



**KOG & another v ATP (Family Appeal E012 of 2025)
[2025] KEHC 5760 (KLR) (Family) (28 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5760 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
FAMILY APPEAL E012 OF 2025
CJ KENDAGOR, J
APRIL 28, 2025**

BETWEEN

KOG 1ST APPELLANT

RAG 2ND APPELLANT

AND

ATP RESPONDENT

(Being an appeal from the Ruling and Order of Hon. R. Gitau, R.M. delivered in the Children Court Nairobi Civil Case No. E366 of 2020 delivered on 7th January, 2025.)

RULING

1. This Ruling is with regard to the application dated 23rd January, 2025 filed by the Appellants. The Application is opposed.
2. The 1st Appellant and the Respondent are the biological parents of L.O. and S.M., minors. The 2nd Appellant is the minor's paternal grandmother. A dispute arose on custody, access and maintenance, and the Respondent sued the Appellants before the Children Court.
3. The Parties entered into a Consent That marked the matter as settled. The said consent was adopted as an order of the Court, and an order was issued on 22nd September, 2021 in the following terms;
 1. The Plaintiff (Respondent) shall have the actual custody of the minors.
 2. That parties shall have joint legal custody.
 3. That the 1st Defendant (1st Appellant) shall access the minors via video call any time from 5.00 p.m. to 9.00 p.m. during school days and 9.00 a.m. to 9.00 p.m. during school holidays.



4. That when the Defendant is in Kenya, he shall access the minors every Saturday of the month from 10.00 a.m. and return them to the Plaintiff on Sundays at 5.00 p.m.
 5. That when 1st Defendant is in Kenya, he shall access the minors for half of the school holidays.
 6. That the 2nd Defendant (2nd Appellant) shall have access of the minors every last Saturday of the month from 10.00 a.m. to 4.00 p.m.
 7. That the 1st Defendant shall cater for the school fees and school related expenses for the minors.
 8. That as long as the 1st born minor remains in the current secondary school, the 1st Defendant shall continue to pay school related expenses at a rate of Kshs.40,000/= per year and the Plaintiff shall pay the balance.
 9. However, if the minor transfers to a public school, the 1st Defendant shall resume to cater for full school fees.
 10. That the Plaintiff shall cater for the minor's medical expenses as covered under her employment medical scheme and the 1st Defendant shall cater for any medical expenses not covered under the Plaintiff's medical cover.
4. The 1st Appellant filed an application dated 12th August, 2024 seeking the setting aside/review/discharge of the consent order and the lifting of warrants of arrest That had been issued against him and That fresh orders of maintenance and access to the minors be issued. The application also sought to have the 2nd Appellant's name struck out of the proceedings.
 5. The trial Court declined to grant the orders sought in the application, and the Appellants lodged the appeal herein, which is pending hearing and determination. The appeal presents the following grounds:
 1. That the learned magistrate erred in law and in fact by refusing to review and/or set aside the Consent Order dated 16th August, 2021 despite being furnished with evidence That the 1st Appellant was unemployed and could no longer comply with the same.
 2. That the learned magistrate erred in law and in fact by declining to lift and/or set aside the Warrants of Arrest against the 1st Appellant yet the said Warrants were hinged on the Consent Order dated 16th August, 2021, and were grossly exaggerated.
 3. That the learned magistrate erred in law and in fact by failing to take into consideration That the 1st Appellant has discharged both his legal and evidential burden in proving That he was unemployed and proceeded to shift the legal and evidential burden on the 1st Appellant to disprove the Respondent's averment That the 1st Appellant was employed despite the Respondent not furnishing the Court with any evidence to prove her claim.
 4. That the learned magistrate erred in law and in fact by failing to strike out the 2nd Appellant's name from the suit despite the 2nd Appellant's relevance not being demonstrated.
 5. That the learned magistrate erred in law and in fact by reaching a decision That is contrary to the facts and evidence presented to her.
 6. That the learned magistrate erred in law and in fact by basing her decision on documents/pleadings not verified and/or properly filed.



7. That the learned magistrate erred in law and in fact by reaching a decision That is not in the best interest of the children.
6. The Appellants have moved the Court on an application dated 23rd January, 2025 which is the subject of this Ruling. The Application seeks the following orders;
 - i. Spent
 - ii. Spent
 - iii. That there be a stay of execution of the Warrants of Arrest dated 8th March, 2024, issued in MCCC No. E366 of 2021, pending the hearing and determination of this Appeal.
 - iv. That the costs of this Application be provided for.
7. The Application is supported by an Affidavit sworn on the same date as the Application and a Supplementary Affidavit sworn on 28th February, 2025.
8. The Respondent filed a Replying Affidavit sworn on 26th February, 2025 in opposition to the application.
9. The Appeal was canvassed through written submissions, which both parties filed.

The Appellants' case.

10. The 1st Appellant argues That he has a valid appeal with a good chance of success.
11. He contends That the stay orders he is requesting would be in the best interest of the minors and That these orders would not negatively impact the Respondent in any way.
12. Additionally, he points out That the financial calculations contested in the trial court were made in his absence. He asserts That the figures in question were not properly accounted for and That they are unaffordable for him, considering he is currently unemployed.

The Respondent's case.

13. The Respondent argues That the stay orders sought are a delay tactic being used by the 1st Appellant and made in bad faith.
14. She argues That the figures were computed in court and That the 1st Appellant had acknowledged being in arrears, had made a partial payment, and committed to paying the balance within 5 months.
15. The Respondent invited the Court to note That the 1st Appellant had neither made an offer to settle part of the claim nor provided any security for it..
16. Having considered the application, the respective affidavits and submissions filed by the parties, there are two issues for determination;
 - a. Whether the Applicants have met the threshold for the grant of stay of execution orders as sought in the application dated 23rd January, 2025;
 - b. Who should bear the costs of the application.
17. The law governing applications for stay of execution is Order 42 Rule 6 of the Civil Procedure Rules. The Rule provides That for stay of execution to issue; the applicant must prove That he 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.

18. 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 appellant 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.”

19. I have reviewed the ruling issued by the lower Court, which is now under appeal. The warrant of arrest was issued following a Notice to Show Cause, which the 1st Appellant challenged, asserting That he had not been properly served with the necessary documentation. This Application was brought timely, and the grounds of appeal are arguable.

20. The amounts related to the consent judgment That was entered. The 1st Appellant did not dispute That he was in arrears; instead, he challenged the calculation and the demand for payment, claiming That this changes in employment circumstances were not taken into account.

21. The 1st Appellant contends That this arrest could result in incarceration and substantial loss.

22. The stay orders, whether granted or not, affect not only the 1st Appellant personally but also have broader implications That must be examined. It is crucial to consider the perspectives of the Respondent, who has shared her concerns as the primary caregiver, and, most importantly, the perspectives of the minors involved in this case.

23. In *Akelo v Wamuri (Miscellaneous Civil Application E122 of 2022)* [2024] KEHC 3610 (KLR) (8 March 2024) (Ruling), 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.”

24. The Court has a fundamental duty to prioritize the best interests of these minors, ensuring That their well-being is at the forefront of any decisions made.

25. I have carefully considered the concerns raised by the 1st Appellant regarding the potential consequences of granting the stay orders. The amounts in question are substantial, and it seems That the 1st Appellant did not comply with the consent order for an extended period. This situation prompted the Respondent to pursue enforcement. It demonstrates bad faith if a parent must wait until enforcement actions begin before complying with or applying for review of the existing orders.

26. While the amounts in question are substantial, granting a stay may also negatively impact the welfare of the minors, as the maintenance orders are intended to support their upbringing. The ongoing care of the minors cannot be interrupted or delayed due to the pending proceedings; their welfare continues to be a priority That demands immediate attention and action.



27. The 1st Appellant has not presented any proposal for payment of any part of the sum or offered any form of security Thatwould guarantee adherence to the order. This oversight is significant, as the Respondent and the minors are entitled to receive the maintenance money outlined in the Court order, which remains in effect unless set aside.
28. Upon reflecting on the delicate balance in this case, I conclude Thatgranting the stay of execution is not in the best interests of the minors. The warrants can be resolved through the payment specified in the Court order. If the Court later determines Thatthese payments were not owed and finds in favour of the Appellants, the Respondent can be ordered to refund the amount.
29. The Application dated January 23, 2025 is dismissed. I hereby order Thateach party bear their own costs related to the application.
30. The Parties are directed to prioritize and expedite the compilation of the Record of Appeal and to schedule the Appeal hearing so Thatthe contested issues are addressed with the urgency they demand.
31. It is so ordered.

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

C. KENDAGOR

JUDGE

