on the Court of Appeal in Jayesh Hasmukh Shah v Navin Haria & Manu Shah [2016] KECA 762 (KLR), which affirmed that where a foreign judgment is delivered by a Court of competent jurisdiction after a full and fair trial with due citation or voluntary appearance by the defendant, it must be given full effect in Kenya without a retrial of the merits. He submitted that the Appellant had in fact expressly acknowledged the existence of ongoing proceedings in Botswana, thereby conceding the jurisdiction of the Botswana High Court. He submitted that the Botswana order of 1st February 2024 remains in force, has not been set aside in Botswana, and is binding. He further submitted that mere dissatisfaction with the outcome, or reliance on an earlier order that has since been revoked, does not amount to proof of unlawfulness so as to trigger Section 10(2).

22. On jurisdiction, learned Counsel Mr. Ochiel submitted that only the Children's Court had jurisdiction to enforce the Botswana High Court orders, and that the Appellant's invocation of this Court's jurisdiction is misconceived. He submitted that Section 3(3)(e) of the *Foreign Judgments (Reciprocal Enforcement) Act*, Cap. 43 expressly excludes from the High Court's enforcement jurisdiction any judgment or order made in proceedings concerning the custody or guardianship of children, and that Section 91(1) of the Children's Act, Cap. 141 vests that jurisdiction exclusively in the Children's Court. He relied on Ian Mbugua Mimano v Charlotte Wamuyu Mutisya & 2 others [2014] KEHC 1553 (KLR), where Musyoka J held that there is no jurisdiction in the High Court to deal with the enforcement of a foreign decree in proceedings concerning the custody or guardianship of a child; on Re AVK (Child) [2021] KEHC 12906 (KLR), where the Court found a foreign custody order inadmissible by reason of the same exclusion; on AZU v ZUM [2015] KEHC 6769 (KLR), where the High Court declined to register a Tanzanian custody order on the same grounds; and on MJ v NK & another [2017] KEHC 4238 (KLR), where Ougo J affirmed the necessary mandate of the Children's Court to hear and determine such matters. He submitted that the Children's Court rightly held, under the principle of judicial comity and the Foreign Judgments Act, that due weight must be given to the orders of a competent Court in Botswana, particularly where the children are citizens of that state.

23. On forum conveniens, learned Counsel submitted that in cases of international child abduction the proper forum is the Court of the child's habitual residence immediately prior to the wrongful removal, which in this case is the High Court of Botswana at Lobatse. He cited the European Court's analysis in Barbara Mercredi v Richard Chaff on the concept of habitual residence as the place reflecting the child's degree of integration into a social and family environment, and submitted that all the relevant factors in this case, including the duration of the children's residence in Botswana, their ages, the family and social connections they had there, and the mother's origins, point to Botswana as the appropriate jurisdiction. He submitted that the Appellant's continued retention of the children in Kenya contravenes Article 2(5) of *the Constitution* of Kenya 2010 and Kenya's obligations under the African Charter on the Rights and Welfare of the Child, and that the Appellant is taking advantage of a lacuna in Kenya's domestic law on international child abduction.

24. On the best interests of the children, learned Counsel Mr. Ochiel submitted that a return to Botswana with their mother is unequivocally in the best interests of the two children of tender years. He submitted that for over two years the Appellant had deliberately severed all maternal contact between the Respondent and the children, who were barely two and three years old at the time of the abduction.

He relied on the Supreme Court decision in MAK v RMAA & 4 others [2023] KESC 21 (KLR) for the principle that the best interests of the child are the paramount and determining consideration against which parental rights must be balanced. He urged this Honourable Court to dismiss the appeal in its entirety with costs and to uphold the decision of the Children's Court

Analysis and determination.

25. I have read through the two applications before this Court, the sworn affidavit evidence, the written submissions of both Counsel, and the authorities placed before me and I am satisfied that the following issues arise for determination:

    a. Whether the Children's Court had jurisdiction to entertain proceedings for the adoption of a foreign custody order.

    b. Validity and enforceability of the Botswana High Court order of 1st February 2024.

    c. The question of Forum conveniens in cases of international child abduction.

    d. What is the best interest of the children?

Whether the Children's Court had jurisdiction to entertain proceedings for the adoption of a foreign custody order:

26. Jurisdiction is the bedrock upon which every judicial proceeding rests. A Court that acts without jurisdiction acts in vain, and every step taken in the exercise of a jurisdiction that does not exist is a nullity of no legal consequence. The Court of Appeal in Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR, stated:

> "Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

27. The Appellant, through learned Counsel Mr. Okari, mounts a jurisdictional challenge at two levels. At the first level, he contends that the Magistrate's Court lacked competence to adopt a foreign judgment at all, relying on Section 6(1) of the *Foreign Judgments (Reciprocal Enforcement) Act*, Cap. 43, which provides:

> "Where, on an application under Section 5(1), the High Court is satisfied as to the proof of matters required by this Act and any rules of Court, it shall, subject to this Act, order the judgment to be registered."

28. On this basis, he argues that the proceedings in MCCHCC/E288/2025 were incompetent from inception and the resultant adoption order a nullity ab initio. At the second level, he argues that even if the matter had been brought before the High Court, the order in question would still not be registrable, by reason of the exclusion in Section 3(3)(e) of the said Act, which removes from its scope any judgment given in proceedings in connection with the custody or guardianship of children. The provisions states:

> "This Act does not apply to a judgment or order—
>
> .....
>
> (e) in proceedings in connection with the custody or guardianship of children;"

29. These two limbs of the Appellant's argument are, on analysis, self-defeating. It is a well-established principle of statutory interpretation that a statute must be read as a whole, and that a party may not selectively invoke the provisions of an Act while ignoring others within the same instrument. The *Foreign Judgments (Reciprocal Enforcement) Act* is either applicable to this matter or it is not. If it is applicable, then its procedural requirements including Section 6(1) govern. If it is not applicable, then those procedural requirements fall away entirely. The Appellant cannot, on the one hand, invoke the procedural machinery of Cap. 43 to attack the jurisdiction of the Magistrate's Court, while on the other hand relying on Section 3(3)(e) of the same Act to argue that no Kenyan Court could have adopted the order. The two propositions are mutually exclusive, and the Appellant must choose between them.

30. The answer, in my assessment, is clear. Section 3(3)(e) of Cap. 43 provides in unambiguous terms that the Act shall not apply to judgments given in proceedings in connection with the custody or guardianship of children. This is not a discretionary provision nor a qualified exclusion, it is an absolute statutory bar. The order of the High Court of Botswana dated 1st February 2024 is, in its entirety, a judgment given in proceedings concerning the custody, welfare, and protection of the two minor children. It declares them children in need of care and protection, vests their custody in the Respondent, and addresses their return to Botswana. There is no conceivable basis upon which this Court could characterize that order as falling outside the scope of Section 3(3)(e). The *Foreign Judgments (Reciprocal Enforcement) Act* simply does not apply to it, and the entire jurisdictional edifice that the Appellant has sought to construct upon its provisions collapses at the foundation.

31. The exclusion of custody matters from Cap. 43 is not a lacuna in the law, in my view it is a deliberate legislative recognition that the welfare of children is a specialized jurisdiction requiring a dedicated forum. That forum is established by the Children's Act, Cap. 141. Section 91(1) of the Act vests in the Children's Court the jurisdiction to conduct civil proceedings on matters including parental responsibility, custody and maintenance, guardianship, judicial intervention for the care and protection of children, and the determination of children in need of care and protection. Read together with Section 3(3)(e) of Cap. 43, the legislative intent is manifest. Custody matters, including the adoption of foreign custody orders, are the exclusive province of the Children's Court.

32. In Ian Mbugua Mimano v Charlotte Wamuyu Mutisya & 2 others [2014] KEHC 1553 (KLR), Musyoka J held:

> "...There is no jurisdiction for me to deal with the matter of the enforcement of a foreign decree in proceedings in connection with the custody or guardianship of a child.....
>
> The issues around custody or guardianship of children are within the jurisdiction of the Children's Court"

33. In AZU v ZUM [2015] KEHC 6769 (KLR), the same principle was applied to a Tanzanian custody order, with the Court holding that the Foreign Judgments Act does not apply to such judgments by reason of Section 3(3)(c), (d), and (e). The Court held:

> "The judgment sought to be adopted for enforcement is a foreign judgment which falls under Section 3(3) (c) (d) and (e) of the *foreign judgments (Reciprocal Enforcement) Act*. It follows that the Act does not apply to the said judgment and the same is therefore not available for adoption and enforcement by the Court under the said Act"

34. More recently, in MJ v NK & another [2017] KEHC 4238 (KLR), Ougo J affirmed the necessary mandate of the Children's Court to hear and determine all matters as set out in the Children's Act. The Court stated:

> "The provisions provided in the Children's Act give the Children's Court the necessary mandate to hear and determine matters as set out by the Children's Act."

35. The thread running through these decisions is the same. The Children's Court is the proper and exclusive forum for custody-related proceedings in Kenya, including interrogating issued relating to foreign orders as regards to custody.

36. I therefore find and hold that the Children's Court at Eldoret had the requisite jurisdiction to entertain the Respondent's application for the adoption of the Botswana order.

Validity and enforceability of the Botswana High Court order of 1st February 2024

37. The Appellant contends in his Replying Affidavit that the Botswana High Court order of 1st February 2024 was obtained ex parte and is therefore in violation of natural justice and contrary to public policy. He draws the Court's attention to the first paragraph of that order, which states that the matter was heard in his absence. On that basis, he argues that the order cannot form a valid foundation for enforcement proceedings in Kenya.

38. I have considered this argument with care, and I am unable to agree. The argument divorces the procedural form of the order from its substantive context, and in doing so, it commits the very sleight of hand that the Appellant has consistently employed throughout these proceedings. The critical question is not simply whether the Appellant was present at the hearing of 1st February 2024, but why he was absent and what role his own conduct played in creating the circumstances that led to that absence.

39. A careful perusal of the record discloses the following sequence of events, which is largely uncontested. The Appellant was a party to the proceedings before the High Court of Botswana in Case No. MLHGB-001106-22. He had himself initiated the divorce and custody application before that Court. He was granted interim custody on 30th August 2023. While the custody proceedings were ongoing, he applied for leave to take the children out of Botswana to Kenya. Rather than await the determination of that application, he departed Botswana with the children, crossing the border before the return date on his own application. His advocate, appearing in Court, confirmed this fact. It was the Appellant's own unilateral, unauthorized removal of himself and the children from the jurisdiction that rendered him absent at the hearing of 1st February 2024. A litigant who removes himself from a jurisdiction, taking with him the very children whose custody is in dispute cannot then invoke the protections of natural justice as a shield against the consequences of his own flight. Therefore, in my fair assessment, the doctrine of natural justice is not available to a party who has engineered the circumstances of his own exclusion from proceedings.

40. The grounds for resisting enforcement are strictly limited. Section 10(2) of Cap. 43 enumerates the bases upon which a registered foreign judgment may be set aside, and they include lack of jurisdiction in the original Court, fraud, absence of due service, and manifest contravention of public policy. Even setting aside the inapplicability of Cap. 43 to custody orders under Section 3(3)(e), the Appellant has demonstrated none of these grounds. He has not shown that the High Court of Botswana lacked jurisdiction over him indeed, as I have noted, he expressly acknowledges that proceedings in Botswana

are ongoing, which is an admission of that Court's continuing jurisdiction. He has adduced no credible evidence of fraud in the Botswana proceedings.

41. The Appellant further argues that the order of 1st February 2024 was issued on the basis of documents and information that he disputes. I note that this argument was available to him in Botswana, where proceedings remain ongoing by his own admission, and where he has every opportunity to ventilate his version of events before a Court of competent jurisdiction. It is not an argument that can be lodged before a Kenyan Court as a basis for declining to give effect to a subsisting order of a foreign Court. To allow it would be to conduct a retrial of proceedings that have already taken place, which is precisely what the principles governing the recognition of foreign judgments forbid.

42. I am therefore satisfied that the Botswana High Court order of 1st February 2024 was issued by a Court of competent jurisdiction, in proceedings that the Appellant himself initiated, and following a process whose integrity was not compromised by his self-induced absence. The Children's Court at Eldoret was right to accord it recognition under the principle of judicial comity and to adopt it as an order of the Court.

The question of Forum conveniens in cases of international child abduction

43. Jurisdiction, used in its widest sense, refers to the question whether a Court will hear and determine an issue upon which its decision is sought. Before turning to look at the question of declining jurisdiction, something needs to be said more generally in relation to the rules determining when the Courts of different States have jurisdiction. The codification of the sources of rules governing the international jurisdiction are usually spread in various codes, Statutes and conventions. They include but not limited to the following: Greece and Quebec Civil Code, Swiss Private International Law Statute of 1987, The Brussels and Lugano Conventions are well known examples of such multilateral conventions. Similarly, the Belgian Rules on international jurisdiction are largely based on the common principle of the jurisdictional protection of the foreign Defendant. Whereas the English Courts are empowered under non-convention rules on jurisdiction to permit service of a writ out of the jurisdiction on a foreign defendant under Order 11, Rule 1(1), of the Rules of the Supreme Court. The court has to be satisfied that there is a serious issue to be tried, that one of the heads of Rule 1(1) applies, and that the discretion should be exercised to allow service out of the jurisdiction. The criterion for the exercise of this discretion is that of forum conveniens. The Plaintiff has to show that England is the clearly appropriate forum for the trial. It was observed by the House of Lords in the case below that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having jurisdiction, which is the appropriate forum for trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice." (See the principles in Spiliada Maritime Corp v Consulex Ltd [1987] AC 460 at 478.

44. In this species of the law, the following factors are relevant when the Courts exercising jurisdiction which has also been invoked in another foreign State or Territory:

    a. The location and domicile of the majority of the parties and witnesses.

    b. The location of the subject matter for example contract or actionable tort, marriage union solemnization.

    c. The governing law on adjudication of such disputes.

    d. The avoidance of multiplicity of proceedings.

    e. The risk of conflicting decisions.

f. The enforcement of an eventual judgment and the fair and efficient working of the Botswana legal system as a whole.

45. It should be borne in mind and the Court take judicial notice that the Appellant and the Respondent have invoked the jurisdiction of their country of domicile with regard to custody of the children typically an important issue which arose after the dissolution of their marriage. This issue of custody has been extensively litigated in Botswana Court including the High Court from which various declarations have been made based on the paramountcy principle on the welfare and best interest of the children. The issue which came to haunt Courts in Kenya arose from a decision in the Courts of Botswana requiring trace of the children outside their own country which include engaging Interpol. That is how the Respondent happened to move the Children's Court in Kenya which apparently are being challenged by this Appeal's Court.

46. This is the very basis upon which the intended Appellant/Applicant on the motion of stay of the impugned ruling seeks leave of this Court to enforce forum selection and choice of law clauses in Kenya regardless of whether they conflict with Botswana's own laws. I recognize without a doubt that both countries have different approaches when dealing with children matters both from the Courts and legislative perspective. There is therefore a just basis for denying enforcement of a forum selection to be in Kenya for all intents and purposes first and foremost given the fact that there is already a binding judgment from the levels of Courts in Botswana. Simply put, this Appeal's Court cannot exercise jurisdiction on matters of children which form the basis of the issue of Interpol which facilitated the Respondent to strive, search and locate her children in Uasin Gishu County being the County of residence of the intended Appellant/Applicant to these proceedings.

47. The Appellant argues that Kenya is the appropriate forum for the determination of the children's custody, pointing to the fact that the children have now been resident in Kenya for over two years, are enrolled in school, and have established routines and attachments here. This argument, interrogated deeply, is a contention that the wrongful act of removing the children from Botswana has, with the passage of time, generated its own legitimacy. I reject it. The matter ought to proceed in Botswana where the local High Court has territorial and subject matter competence, the applicable Statutes which provide important local protections on the welfare and best interests of the child. The very same Courts are seized of the subject matter in question which compels any of the parties to proceed before those local Courts. The existence of strong cause is sufficient to support this appeal, however there are other failings which prima facie persuades this Court to find that Kenya Courts are forums of Non-Conveniens. The intended Appellant seeks to rely on the decision made by the Magistrate's Court in terms of its impugned decision to stay the proceedings to have the appeal proceed normally as if this was a matter for local jurisdiction. In my view, even if the forum of this country could be taken to be valid, clear, enforceable and applicable it should not be enforced in this particular case. This case of children custody as between the Appellant/Applicant and the Respondent is a case sensitive under the strong cause test which should be allowed to proceed in earnest as it has already been progressed before the legal system in Botswana.

48. The concept of the child's habitual residence is the cornerstone of international law on child abduction. The African Charter on the Rights and Welfare of the Child, which Kenya has ratified and which is therefore binding on Kenya by virtue of Article 2(5)(6) of *the Constitution*, expressly addresses the protection of children from abduction and illegal transfer. Article 18(2) of the Charter provides that state parties shall take all appropriate measures to ensure that a child does not suffer as a result of parental separation.

49. In this case, the children were born in Botswana, lived there throughout their early childhood, and were removed to Kenya when they were two and three years old respectively. The integration they had achieved in Botswana by the time of their removal with their mother, their extended family, and their wider social environment was torn away by an act that the Botswana High Court found to have been accomplished by misleading the Court and providing falsified information. Their habitual residence immediately prior to the wrongful removal was Botswana, and that is the jurisdiction whose Courts are seized of the matter.

50. This Court should deter forum shopping by the intended Appellant/Applicant by granting a stay of proceedings which can only be done under limited circumstances. The true threshold in my view is a mere balance of convenience is not a sufficient ground for depriving the Respondent and the Applicant in the Botswana Court of the advantages of prosecuting her action in Botswana legal system so long as it is properly filed within the enabling laws of that country. The right of access to justice in Botswana must not be lightly refused by this Court. It is for the intended Appellant/Applicant to demonstrate that the continuance of the cause of action on custody of children in Botswana legal system would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way. The facts of this case resonates well with the principles illuminated in the Atlantic Star Case [1974] A.C. 436, [1973]2 All E.R. 175 (H.I). Thus;

> ...A key to the solution of the problem may be found in a liberal interpretation of what is oppressive on the part of the Appellant/Applicant. The position of the Respondent must be put in the scales. In the end it must be left to the discretion of the court in each case where a stay is sought, and the question would be whether the Appellant/Applicant has clearly shown that to allow the case to proceed in Botswana would in a reasonable sense be oppressive looking to all the circumstances including the personal position of the Appellant/Applicant. (Empahsis is mine).

51. On thing is very clear, if this Court was to stay the proceedings currently in progress in Botswana on the strength that the Kenyan forum is more appropriate for enforcement of the judgment, it would run foul the condition precedent of multiplicity of proceedings. I must therefore avoid parallel lawsuits being initiate in different countries by the same parties. The standard and burden of proof under International law as construed with our own provisions of the *Evidence Act* being Section 107(1), 108 and 109 is vested with the Appellant/Applicant to displace the Respondent's chosen forum. This Court emphasizes the doctrine of comity in respect for foreign Courts and the efficiency of the overall legal system which are key in a proper functioning of any legal system meaning that if a foreign Court has already accepted jurisdiction Kenyan Courts should be hesitant to interfere.

52. In the case of Barbara Mercredi v Richard Chaff as cited by the Respondent, the European Court explained that:

> " such residence [as] corresponds to the place that reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in [a second state], other than that of her habitual residence, to which she has been removed, the factors that must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that [second state] Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have

with that [second state]. It is for the national Court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case."

53. The argument that two years of unlawful retention in Kenya should now be treated as generating a new habitual residence must be firmly rejected. To accept it would be to reward the very conduct that the law is designed to deter. International law has long recognized that a wrongful removal cannot, without more, be permitted to generate its own justification through the passage of time. The High Court of Botswana, as the Court of the children's habitual residence, is the appropriate forum for the substantive determination of their custody. The Children's Court at Eldoret acted correctly in recognizing and enforcing the Botswana Court's order, rather than seeking to supplant it.

What is the best interest of the children?

54. Every analysis in a matter concerning children must ultimately arrive at this question, for it is the question that Article 53(2) of *the Constitution* places above all others. The provision is peremptory in its terms: the best interests of the child shall be the paramount consideration in every matter affecting the child. This is not a factor to be weighed against other considerations but rather the overriding principle that governs the entire inquiry. In in FSL v FNK Civil Appeal No E060 of 2021; [2022] eKLR Thande, J observed:

> "In the present matter which relates to a child of the parties, the interests of the child supersede those of the parties and must at all times be upheld. In this regard, the Court is guided by the provisions of *the Constitution* of Kenya, 2010 and of the *Children Act* which require the Court to give paramount importance to the best interests of the child. Article 53(2) of *the Constitution* provides:
>
> "A child's best interests are of paramount importance in every matter concerning the child. The *Children Act* on the other hand provides at Section 4(3) that:
>
> "In all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

55. Essentially, as also affirmed by the Supreme Court in MAK v RMAA & 4 others [2023] KESC 21 (KLR), the best interests of the child are the determining factor against which all parental rights must be balanced, and no right should be compromised by a negative interpretation of that standard, the best interests of the child are the determining factor against which all parental rights must be balanced, and no right should be compromised by a negative interpretation of that standard.

56. The Appellant relies heavily on the Social Inquiry Report prepared by the Assistant Director of Children's Services, Turbo Sub-County, dated 18th February 2026, which confirms that the children are physically healthy, enrolled in school at Testimony School in Eldoret, and appear emotionally and socially adjusted in their current environment. I have read this report with attention and I give full weight to its findings. I cannot dismiss the children's current stability, and I recognize that any disruption to established routines carries real emotional consequences for children of tender years. Courts in my considered view must be vigilant against ordering changes that, though legally correct, are practically harmful to a child's well-being.

57. However, the report must be assessed in the full context of the circumstances that produced it. The stability that the children currently enjoy in Kenya is a stability that was created unlawfully, by the deliberate act of a father who, as the Botswana High Court found, misled that Court using falsified information to obtain the very custody orders he relied upon to remove the children. More

importantly, that stability has been purchased at the price of two years of complete and systematic severance of the children's relationship with their mother. The minors were two and three years old respectively when their father removed them from Botswana. They were at the most critical and formative stage of their psychological and emotional development, a stage at which the mother-child bond is not merely beneficial but developmentally foundational.

58. It is also significant that the Social Inquiry Report, for all that the Appellant relies upon it, does not recommend that the children remain solely in the Appellant's care. On the contrary, it recommends structured and enforceable access arrangements to guarantee regular contact with both parents, referral of the parties to Court-annexed mediation, and parental Counselling to promote cooperative parenting. It further acknowledges that jurisdictional clarity is required to harmonize the conflicting Court orders as between Kenya and Botswana. These recommendations are not the endorsement of the status quo that the Appellant presents them as. They are a recognition by the officer appointed to assess the children's welfare that the current arrangement is incomplete and that the mother's involvement is essential to the children's balanced development.

59. I am therefore satisfied that the return of LTR and PESR to Botswana under the care of their mother, in compliance with the orders of the High Court of Botswana and the Children's Court at Eldoret, is in their paramount interests. The transition should, however, be managed with sensitivity to the children's current attachments and routines. The Court's orders will reflect this consideration accordingly.

60. As I pen off, let me state that nothing in this ruling should be construed as a permanent termination of the children's relationship with the Appellant. He is their father, and the children have a right to know and be cared for by him, as much as they have the right to be cared for by their mother. The appropriate forum for the determination of a structured, fair, and enforceable parenting arrangement is the High Court of Botswana, where proceedings are ongoing and where both parties may be heard on the full merits. This Court urges both parties, in the interests of the minors, to approach those proceedings in a spirit of cooperation and with the welfare of the children as their singular objective.

61. Before setting out the orders, there remains the matter of the ex parte stay of execution granted by this Court on 26th February 2026. That stay must be formally vacated given the Court's analysis herein. When the Appellant moved this Court ex parte on 25th February 2026, he anchored his application on the Botswana High Court order of 30th August 2023 while saying nothing of the subsequent order of 1st February 2024 that had revoked it, nothing of the Children's Court order of 18th December 2025, nothing of the judgment and decree of 24th February 2026 whose execution he was seeking to stay, and nothing of the fact that he had participated through Counsel in the very proceedings he was misrepresenting to this Court as having condemned him unheard. As the Court of Appeal stated in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, a party who fails to make the fullest possible disclosure of all material facts cannot retain any advantage obtained from those proceedings.

62. It is trite that the applicable law on stay of execution is Order 42 Rules 6(1) (2) of the Civil Procedure Rules. A stay of execution pending appeal emphasize that the Applicant must demonstrate that substantial laws may occur if the stay is refused and that the appeal has prospects of success. The principles on stay of execution are now well settled in the following cases:

First, the Court in SKM v JLG (Family Appeal E003 of 2023) [2024] KEHC 1601 (19 Feb 2024): The High Court dismissed a stay application, finding a failure to demonstrate substantial loss. In Butt v Rent Restriction Tribunal [1979] eKLR: Established that the power to grant a stay is discretionary to ensure the appeal is not rendered nugatory. Likewise the Court in Machira T/A Machira & Co.

Advocates v East African Standard (No. 2) [2002] KLR 63: Highlighted that the conditions in Order 42 Rule 6(2) are cumulative. Finally in Vishram Ravji Halai v Thornton & Turpin [1990] KLR 365: Established that the High Court's jurisdiction is "fettered" by the three requirements. From the comparative law perspective the Court in Marie Makhoul and Marguerita Desir v Sabina James Alcide SLUHCVAP No. 30/2011 it was observed as follows:

> " The court's jurisdiction to grant a stay is based upon the principle that justice requires that the court should be able to take steps to ensure that its judgments are not rendered valueless. The essential question for the court is whether there is a risk of injustice to one or both parties if it grants or refused a stay. Further, the evidence in support of the application for stay of execution should be full, frank and clear. The normal rule is for no stay and if a court is to consider a stay, the applicant has to make out a case by evidence which shows special circumstances for granting one. The mere existence of `arguable grounds of appeal is not by itself a good enough reason."

63. In the same vein, the application on stay of execution of the impugned ruling of the Magistrate's Court lacks merit.

64. In the premises, this Court makes the following orders:

a. That the ex parte stay of execution granted by this Court on 26th February 2026 is hereby vacated and set aside, and the directions and decree of the Children's Court at Eldoret in MCCHCC/E288/2025 dated 24th February 2026 are hereby upheld.

b. That the discretion on stay of proceedings or judgment in the Lower Court under Order 42 Rule 6(1) (2) of the Civil Procedure Rules is denied.

c. That the Respondent/mother, who is currently present in Kenya, is hereby granted access to the minor children LTR and PESR on a structured basis pending their return to Botswana or further orders from the Children's Court.

d. That the Sub-County Children's Officer, Turbo Sub-County, is hereby directed to facilitate the transition of the children to the Respondent's care and their return to Botswana. To that end, the Children's Officer shall convene a transition meeting with both parties and their respective Advocates within seven (7) days of the delivery of this ruling, for the purpose of agreeing a transition plan that is sensitive to the children's current routines, educational calendar, and emotional well-being.

e. That the Appellant shall surrender the passports and all travel documents of the minor children to the Sub-County Children's Officer 7 days of the delivery of this ruling, to be held by that Officer pending implementation of the transition plan referred to in Order 3 above, upon which they shall be released to the Respondent.

f. That the transition and return of the children to Botswana shall be completed within the period upon which the Children's Court shall determine based on the compelling circumstances given that they ought to be allowed to secure their rights to education for this term in the institution they have been admitted.

g. That both parties are directed to engage the ongoing proceedings before the High Court of Botswana in good faith and with urgency, with a view to establishing a structured, enforceable, and mutually agreeable co-parenting arrangement that preserves the Appellant's meaningful relationship with the children.

h. That the nature of the orders made herein renders the appeal as preferred by the Appellant moot.

i. That the costs of the Respondent's application dated 27th February 2026 shall be borne by the Appellant.

65. Orders accordingly.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF MARCH 2026.

.....

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Ochiel Advocate, Mr. Ojala Advocate and Mr. Bett Advocate all appearing for the Respondent.

Mr. Okara for the Appellant

The Respondent in person