



**CS (Suing as Next Friend and Mother of JAZS & BPAPS) v POO & another (Civil Appeal E038 of 2025) [2025] KEHC 5426 (KLR) (Family) (28 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5426 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPEAL E038 OF 2025  
CJ KENDAGOR, J  
APRIL 28, 2025  
IN THE MATTER OF THE CHILDREN ACT  
IN THE MATTER OF JAZS & BPAPS (MINORS)**

**BETWEEN**

**CS ..... APPELLANT  
SUING AS NEXT FRIEND AND MOTHER OF JAZS & BPAPS**

**AND**

**POO ..... 1<sup>ST</sup> RESPONDENT  
DIRECTORATE OF IMMIGRATION SERVICES ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal from the orders of Hon. R. W. Gitau issued on 6th March, 2025 in Nairobi Chief Magistrate’s Children Court, Children Case No. E2334 of 2024)*

**RULING**

1. This ruling concerns an application dated 7<sup>th</sup> March, 2025 filed by the Appellant/Applicant seeking orders of stay of execution. The application is opposed.

**Background**

2. The Applicant and the 1<sup>st</sup> Respondent are the biological parents of the subject minors, JAZS and BPAPS. The Applicant is a German Citizen, while the 1<sup>st</sup> Respondent is a Kenyan Citizen.
3. The Applicant filed a children’s case against the Respondent in the Nairobi Children’s Court. In the Plaintiff, she sought custody orders in her favour with access to the Respondent. She also sought orders for leave to travel and relocate with the children. The pleadings indicate that, at the material time, the



Applicant resided in Nairobi, Kenya, with the minors, while the 1<sup>st</sup> Respondent resides in Germany. The case is pending hearing and determination.

4. The Applicant left Kenya for Abidjan, Côte d'Ivoire, with the minors, and on 6<sup>th</sup> March, 2025, the rial Court made an order directing that she produces the minors within 7 days, failing which she be arrested with the assistance of Interpol.
5. The Applicant was dissatisfied with the orders and appealed to this Court vide a Memorandum of Appeal dated 7<sup>th</sup> March, 2025. She listed the following Grounds of Appeal;
  1. That the Magistrate, without any legal basis, criminalized, post facto, the lawful departure of the Applicant, who is a German citizen, and her two minor children from Kenya, despite the absence of any travel ban or legal restriction preventing such travel as of the 27/2/2025.
  2. That the Magistrate issued orders on the 6/3/2025 based on an application that was served on the Applicant at 6:49 AM on the same date. The matter was scheduled for mention and the application was not listed for hearing or directions, nor was it prosecuted by any of the parties.
  3. That the Magistrate, suo moto, prosecuted the application dated 6/3/2025 and rendered a determination on it without allowing the parties to be heard, thereby denying the Applicant the right to fair hearing and natural justice.
  4. That the Magistrate meted out orders that are manifestly harsh and excessive against the Applicant and her two children by issuing a draconian order that effectively calls for the Applicant's arrest through Interpol when no offence or crime had been committed.
  5. That the Magistrate's order is ambiguous as it does not specify where the children, now lawfully in Abidjan, should be produced and was issued without an opportunity for explanation or a hearing, thereby unfairly prejudicing the Applicant.
  6. That the Magistrate's order is overreach and ultra vires. The Children, who are German citizens, had already lawfully left the Kenyan jurisdiction on the 27/2/2025, and the Magistrate did not have jurisdiction over them as of the 6/3/2025.
  7. That the Magistrate flouted the rules of natural justice and, without being moved by either party, issued an order that amounts to a repatriation order of foreign citizens now domiciled in a foreign jurisdiction.
6. She asked the Court to set aside the orders issued by the lower Court on 6<sup>th</sup> March, 2025. She also asked the Court to remit the Notice of Motion dated 6<sup>th</sup> March, 2025 filed in Nairobi Children Case No. E2334 of 2024, and all further proceedings therein, for hearing on merits before any other Magistrate other than Hon. Rose Gitau, Resident Magistrate.
7. Before the Appeal Court be heard and determined, the Applicant brought the current application dated 7<sup>th</sup> March, 2025 in which she sought the following orders;
  1. Spent
  2. Spent
  3. Spent
  4. That there be a stay of execution of the order dated the 6/3/2025, made by Hon R. Gitau, Magistrate Children's Court Nairobi, pending the hearing and determination of this Appeal.



5. That the order dated the 6/3/2025, made by Hon R. Gitau, Resident Magistrate Children’s Court be set aside.
6. That the costs of this Application be in the cause.
8. The Applicant swore an affidavit dated 7<sup>th</sup> March, 2025 in support of the application. The Respondent filed a Replying affidavit dated 14<sup>th</sup> March, 2025 in which he opposed the application.
9. The application was canvassed by way of written submissions.

### **Applicant’s Written Submissions**

10. The Applicant submitted that, in the exceptional circumstances of the case, this Court should grant a stay of execution of the order pending the hearing and determination of the Appeal. She argued that her application for stay of execution is well founded and meets the threshold required for such an application. She submitted that it is in the best interest of the children to stay the execution pending the hearing and determination of the Appeal. She argued that failure to stay the execution pending the hearing of the appeal will prejudice her ability to provide and take care of the subject minors. She also argued that her looming arrest by Interpol will likely cost her the new job in Abidjan and render her jobless to the detriment of the children’s welfare.

### **Respondent’s Written Submissions**

11. The Respondent submitted that the Application should not be allowed because it failed to meet the threshold required for granting a stay of execution. He argued that the Applicant has failed to demonstrate that she has an arguable appeal and that the refusal of a stay of execution would render the appeal nugatory. He also argued that the Applicant failed to demonstrate that substantial loss may result unless a stay of execution and stay of proceedings order is made. Lastly, he argued that the application for stay of execution should not be allowed because the Applicant has failed to provide any security for the due performance of the order of the Children’s Court as required by the law.

### **Issues for Determination**

12. Having considered the Grounds listed in the application, the respective affidavits filed by the parties, and their submissions, I am of the view that there is only one issue for determination;

#### **a. Whether the Applicant has met the threshold for grant of stay of execution orders.**

13. The law governing applications for stay of execution is Order 42, Rule 6 of the *Civil Procedure Rules*. The Rule provides that for a stay of execution to issue, the Applicant must prove that he/she is likely to suffer substantial loss should the prayer be rejected, that the application for stay has been made without unreasonable delay, and that security for due performance of the decree has been provided.
14. The Court in *RWW vs. EKW* [2019] eKLR addressed its mind to the purpose of a stay of execution order pending appeal and stated as follows;

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the applicant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”



15. Courts have created a special jurisprudence on stay of execution in children matters. The prevailing jurisprudence is that the threshold for granting a stay of execution in children matters differs slightly from the threshold applicable in ordinary disputes. The special rule is that Courts must exercise extreme caution in children matters before granting stay of execution orders. This was restated in [\*BRO v WJNW \(Suing as Mother and next friend of DJO \(Minor\)\)\*](#) [2020] eKLR, where the court held as follows;
38. It is trite that in children matters, courts should exercise extreme caution before granting stay of execution orders. This is because issues of maintenance do affect the welfare and livelihood of a minor. To allow stay will imply stoppage of some sphere of life e.g a child will not eat, dress drink or have shelter. The orders sought against the minor’s mother have a direct negative effect to the welfare of the minor whose interest ranks first in priority to those of the parents.”
16. This special jurisprudence was recently advanced by the Court in [\*Akello v Wamuri \(Miscellaneous Civil Application E122 of 2022\)\*](#) [2024] KEHC 3610 (KLR) (8 March 2024) (Ruling), where the Court observed as follows;
- “26. While considering stay of execution in respect to children matters, beside the above, the Court has to consider the best interest of the child. The applicant is expected to demonstrate that the minors will suffer if a stay is not granted.
27. It is now trite that, in applications for stay in respect of decrees or orders made in matters involving children, the welfare of the children in question be given utmost consideration.”
17. This principle was also alluded to by the Court in [\*Bhutt vs. Bhutt\*](#), Mombasa HCCC NO. 8 of 2014 (O.S.) where the Court observed 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 an overriding consideration of the best interest of the child in accordance with the injunction of Article 53(2) of [\*the Constitution...\*](#)”
18. Guided by the above authorities, I have analyzed the evidence to determine the best interests of the minors. In my view, the orders sought against the minors’ mother (the Applicant) have a direct effect on the welfare of the minors, whose interest ranks first in priority to those of the parents. It is not denied that the minors have been under the Applicant’s physical custody and that they had relocated with her before. I note that the minors have already been enrolled in their new schools and are hopefully adapting. The orders were issued in the interim, and the case is still pending. Denying a stay could result in ongoing back-and-forth, which might not benefit the parties involved. This uncertainty and potential disruption to the minors would not be in their best interest.
19. Lastly, Courts have held that an Applicant for stay of execution in children matters ought to demonstrate that the minors will suffer substantial loss if the stay is not granted. This was alluded to in



*Akello v Wamuri (Miscellaneous Civil Application E122 of 2022)* [2024] KEHC 3610 (KLR) (8 March 2024) (Ruling), where the Court held as follows;

“On the ground of substantial loss, the applicant has not demonstrated on what loss he will suffer if the stay is not granted, in any case the substantial loss that he should demonstrate is how the minors will suffer substantial loss which in this case, none has been availed.”

20. The Applicant has demonstrated that she is likely to suffer substantial loss if the stay is not granted. She has demonstrated that her arrest by Interpol will likely cost her the new job in Abidjan and render her jobless. She has also demonstrated that the minors will be direct victims and will suffer substantial loss if the stay is not granted. She averred that she is the primary provider for the minors and that the loss of the current job will prejudice her ability to provide for the minors. She stated that her new job has assured her housing, schooling for the minors, and robust health insurance, which would certainly mean better living standards for the minors.
21. This Court is also satisfied that the application was made without delay. The lower Court made the order on 6<sup>th</sup> March, 2025 and the application for stay of execution was filed the next day on 7<sup>th</sup> March, 2025. Lastly, I have considered whether the refusal of the stay will render the appeal nugatory. I have seen all the 7 Grounds of Appeal listed in the Memorandum of Appeal. I can safely conclude that the Applicant is questioning the legality and lawfulness of the order, and particularly the call for her arrest by Interpol. If the stay is not granted, the Applicant may be arrested and returned to Kenya, rendering her appeal an academic exercise.
22. Upon considering the unique circumstances of this case and the best interests of the children, this Court opines that the solution lies in expediting the appeal process. In the end, I find that the application for stay of execution is merited and is hereby allowed. The Applicant’s appeal will be heard on a priority basis.

### **Disposition**

23. These are the final orders of the Court;
  - a. The Prayer No. 4 in the application is allowed.
  - b. The Prayer No. 5 in the application is disallowed.
  - c. A stay of execution of the order dated the 6<sup>th</sup> March, 2025, made by Hon R. W. Gitau, Magistrate, Children’s Court Nairobi, is hereby granted pending the hearing and determination of this Appeal.
  - d. The Applicant shall file the Record of Appeal within 30 days of this Ruling.
  - e. The Appeal will be heard on 18<sup>th</sup> June, 2025.
  - f. This being a children’s matter, I make no order as to costs.
24. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 28<sup>TH</sup> DAY OF APRIL, 2025.**

.....

**C. KENDAGOR**

**JUDGE**



In the presence of:

Court Assistant: Beryl

Ms. Mbanya, Advocate for the Applicant

Ms. Mukuhi, Advocate for the Respondent

