



**MK v BKW (Civil Appeal E209 of 2025)
[2026] KEHC 5660 (KLR) (Family) (30 April 2026) (Ruling)**

Neutral citation: [2026] KEHC 5660 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

CIVIL APPEAL E209 OF 2025

H NAMISI, J

APRIL 30, 2026

BETWEEN

MK APPELLANT

AND

BKW RESPONDENT

RULING

1. This Court is called upon to determine a procedural contest that lies at the intersection of strict civil procedure and the overarching constitutional imperative of child welfare. Before me is a Notice of Preliminary Objection dated 10 February 2026, filed by the Respondent. The Preliminary Objection seeks to strike out the Appellant's Appeal dated 11 December 2025 in its entirety, alongside the consequential Notice of Motion dated 17 December 2025, on the assertion that the appeal is premature, incompetent, and an abuse of the court process.
2. The Appellant, through his Notice of Motion dated 17 December 2025, moved this Court seeking interim access and physical custody of the minor child, W.M.K., for the second half of the Christmas school holiday period, from 23 December 2025 to 4 January 2026. The Appellant's motion is predicated on the contention that the subordinate court, rather than issuing clear interim protective and access orders, abdicated its mandate by directing the hostile parents to informally work out access modalities, thereby effectively denying the Appellant access to the minor.
3. A judicious resolution of this matter necessitates a brief recourse to the factual matrix from which this appeal emanates. The parties are the biological parents of a male child born on 14 May 2021. Following a brief period of cohabitation, the parties separated in January 2023, initiating a deeply polarized and adversarial co-parenting relationship. The minor has predominantly remained under the actual custody of the Respondent, prompting the Appellant to institute Milimani MCCHCC No. E1455 of 2024 seeking defined access and custody rights.



4. The record of the subordinate court reveals an extensive investigative process. On 6 August 2024, the trial court directed the preparation of a comprehensive Children Officer's Report to aid the court in determining the best interests of the minor. The resultant report, filed by the Westlands Sub-County Children's Officer, provided an exhaustive socio-economic and psychological evaluation of the family unit. The report concluded that both parents are capable and fit, formally recommending that they share joint legal custody, that actual custody remain with the Respondent, and that the Appellant be granted structured access on alternate weekends and for half of all school holidays.
5. Despite this recommendation, the litigation remained highly contentious. On 3 December 2025, the trial court issued a specific directive prohibiting the Respondent from removing or transporting the minor outside the jurisdiction of the court without the written consent of the Appellant or leave of the court. The Appellant subsequently filed complaints alleging that the Respondent wilfully violated this order by unilaterally relocating the child to Laikipia County.
6. The immediate catalyst for the present appellate proceedings occurred during a virtual sitting of the Children's Court on 8 December 2025. The trial court heard the parties regarding pending applications for holiday access. The extracted court order from that session indicates the following directives:
 - i. That the application be canvassed by way of written submissions.
 - ii. That parties are granted 14 days each.
 - iii. That parties to work out access modality during Christmas holidays.
 - iv. That the court is currently on transfer. The new court will handle the matter on 19 January 2026.
 - v. That the matter be placed before the Chief Magistrate.
7. Aggrieved by these directions—specifically the directive to work out access modality which he claims amounted to a de facto denial of his urgent plea for holiday access—the Appellant filed the present appeal on 11 December 2025, followed swiftly by the contested Notice of Motion seeking direct intervention by this court.
8. The Court directed the parties to file written submissions to canvass the Preliminary Objection, which they duly complied with. I have carefully distilled the arguments advanced by both parties.

The Case for the Respondent / Objector

9. The Respondent anchors her Preliminary Objection on four primary pillars.
10. The Respondent contends that the appeal is premature because it arises from what she characterizes as ex parte directions issued on 8 December 2025. She argues that the Appellant was mandated under Order 51 Rule 15 of the Civil Procedure Rules to first apply to the trial court to set aside or vary the ex parte order before invoking the appellate jurisdiction of this Court. By failing to do so, the Appellant is accused of abusing the court process.
11. The Respondent posits that the directions issued by the trial court were merely case-management directives, such as filing submissions and exploring parental coaching, and are not final, appealable orders. Relying on Section 75 of the *Civil Procedure Act*, the Respondent argues that these directions do not fall within the strict statutory ambit of appealable orders. She cites the High Court decision in *JCK v EC (Children's Appeal Case E038 of 2024) KEHC 11964 (KLR)* for the proposition that appeals must strictly follow a final judgment or a substantive ruling.



12. The Respondent submits that entertaining this appeal would offend the principle of judicial hierarchy, effectively allowing the High Court to act as a court of first instance for interlocutory orders, thereby encouraging forum shopping and undermining the subordinate court's authority.
13. Consequently, the Respondent urges this court to find that the appeal is fatally defective and incapable of being remedied, praying that the Preliminary Objection be upheld and the appeal struck out with costs.

The Case for the Appellant / Respondent to the Objection

14. The Appellant fiercely opposes the Preliminary Objection, characterizing it as legally misconceived and incompetent. The Appellant's riposte is anchored on the following grounds:
15. The Appellant submits that the Respondent's objection does not raise a pure point of law as required by the landmark case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd EA 696*. The Appellant argues that the objection is founded on contested factual assertions—specifically, the Respondent's erroneous classification of the 8 December 2025 order as an *ex parte* direction, whereas the court record shows it was an *inter-partes* hearing.
16. The Appellant contends that the Respondent's reliance on section 75 of the *Civil Procedure Act* is fundamentally flawed. In matters concerning minors, section 99 of the *Children Act* confers a broader appellate right, allowing appeals from any civil proceedings in the Children's Court. The Appellant argues that the trial court's directions had a substantive, immediately prejudicial effect by deferring urgent welfare decisions, thus rendering them appealable.
17. Drawing upon Article 53(2) of *the Constitution* and section 8 of the *Children Act*, the Appellant submits that children's matters are *sui generis*. He cites *SM v DK & another (Civil Appeal 120 of 2023) KEHC 162 (KLR)* to demonstrate that the High Court routinely intervenes in interim access orders where the lower court fails to properly secure the child's best interests. To uphold the Preliminary Objection, he argues, would elevate procedural technicalities over the substantive welfare of the minor.

Analysis & Determination

18. This Court distils the following issues for determination:
 - i. Whether the Notice of Preliminary Objection dated 10 February 2026 meets the jurisprudential threshold of a valid preliminary objection in law;
 - ii. Whether the appeal is premature and violates the doctrine of exhaustion of remedies, specifically concerning Order 51 Rule 15 of the Civil Procedure Rules;
 - iii. Whether the directions issued by the trial court on 8 December 2025 are capable of founding an appeal to the High Court, particularly when evaluated against section 99 of the *Children Act, 2022*, and Article 53(2) of *the Constitution*.
19. The primary procedural threshold that the Respondent must cross is establishing that her Notice of Preliminary Objection is validly constructed in law. The jurisprudence governing preliminary objections in this jurisdiction is not merely persuasive; it is rigid and foundational.
20. The locus classicus on this subject remains the East African Court of Appeal decision in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd EA 696*. In that decision, Law JA articulated the controlling standard: a preliminary objection consists of a pure point of law which has been pleaded,



or which arises by clear implication out of pleadings, and which, if argued as a preliminary point, may dispose of the suit.

21. Sir Charles Newbold P., concurring in the same judgment, provided the definitive negative test that courts utilize to strike down improper objections. He stated that a preliminary objection is akin to a demurrer; it raises a pure point of law that is argued on the strict assumption that all the facts pleaded by the opposite party are correct. The Court explicitly warned:

“It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper practice of raising points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop”.

22. This strict parameter has been unequivocally adopted and repeatedly affirmed by the Supreme Court. In *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* [2014] eKLR, the apex court reiterated the Mukisa Biscuit test, confirming that an objection rooted in contested facts cannot dispose of a suit in limine. Similarly, in *Oraro v Mbaja* [2005] KEHC 3182 (KLR), Ojwang J. (as he then was) observed that any assertion which claims to be a preliminary objection but bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is defective as a matter of legal principle.
23. Applying these settled principles to the Respondent’s Notice of Preliminary Objection exposes a fatal structural defect. The Respondent’s entire objection—that the Appellant failed to exhaust trial court remedies—is inextricably anchored on the factual assertion that the directions of 8 December 2025 were ex parte directions.
24. However, a perusal of the extracted Court Order (Exhibit MWK1) directly contradicts this assertion. The Order, signed by Hon. Jackie Kibosia, explicitly reads:

“This Matter coming up for Hearing of Applications dated 28th November 2025... and upon hearing counsels for both parties: it is hereby ordered...”.

25. The classification of the 8 December 2025 proceedings as ex parte is not an abstract point of law; it is a disputed factual claim that requires evidentiary resolution. Because the Respondent’s objection invites this Court to investigate the record and ascertain the true procedural nature of the subordinate court proceedings, it violently offends the cardinal rule established in *Mukisa Biscuit* and *Oraro v Mbaja*. Therefore, I find that the Notice of Preliminary Objection dated 10 February 2026 is structurally incompetent. It is not a true preliminary objection in law and is liable to be dismissed on this ground alone.

Order 51 Rule 15 and the Doctrine of Exhaustion

26. Even if this Court were to charitably excuse the structural defects of the Preliminary Objection and examine its substantive core, the Respondent’s reliance on Order 51 Rule 15 of the Civil Procedure Rules betrays a misunderstanding of procedural jurisprudence.
27. The Respondent asserts that the Appellant’s failure to apply to the trial Magistrate to review or set aside the directions under Order 51 Rule 15 constitutes a violation of the doctrine of exhaustion, rendering the appeal premature. Order 51 Rule 15 provides succinctly: “The court may set aside an order made ex parte”. The jurisprudence governing this rule was famously laid down in *Shah v Mbogo* EA 116, where the Court established that the discretion to set aside ex parte orders is intended to avoid injustice resulting from accident, inadvertence, or excusable mistake preventing a party from attending court.



28. The fundamental prerequisite for invoking Order 51 Rule 15 is that the impugned order must have actually been issued *ex parte*—meaning in the absence of the opposing party. As established above, the court record confirms that both parties were represented before the trial Magistrate on 8 December 2025. A party cannot apply to set aside an inter-partes order under a rule exclusively designed for *ex parte* orders. Had the Appellant filed an application under Order 51 Rule 15 in the Children's Court, it would have been struck out for procedural incompetence. The Respondent cannot accuse the Appellant of failing to exhaust a statutory remedy that was legally unavailable to him.
29. Regarding the broader doctrine of exhaustion of alternative remedies, the Supreme Court in *Edwin Harold Dayan Dande & 3 Others v Inspector General (Petition 6 of 2022) KESC* affirmed that where legislation establishes a dispute resolution mechanism, courts should generally accord deference to it. However, our jurisprudence uniformly recognizes exceptions to this doctrine, particularly where the alternative remedy is ineffective, illusory, or where there is a real risk of irreparable injury if judicial intervention is delayed.
30. In the context of family law, time is a highly perishable commodity. The Appellant sought holiday access beginning on 10 December 2025. The trial court scheduled the next mention date for 19 January 2026—weeks after the holiday period had expired. Forcing the Appellant to return to the very Magistrate who had just deferred the matter, especially considering the Magistrate was on transfer, would have been an exercise in absolute futility. The doctrine of exhaustion cannot be weaponized to effectively run out the clock on a parent's perishable right to spend holiday time with their child.

Appealability of "Directions" vs. Substantive Child Welfare

31. The most consequential argument advanced by the Respondent is that the directions issued on 8 December 2025 are merely procedural case-management orders and are therefore unappealable under section 75 of the [Civil Procedure Act](#).
32. This argument demonstrates a critical misapprehension of the statutory architecture governing children's matters. The [Civil Procedure Act](#) provides general rules for civil litigation. However, proceedings involving minors are *sui generis* and are governed by the specific framework of the [Children Act, 2022](#). Under the principles of statutory interpretation, *lex specialis derogat legi generali* dictates that the specific provisions of the [Children Act](#) supersede the general provisions of the [Civil Procedure Act](#).
33. Section 99 of the [Children Act](#) regulates the right of appeal in children's matters, stating:

Unless otherwise provided under this Act, in any civil or criminal proceedings in a Children's Court, an appeal shall lie—(a) in the first instance, to the High Court on points of fact and law...
34. The legislature deliberately crafted a wider appellate gateway in the [Children Act](#) to ensure the High Court, exercising its supervisory jurisdiction under Article 165 of [the Constitution](#), can intervene swiftly to safeguard the welfare of minors.
35. To determine whether the Magistrate's directive is appealable, this Court must apply a functional test: what was the substantive effect of the trial court's action? The Appellant moved the court for an urgent interim injunction for holiday access. By directing the hostile parents to work out access modality and adjourning the matter past the end of the holidays, the trial court functionally refused the interim injunction. In high-conflict family litigation, a directive instructing warring parties to informally agree,



without the coercive backing of a court order, is a de facto denial of relief. The practical consequence was the total deprivation of the Appellant's access to the minor for the entirety of the holiday period.

36. This Court is not persuaded by the Respondent's reliance on JCK v EC (Children's Appeal Case E038 of 2024) KEHC 11964 (KLR). That case involved a post-trial appeal challenging the proportional financial distribution of child maintenance following a final custody decree. It is factually and legally distinguishable from the present scenario, which involves the imminent, irreparable loss of perishable time with a child due to a trial court's refusal to issue enforceable interim directions.
37. I am more persuaded by the jurisprudence established in cases such as SM v DK & another (Civil Appeal 120 of 2023) KEHC 162 (KLR). In that matter, the Court did not dismiss an appeal against an interim access order as premature; rather, it intervened substantively to overturn interim orders granted by a Magistrate because they conflicted with the children's school calendar and violated the best interests principle. Similarly, in CK v KA (Civil Appeal E039 of 2023) KEHC 4137 (KLR), the Court asserted its jurisdiction over interlocutory child custody disputes to ensure the minor's welfare remained paramount.
38. These decisions underscore a fundamental tenet of Kenyan family law: a judicial direction that effectively paralyses a parent's right to access during a specific, time-bound period is an order with immediate, substantive, and potentially irreversible consequences on the child's psychological welfare. Such a directive is unequivocally capable of founding an appeal.
39. Accordingly, I make the following orders:
 - i. The Respondent's Notice of Preliminary Objection dated 10 February 2026 is hereby dismissed.
 - ii. The costs of this Preliminary Objection shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 30 DAY OF APRIL 2026

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

for the Applicant: Mr Irungu

for the Respondent: Ms Buluma h/ Miller

Court Assistant: Lucy Mwangi

