

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. E097 OF 2025

TALAI MAASAI STEPHEN.....APPELLANT/ APPLICANT
VERSUS
EDDAH HEATHER KIPCHUMBA.....RESPONDENT

RULING

1. By way of notice of Motion dated 9th June 2025, the Applicant seeks the following orders;

1) Spent.

2) Spent.

3) Spent.

4) **There be partial stay of execution of the Judgment/Decree delivered on 29th April, 2025 and the Orders thereto with respect to Eldoret Children’s Case No. E049 of 2022 Eddah Heather Kipchumba vs Talai Maasai Stephen pending hearing and determination of the Appeal.**

5) **The parties herein to co-share equally the provision for the minors' school fees and school requirements pending hearing and determination of the Appeal.**

2. The Application is expressed to be brought under **Articles 48, 50 (1), 53 and 159** of the Constitution of Kenya, **Sections 4,6,7,13,15,22 & 84** of the **Children Act, No. 8 of 2001** of the Laws of Kenya, **Sections 1A, 1B, 3A and 63(e)** of the Civil Procedure Act, Chapter 21 of the Laws of Kenya. **Orders 40 Rule 1 and 4, 42 Rule 6** of the **Civil Procedure Rules 2010** and ‘all enabling provisions’ of the law.
3. The Application is premised on the grounds on the face of it and the averments of the Applicant in the supporting affidavit. In his application, he deponed that he married the Respondent in the year 2008 but the marriage was formalized in the year 2016. Further, that the marriage was blessed with the minors, Ezra Kibet Talai and Nellie Jelimo Talai, born on 9th March, 2010 and 27th September, 2014 respectively. He annexed and marked as ‘TMS 1 copies of the Certificates of Birth.
4. He urged that they lived together as husband and wife until August,2021or thereabouts when the Respondent deserted their matrimonial home and have since lived separately to date. he deponed that the marriage irretrievably broke down leading to a dissolution on 27th November, 2024 vide Eldoret MCDC No. E118 of 2022, annexing and marking as 'TMS 2' a copy of the Judgment.
5. The deponent averred that their children are enrolled at Sun and Shield Primary and Junior Secondary School at grade 9 and 5 respectively. He annexed and marked as 'TMS 3' copies of the letters of admission and fee structures. Further, that the Respondent commenced a suit before the Children’s Court with respect to the custody and provision for the children. After a protracted battle in court, they reached a partial settlement with respect to custody and provision for the children.

6. He stated that the only item that they were not able to reach an agreement on, was the provision for the educational needs for the children, and the same was placed before the trial court for determination. That vide its Judgment delivered on 29th April, 2025, the trial court directed that he solely provides for the minors' school fees and school related expenses which is a heavy burden on him. He urged that he was aggrieved by the Judgment and Decree of the trial court necessitating the commencement of the instant Appeal on the grounds set out on the face of the Memorandum of Appeal. He annexed as 'TMS 5' a copy of the Memorandum of Appeal.

7. The deponent averred that the trial court did not give sufficient reason for its decision, and, that it disregarded the Affidavits of Means. Further, that the trial court has provided the Respondent with a basis to decline to support the children with respect to their education thereby occasioning an injustice to him and the children. Further, that the children's fundamental rights will be curtailed and the deprivation further aggravated if the orders sought herein are not granted urgently.

8. He urged that there is possibility of the hearing of the Appeal to delay due to the delay in preparation of the record of appeal occasioned by a delay in typing of the court proceedings hence a need for an interlocutory intervention to safeguard the best interest of the affected minors. He annexed and marked as 'TMS 8' a copy of the letter requesting for proceedings and payment receipt.

Replying Affidavit

9. The Respondent filed a Replying Affidavit dated 16th June 2025 in opposition to the Application. She deponed that she filed a children's case No E049 of

2022 before the children's court at Eldoret Magistrate's court seeking a number of reliefs against the Appellant and he was duly served with all the court documents, and instructed his advocates on record to represent him. While the matter was still pending in court, the Appellant made an Application to the trial court seeking orders that the first minor be transferred to Moi Kabarak which the deponent annexed as Annexure EK1.

10.The Applicant was directed to pay the school fees and all other school related items, and in total violation of the court order, he transferred the said minor to Sun and Shield instead of Moi Kabarak. Further, that vide a Ruling dated 12th July 2024, the trial court directed that there shall be no further interlocutory applications filed unless with leave of Court and status quo is to be maintained until the hearing and determination of the matter. She deponed that in total violation of the said Ruling and orders the appellant also transferred the second minor to Sun and Shield primary.

11.The deponent averred that while the matter was still pending hearing and determination, they recorded a consent in the following terms;

- a) The actual and legal custody of the minors she shared equally;***
- b) The provisions for clothing for the minors be shared equally;***
- c) Each party to cater for shelter food and entertainment while in the actual custody of the children;***
- d) That provision for medication for the children be shared equally and children be enrolled in the respective medical care,***

12.That the trial court was only left with the issue of school fees and other school related items for determination. That in this regard, the parties were directed to file affidavits of means and thereafter the court delivered its

Judgment on 29th April 2025 based on the documents and the evidence tendered.

13. She stated that the Applicant cannot seek to stay a Judgment arising out of a consent recorded by the parties and further, that the Applicant has not stated with clarity what he is seeking to be stayed. She urged that the Applicant had filed an application dated 22nd January 2025 seeking, among other orders, that she be ordered to pay 50% for provision of school fees and other school related items for the minors, which Application was not allowed and no appeal was preferred.

14. That under prayer 4 of his Application, he is seeking reliefs which were declined by the trial court thus allowing the prayer will amount allowing an Application which was dismissed. Additionally, she urged that the applicant is now attempting to seeking for final orders at the interim stage. The deponent stated that the Applicant cannot to seek to stay the Judgment and at the same time pray for the issuance of the reliefs denied.

15. The deponent stated that the present application does not state with clarity whether the Applicant seeks to stay the judgment and decree dated 29th April 2025 or to enforce the reliefs that were denied. She stated that the applicant herein has not satisfied the conditions for an order of stay pending appeal and urged the court to dismiss the application.

Applicants' submissions

16. The Applicant reproduced the contents of the supporting affidavit and urged that the most important and urgent issue is for this Court to offer guidance on the issue of provision of school fees and school related items. Counsel urged that everyone is bound to abide by constitutional provisions without any element of departure and further, that the legal foundation for equality of

parental rights and duties starts off from the Constitution of Kenya as provided under Article 53(e) of the Constitution.

17. Counsel submitted that the Appellant and the Respondent are working in a similar job group and are earning relatively similar salaries. That the trial Court did not give sufficient reason for the excusal of the Respondent with respect to the provision of education and, looking at the Affidavit of means of the Appellant, the Appellant is also supporting his relatives with respect to their education. Additionally, he is also paying a loan which reduces his net income.

18. He maintained that the trial Court failed to take cognizance of the fact that the Appellant is already financially pressed by the requirements for provision of the other needs that parties recorded a consent thereby making it necessary to be supported by the Respondent. Counsel placed reliance on the decision of The Supreme Court in the case of **MAK v RMAA & 4 others eKLR [2023]** in this regard.

19. Counsel submitted that there is no justifiable basis as to why the Respondent should be excused from supporting her children's education noting that she has a good source of income, working as a lecturer at Kenyatta University. He urged the court to return a finding that the parties should carry an equal financial obligation towards their children and urged that at the very least, the provision for education should be prorated in the basis of the income for each party.

20. He cited the case of **MOA v HAO [2021] eKLR** in support of this submission. He further stated that no evidence has been placed before this

Honourable Court to demonstrate that the school fees for the current school is beyond the means of the Respondent.

21. Counsel further cited the case of **Bhutt vs Bhutt HCC NO, 8 OF 2014** on the best interests of the child and further, urged the Court to take note of the fact that the minors have a legitimate expectation for a good living standard commensurate or proportionate to financial status of their parents hence the Respondent's action is a breach of the said expectation. He cited the case of **FSL v FNK, Civil Appeal no E060 of 2021 [2022] eKLR** and urged the court to be guided by the provisions of **Section 24 (1) (now section 32 of the Children Act 2022)**. He additionally cited **Section 31 of the Children Act**.

22. Counsel urged that the Respondent has misled this Court vide paragraph 16 and 17 of her Replying Affidavit. That it is evident that the Appellant sought for the Respondent to be compelled to contribute 50% for the provision of school fees and school related items vide an Application dated 23rd May, 2024. That the said application was not dismissed but was put in abeyance vide the Ruling annexed by the Respondent as annexure 3 where the Court directed that the Application would be heard together with the main suit concurrently. There was no separate Ruling on the question of provision for education that court have been challenged vide a separate Appeal.

23. Counsel submitted that there is an imminent risk that the children will lose out on proper education due to financial constraints on the part of the Appellant, hence the need for an urgent intervention by this Court. He urged the court to return a finding that both parents herein have equal rights and duties over the two children and the parties should contribute equally for the provision of school fees and school related items for the minors. He cited **PKM V ANM (2020) eKLR** in support of the submissions and urged that the

Court has the power to compel the Respondent to contribute to the provision of the children's education under **Section 118 of the Children Act**.

24. Counsel submitted that the Appellant is not seeking for final orders at the interim stage and is seeking for an interlocutory intervention noting that there is a possibility for the hearing of the Appeal to delay due to the delay in the preparation of the Record of Appeal occasioned by delay in typing of the Court Proceedings hence a need for an interim measure.

25. On the issue of partial stay of execution counsel urged that the Appellant herein is not seeking to stay a Judgment arising out of a Consent recorded by the parties. He reiterated that the parties recorded a partial consent on custody and provision of minors and the only item which parties were not able to agree on was the school fees and school related items which was placed before the Court for determination and he seeks to oppose the judgment delivered on 29th April, 2025.

26. Further, that the minors who are the subject of the instant Application are at a critical stage in their education hence any interference will occasion an irreparable harm to them. He cited the case of **DOB v DMA [2021] eKLR** where the court addressed itself on the issue of staying maintenance orders and urged that the minors will suffer prejudice that cannot be compensated by an award of costs.

27. He additionally cited the case of **RWW v EKW [2019] eKLR** and urged that the Application has been filed without any delay noting that the Judgment was delivered on 29th April, 2025. The Applicant filed his Memorandum of Appeal on 12th May, 2025 and this Application was filed on 9th June, 2025 barely six weeks from the date of the Judgment. He submitted that the

Appellant has shown willingness to provide security for the performance of the Decree by paying the minors school fees despite the interim stay order. Counsel stated that the Appellant is however willing to provide security if the Court finds it necessary, citing the case of **Focin Motorcycle C. Ltd vs Ann Wambui Wangui [2018] eKLR** in this regard. Counsel submitted that the Appellant has met the conditions for the stay order and prayed the court allow the application as prayed.

Respondents' submissions

28. Learned counsel for the Respondent reproduced the facts underlying the application and proceeded to submit on the application. On whether there shall be partial stay of execution of the Judgment and Decree, Counsel urged that the principles guiding the grant of stay of execution pending appeal are well settled and provided for under **Order 42 rule (6)(2) of the Civil Procedure Rules**.
29. Counsel submitted that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. The applicant must establish 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 a successful party in the appeal. Counsel urged that the Applicant has not demonstrated and established that substantial loss will occur unless an order for stay is made.
30. Counsel urged that the Applicant has not proposed any security for the due performance of the decree of the lower court. Further, that the Applicant is seeking to stay a judgment out of a partial consent recorded in court and in essence, seeking not to pay the school fees for the minors a fact that will put the minors' right to education at jeopardy. This will not be in the best interest

of the minors as enshrined in the Constitution. He cited **Article 53 (2) of the Constitution of Kenya 2010** and also the case of **Bhutt v Bhutt Mombasa HCCC NO 8 of 2014** and the case of **DOB -VS- DMA (2021)**.

31. On whether the parties herein can co-share equally the provision for the minors' school fees and school requirements pending hearing and determination of the appeal, Counsel submitted that vide an Application dated 13th January 2023, there were orders that the first minor be enrolled at Moi Primary School Kabarak for his Junior Secondary Education and to take care of all school requirements for the minor, which ruling was never challenged by the Applicant.

32. The Applicant further filed an Application dated 22nd January 2025, seeking that the Respondent be compelled to contribute 50% for the provision of school fees and school related items for the minors which Application was dismissed and no appeal was preferred against the same. Counsel submitted that the applicant has mainly appealed on the issue of school fees which was placed on him and in the present application, he has sought to have the parties co-share equally the provision for the school fees.

33. This means that the Applicant is seeking for final orders at the interim stage and allowing the prayer means allowing the appeal at an interim stage. Counsel posited that final orders cannot be issued at the interim stage unless on special conditions and circumstances which special conditions and circumstances have not been demonstrated by the applicant.

34. Counsel submitted that the application is improper as it combines and conflates the two reliefs sought. He cited the case of **Pyaral Mhand Bheru Rajput vs Barclays Bank of Kenya & Others HCCC No. 38 of 2004** and

urged that granting the order for co-sharing the provision of school fees and school related items is the main cause in the appeal filed and allowing the same at an interlocutory stage will mean allowing the entire appeal at an interlocutory' stage. Counsel therefore urged that the appeal be dismissed with costs.

Analysis & Determination

35. Having addressed my mind to the pleadings and the submissions, it is my considered opinion that sole issue that arises for determination is as follows;

Whether interim orders for partial stay of execution should issue

36. In determining matters involving 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 provides;

“A child’s best interests are of paramount importance in every matter concerning the child.”

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

“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;”

37. These principles were aptly restated by **Muriithi J** in the case of **Bhutt v. Bhutt Mombasa HCCC NO. 8 of 2014 (O.S.)** 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.”

38. The principles guiding grant of stay of execution pending Appeal are as set out in **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.”

39. In the case of **ZMO v EIM [2013] eKLR**, the court stated thus;

“As a matter of principle, grant of stay of execution of maintenance orders in children’s cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about it. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in

dispute. To my mind once a maintenance order is made where parentage is undisputed, it should not be suspended pending appeal where the appeal is on the quantum payable.”

40. It is important for the court to put the record straight from the onset on the issue of who ought to pay the school fees of the minors, which is indeed the primary, if not the only ground of appeal, and also the substratum of the Application the subject matter of this Ruling. On this issue, the Respondent deposed that the Applicant seeks to ventilate before this court a matter that was heard and determined before the trial court wherein the Applicant's Application seeking that the equally parties bear the burden of paying the school fees for the minors at 50% was dismissed. She annexed to her Replying Affidavit the relevant Ruling delivered by the trial court on 12th July 2024. That because the Appellant did not appeal that decision, he can now not raise it before this court.

41. I have read the said Ruling. The position is that the Application brought therein by the Appellant whose import was as correctly stated by the Respondent, was not dismissed as alleged. The trial court instead directed that the application shall be heard together with the main suit and proceeded further to bar the parties from filing any more interlocutory applications except with the leave of the court.

42. It is the Judgement that the trial court eventually rendered that the Applicant has appealed against and seeks a partial stay of in the interim. In this regard, I find that this Application is properly before the court. In considering the prayers sought, I would agree with the Respondent that the same is not specific on what aspect of the judgement the Applicant seeks be stayed in its prayer as crafted that the judgement be partially stayed.

43.If the court were to be technical, and strictly go by those prayers sought as drafted, it would easily dismiss the Application on this submission in its entirety for being ambiguous. However, the court takes into account the fact that this is a case involving children, and as is clearly apparent from the provisions of the Constitution, the Statue and case Law herein cited, the command to courts, in matters involving children, is that the best interest of the child is paramount, and it is what should be given the primary consideration in every matter before it.

44.Further, it is my considered opinion, that unless an order sought as drafted is incapable of being granted at the stage at which it is sought, for example where a party has sought for final and/or permanent orders at the interim stage et al, where an order sought, though ambiguous by dint of the fact that it lacks specificity on that which it seeks as is the case here, but the court, from its consideration of the pleadings, is able to discern the import of that which an Applicant seeks, the court then ought not dismiss the application on this anomaly, which I would term as a technicality, but should instead invoke the relevant provisions of the law in ensuring that the ends of justice are met in any such matter before it, and more so in a cause where the interest of a minor is at stake.

45.With this in mind, the court now hereby invokes the provisions of **Article 159(2)(d) of the Constitution**, and the **Oxygen Principles as set out in Section 1A and 1B of the Civil Procedure Act**, in ensuring that the ends of the substantive justice of this case are met in the best interest of the minors herein. In this regard, he court will proceed and consider the application holistically by dint of the fact that every prayer sought in any Application is always grounded on the facts stated in the Certificate of Urgency where applicable, and/or on the grounds stated on the face of the Application, as well as the facts deposed in the affidavit filed in support of thereof.

46.I note from the facts deposed that the parties had agreed on every issue of the maintenance of the minors except the issue of who pays their school fees and the incidentals thereto. The trial court in the impugned judgement ordered that the Appellant pays the school fees for both and he is aggrieved by this decision and has filed this appeal. In the interim, he prays that that decision by the trial court be stayed and the court direct that the parties share the burden of school fees equally ant 50%. The court notes that this was his prayer before the trial court which the court in its final rendition dismissed and orders that the Appellant solely bears the burden.

47.In considering this prayer sought in the Application as juxtaposed against the appeal filed, I find that to allow the interim orders sought would be to dispose of the Appeal in its entirety at the interim stage which then would be an oddity. Secondly, the Applicant has not demonstrated that if the interim orders that he seeks are not granted, he stands to suffer substantial loss.

48.In any event, even as substantial loss has not been demonstrated by the Applicant, I do not see how any such loss would occur for reasons that firstly, all the other responsibilities of the maintenance of the children are already shared equally between the parties. Secondly, in the event that at the determination of the appeal the court finds that the parties ought to share the “burden” of paying their children’s fees equally, the fees already paid by the Applicant, being in monetary terms, can easily be computed and set off from what is to be paid by the Respondent.

49.Further, the court notes that the Applicant is not saying that he cannot afford to pay his children’s fees alone, but rather that even as he states that it is burdensome for reasons that he also has other school fees burdens involving members of his family, his basic complaint is that the Respondent and him are both university lecturers, and earn more or less the same salary and both

therefore ought to bear equal responsibility in catering for their children's school fees.

50. Having taken all these into account, it is my very well considered opinion, that pending the determination of the appeal filed by the Applicant one way or the other, it is in the best interests of the minors that their schooling continues uninterrupted as their parents litigate over the issue of who should pay their fees, and this finding then dictates that the orders of the trial court in the impugned judgement on who pays the minors fees prevail in the interim and I now hereby so find.

51. The upshot of my above conclusions then is that it is my finding that the Applicant's Application herein lacks merit and the same is accordingly dismissed in its entirety with an order that each party bears their own costs.

Read dated and Signed at ELDORET on 12th March 2026

E. OMINDE
JUDGE