

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MILIMANI LAW COURTS

CIVIL APPEAL NO. E106 OF 2025

*(An appeal from the Orders of Hon. Dr. A.W. Macharia,
SPM issued on 28th June, 2025 in Nairobi CM Children
Case E674 of 2025)*

MARYANN NJOKI MACHARIA

APPELLANT

VERSUS

PAUL MUTUGI

RESPONDENT

JUDGMENT

1. The parties herein are the biological parents of the **M.F.M** (Minor), who was born on 3rd April, 2023. A dispute arose

concerning the maintenance of the Minor, as a result of which the Appellant sued the Respondent at the lower Court vide a Plaint dated 10th April, 2025, seeking various reliefs. She sought custody of the Minor and a structured right of access to the Respondent. She also wanted the Court to order the Respondent to pay Kshs.52,000.00/= monthly for the maintenance of the Minor.

2. Alongside the Plaint, the Appellant brought an application dated 10th April, 2025, seeking interim orders pending the hearing and determination of the suit. In one of the prayers, she sought an order compelling the Respondent to pay Kshs.30,000.00/= monthly maintenance for the Minor pending the hearing and determination of the suit.
3. The application came up for mention on 12th June, 2025, wherein the counsels for the parties deliberated on the issue of the monthly maintenance, and the parties made their respective proposals. The Court did not make a determination on this application on that day, and it did not make an order on how much the Respondent should pay for the maintenance. However, for some reasons, the

Respondent believed that the lower Court issued an interim order on that day, directing him to pay Kshs.20,000.00/= per month for child maintenance.

4. Subsequently, and operating on this mistaken belief, the Respondent brought an application dated 20th June, 2025, asking the Court to review its previous orders directing him to pay Kshs.20,000.00/= per month. He stated that the monthly maintenance was excessive and beyond his current means. He asked the Court to review the award and reduce the monthly contribution to Kshs.10,000.00. The Court delivered the Ruling on 28th June, 2025, in which it ruled in favor of the Respondent and reviewed the maintenance amount to Kshs.10,000.00.

5. The Appellant was dissatisfied with the Ruling and appealed to this Court vide a Memorandum of Appeal dated 15th July, 2025, in which she listed the following Grounds of Appeal;

1) That the Learned Magistrate seriously erred in law by reviewing her orders issued on the 12th of June, 2025 ex parte.

- 2) That the Learned Magistrate seriously erred in law by issuing final orders ex parte.**
- 3) That the Learned Magistrate seriously erred in law by issuing orders that had not been sought by the Respondent herein despite the fact that it is trite law that parties are bound by their pleadings.**
- 4) That the Learned Magistrate seriously erred in law by failing to give the Appellant herein an opportunity to respond to the Respondent's Application dated 20th June, 2025 as well as an opportunity to be heard.**
- 5) That the Learned Magistrate seriously erred in law by failing to give the Appellant herein an opportunity to cross-examine the Respondent on the content of his Affidavit dated 20th June, 2025 and the annexures thereof.**

6) That the Learned Magistrate erred in law and procedure by hearing an application ex parte and issuing final orders on the same day.

7) That the Learned Magistrate erred in fact and in law by giving orders that were completely not in the best interest of the Minor.

6. The Appellant asked the Court to allow the appeal and set aside the orders issued by the lower Court on the 28th June, 2025. She also asked for an order directing the Respondent to contribute towards the maintenance of the minor by sending her Kshs.20,000.00/= per month pending the hearing and determination of the main suit in the lower Court. She also asked that the file in the lower Court be forwarded to the Presiding Magistrate for purposes of reallocation to another Magistrate for purposes of hearing and determination of the main suit.

7. The Appeal was canvassed by way of written submissions.

Appellant's written Submissions

8. The Appellant submitted that the lower Court was wrong in reviewing the maintenance from Kshs.20,000.00/= to Kshs.10,000.00/=. She submitted that the Respondent's application for review did not meet the requirements of **Section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules**. She argued that the Respondent did not demonstrate any discovery of new and important matters or evidence that were not within his knowledge when the Appellant's application for maintenance was heard. She also argued that he did not demonstrate that there was an error apparent on the face of the record.
9. In addition, the Appellant submitted that the said orders, being substantive and final, were issued *ex parte*, without according her an opportunity to respond. She argued that it was wrong for the lower Court to consider the Respondent's application dated 20th June, 2025, *ex parte* and allow it without allowing her an opportunity to file a Replying affidavit. They submitted that this was an obvious breach of her right to be heard. Lastly, she argued that the

Respondent did not demonstrate any other sufficient reason that was to be considered higher in ranking, compared to the best interest of the child.

Respondent's written Submissions

10. The Respondent submitted that the lower Court was right in reviewing the maintenance from Kshs.20,000.00/= to Kshs.10,000.00/=. He submitted that he had attached his Affidavit of Means to the review application and that this constituted new and important evidence that the Court did not have when granting the initial order. He argued that Courts have repeatedly affirmed that financial disclosure qualifies as new evidence where maintenance was fixed before interrogating means. He submitted that the initial order was granted without interrogating his financial position and was hence liable to review.

11. The Respondent also submitted that the trial Court was right in issuing the orders *ex parte*. He submitted that the court is not bound by the strict technical thresholds under **Order 45** of the **Civil Procedure Rules**, arguing that the

Child's welfare supersedes procedural rigidity. He argued that the trial Court was empowered to issue a temporary *ex parte* order to prevent injustice, and then set a return date so that both parties could be heard *inter partes* on the main suit. He also submitted that **Section 119** of the **Children's Act** grants the Court inherent powers to adjust interim orders to align with financial realities.

Issues for Determination

12. Having carefully considered the Grounds of Appeal and the submissions of the parties, I find that there are three issues for determination;

a) Whether the Lower Court issued a Court Order on 12th June, 2025, directing the Respondent to pay Kshs.20,000.00 monthly maintenance.

b) Whether the Respondent's Application for review dated 20th June, 2025, was merited.

c) What Interim Reliefs are available to the Appellant?

13. This being a first Appeal, this Court has a duty to revisit the evidence tendered before the trial Court afresh, evaluate, analyze it, and come to its own independent conclusion, but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence, and give allowance for that. (See **Okeno vs. Republic (1972) EA 32** and **Mark Oiruri Mose vs. R (2013) eKLR**.)

14. Accordingly, this Court is being required to undertake a wholesome review of the Respondent's application for review dated 20th June, 2025, and come up with its conclusion.

Whether the Lower Court issued a Court Order on 12th June, 2025, directing the Respondent to pay Kshs.20,000.00 monthly maintenance

15. The Court noted an additional issue that the parties did not raise in their submissions. The gist of the dispute is on an order alleged to have been made by the lower Court on 12th June, 2025. This Court interrogated the existence of the

said Court order because its existence or absence has a significant bearing on the determination of this Appeal.

16. I shall first set out the background of the dispute. According to the record, the Appellant brought an application dated 10th April, 2025, seeking interim orders pending the hearing and determination of the suit. In one of the prayers, she sought an order compelling the Respondent to pay Kshs.30,000.00/= monthly maintenance for the Minor pending the hearing and determination of the suit.

17. The application came up for mention on 12th June, 2025, wherein the counsels for the parties deliberated on the issue of the monthly maintenance, and the parties made their respective proposals. The counsel for the Appellant proposed that the Court should settle the figure at Kshs.30,000.00/=, while the counsel for the Respondent suggested that his client was ready to pay Kshs.9,000.00/= per month.

18. From the face of record, the Court did not make a determination on this issue at all. However, both parties claimed that on that day, 12th June, 2025, the lower Court

made an interim order directing the Respondent to pay Kshs.20,000.00/= per month in child maintenance, payable on the 5th of each Month.

19. I noted that a copy of the said Court order is not in the Court file. I have also perused the record of the lower Court and the typed proceedings to ascertain the existence of the said court order. However, I could not identify the specific Court order that directed the Respondent to pay Kshs.20,000.00/= per month for child maintenance.

20. Based on these facts and the materials placed before this Court, I make a factual finding that the alleged Court order directing the Respondent to pay Kshs.20,000.00/= per month does not exist because the lower Court did not make that order in the first place. I also find that the lower Court did not make a determination on the Appellant's application dated 10th April, 2025 in which she sought interim maintenance orders against the Respondent.

Whether the Respondent's Application for review dated 20th June, 2025, was merited

21. The statutory basis for review and the requirements are set out in **Section 80 of the Civil Procedure Act**, which provides as follows:

"Any person who considers himself aggrieved -

a. By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred or

b. By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order and the court may make such order thresh as it thinks fit."

22. Similarly, **Order 45 Rule 1 of the Civil Procedure Rules** provides as follows:

"Any person considering himself aggrieved;

a. By a decree or order from which an Appeal is allowed, but from which no appeal has been preferred; or

b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which after the exercise of the diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or an account of some mistake or error...on the face of the record, or for any other sufficient reasons, deserves to obtain a review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay.”

23. Based on the above statutory provisions, it is evident that the application for a review must be founded/based on the existence of a Court order or Decree.
24. Accordingly, I find that the absence of the Court order was fatal to the Respondent's application for review dated 20th June, 2025. Without an identifiable Court order, I find that there was nothing for the lower Court to review, and therefore, the Respondent's application dated 20th June, 2025, asking the Court to review the monthly maintenance from Kshs.20,000.00/= to Kshs.10,000.00/=, was misplaced. For these reasons, the lower Court should not have entertained the application for review because there was no Court order to review in the first place.
25. I therefore allow the appeal, although on different grounds, and set aside the ruling of the lower Court delivered on 28th June, 2025.

What Interim Reliefs are available to the Appellant?

26. In the previous paragraphs, I have already found that the lower Court did not make a determination on the Appellant's application dated 10th April, 2025 in which she sought interim maintenance orders against the Respondent. In particular, I have also held that the lower Court did not make an interim order directing the Respondent to pay Kshs.20,000.00/= per month in child maintenance, payable on the 5th of each Month.

27. However, I note that the issue at hand concerns the welfare of a Minor. The guiding principles when considering matters concerning children's welfare are found in the Constitution, which requires that the best interests of the child be of paramount importance. **Article 53(2) of the Constitution** provides:

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

28. The same principles are echoed in **Section 4(2) and 3(b) of the Children Act, 2022** that provides that:

(2) 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.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration... to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

29. Based on the above provisions, this Court is enjoined to consider the best interests of the minor, in matters that

concern a child. It is bound to ensure that its decisions safeguard and promote the rights and welfare of the child.

30. This instant matter concerns a child, and therefore the above constitutional and statutory requirements bind this Court. Accordingly, I find that it is in the best interest of the child to make an interim order directing the Respondent to pay monthly maintenance towards the child's welfare pending the hearing and determination of the matter at the lower Court.

31. Nonetheless, in arriving at the interim figure, this Court has warned itself against prejudicing the determination of the matter at the lower Court, which is still seized with the main suit. I will thus not comment on the financial capacity of the parties herein as well as the documentary evidence filed by the parties to demonstrate their financial abilities.

32. In the interest of justice, and without prejudice to the matter pending at the lower Court, I find that the Respondent should be paying Kshs.10,000.00/= monthly to the Appellant for the Maintenance of the minor pending the

hearing and determination of the main suit at the lower Court.

Disposition

33. The Appeal succeeds, although on different grounds.

34. These are the final orders of the Court;

a) The lower Court ruling delivered on 28th June, 2025, and all consequential orders, is hereby set aside.

b) The Respondent is hereby ordered to pay Kshs.10,000/= monthly to the Appellant for the Maintenance of the minor pending the hearing and determination of the main suit at the lower Court.

c) No order as to costs for this Appeal.

35. Orders accordingly.

DATED, DELIVERED and SIGNED at NAIROBI through the Microsoft Teams Online Platform on this 19TH day of MARCH 2026.

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HON C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Advocate Mwangi for the Appellant

No attendance for the Respondent

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