



REPUBLIC OF KENYA



KENYA LAW
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**In re JSK (Minor) (Civil Appeal E144 of 2023)
[2025] KEHC 5427 (KLR) (Family) (28 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5427 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E144 OF 2023
CJ KENDAGOR, J
APRIL 28, 2025**

BETWEEN

JM 1ST APPELLANT

RG 2ND APPELLANT

AND

MWS RESPONDENT

*(Being an appeal from the Judgment and Orders of Hon. A.G. Munene,
Principal Magistrate, Chief Magistrate's Court, Children Court Nairobi,
delivered on 6th December, 2023 in Children Case No. E352 of 2022)*

RULING

1. This Ruling concerns the Application dated 13th December, 2023 filed by the Appellants and Application dated 30th October, 2024 filed by the Respondent. The Applications are opposed. In this Ruling, the term Applicant/s refers to the Appellants.
2. The Respondent, MWS, is the biological father of the subject minor, JSK. The mother of the minor passed on in March, 2016, and the minor has been in the actual custody of his maternal aunt Judy Muchwe, the 1st Applicant herein. Ruth Gatoto, the 2nd Applicant, is the minor's maternal grandmother.
3. A dispute arose over access and custody of the minor, and the Respondent sued the Applicants at the lower Court. He sought full physical custody of the minor and sole legal custody. He also sought an order to prevent any person from taking the minor outside the Court's jurisdiction without his consent.



4. The Applicants filed a Statement of Defence and Counterclaim, denying the Respondent's claim. Generally, they stated that the Respondent did not deserve to be given the prayers he sought and that he was still a stranger to the minor. In the counter-claim, the Applicants prayed for an order awarding full custody of the minor to his maternal grandparents. They also sought an order refraining the Respondent from interfering with the minor's right to a peaceful life whilst in school and at home.
5. The trial Court delivered a judgment on 6th December, 2023 in favour of the Respondent. It found that the Applicants had not demonstrated why the Respondent, who is the biological father of the minor, should not be given full custody of his child. It granted him sole legal and physical custody of the minor and directed that the minor be handed over to the Respondent by 31st December, 2023. The Court also ordered that before the handover, the Respondent was required to facilitate counselling to prepare the child for the transition. Lastly, it held that the parties were at liberty to come up with modalities of access to the minor by the maternal grandparents.
6. The Applicants were dissatisfied with the judgment and orders of the lower Court and appealed to this Court vide a Memorandum of Appeal dated 13th December, 2023. They listed the following Grounds of Appeal;
 1. The Learned Trial Magistrate erred in law and in fact by granting the Respondent sole legal custody of the minor herein while as the Respondent does not have an established relationship with the minor.
 2. The Learned Trial Magistrate erred in law and in fact by ordering that the minor herein be handed over to the Respondent by the 31/12/2023, less than three weeks from the date of the judgment while as the minor has no established relationship with the Respondent.
 3. The Learned Trial Magistrate erred in law and in fact by failing to consider the Counter-Claim by the 2nd Appellant dated 17/8/2022.
 4. The Learned Trial Magistrate erred in law and in fact by failing to take the minor's evidence and opinion during trial, despite the Appellant's listing him, the minor as a witness and requesting for him to give evidence.
 5. The Learned Trial Magistrate erred in law and in fact by failing to analyse and distinguish the two Children's officers reports filed on record from the Ruiru Children's officer where the minor lives and Kisumu Children's officers where the Respondent intends to move the minor.
 6. The Learned Trial Magistrate erred in law and in fact by issuing a judgment that is completely against the best interest of the minor.
7. They requested the court to allow the appeal and set aside the judgment and orders of the subordinate Court given on 6th December, 2023. They also asked the Court to allow the Counter-Claim dated 17th August, 2022.
8. Before the appeal could be heard and determined, the Applicants brought an application under certificate of urgency dated 13th December, 2023. They sought the following orders;
 1. Spent.
 2. Spent.
 3. That this Honourable court be pleased to order a stay of execution of the Judgment and orders delivered by the subordinate court on 6/12/2023 in Children's Case No. E3XX of 2022 pending the hearing and determination of the appeal herein.



4. That the costs of this application be provided for.
9. In the application, the Applicants argued that the minor will be gravely prejudiced if the orders of the subordinate are not stayed pending hearing of the appeal. They argued that the Respondent has no established relationship with the minor and that they are only getting to know each other. They argued that it is not in the best interest of the minor to have him handed over to the Respondent immediately and that it would harm the minor physically, psychologically, and emotionally. They stated that they have an arguable appeal with a high chance of succeeding and that the Appeal will be rendered nugatory if the stay of execution is not granted. They also stated that they have brought the application within a reasonable time.
10. The application was supported by an affidavit sworn by the 1st Applicant, Judy Muchwe, dated 13th December, 2023. She stated that the minor came to know of the Respondent in the year 2021. She stated that the Respondent has not been present or participating in the minor's upbringing. She stated that she had pleaded with the Respondent to build a relationship with the child gradually, but the Respondent was adamant about taking custody immediately. She stated that she has raised the minor together with her 2 children since 2016 and that moving the minor to the Respondent within 3 weeks, as ordered by the Court, would be prejudicial to the minor's wellbeing.
11. The Respondent filed a Replying affidavit dated 30th October, 2024 in which he opposed the Applicants' application dated 13th December, 2023. He stated that the Applicants are raising issues that the trial Court has already determined, and as such, the matter ought to urgently proceed to the main appeal so that all the parties can ventilate their issues for this Court to make a final determination. He stated that the stay should not be granted because it was an attempt to frustrate and deny him his right to provide parental responsibility.
12. Before the Applicant's application could be heard and determined, the Respondent brought an application under a certificate of urgency dated 30th October, 2024. He sought the following orders;
 1. Spent.
 2. Spent.
 3. Spent.
 4. That the [Applicants] be compelled to grant the [Respondent] alternating weekend physical custody of the minor during school going periods, 50% of the holiday available during school break and daily virtual access, BRAITTON WENYAH WERUNGA, pending the hearing and determination of this Appeal.
 5. That the Director of Directorate Immigration Services is hereby ordered to disallow the travel of the minor, BRAITTON WENYAH WERUNGA, beyond the jurisdiction of this Honourable court unless so authorized by this Honourable Court or upon the Consent of the Respondent being issued in writing to the Director of Directorate Immigration Services.
 6. Spent.
 7. That this Court does grant an Order allowing the Applicant to file his response to the main appeal once he has physically interacted with the minor.
 8. That each party bears its own costs borne out of this Application.
13. In the Application, the Respondent argued that the Applicants had already attempted to remove the minor out of the jurisdiction of this Court during the main trial and were thwarted once he obtained



an Order barring the removal of the minor from the Court's jurisdiction. He argued that the minor's whereabouts are unknown and he last saw the minor on 23rd August, 2022. He also argued that the minor's current school and current physical residence were unknown and that his physical, mental, and emotional welfare was deteriorating due to the absence of his father in his life. He argued that the Court's urgent intervention is required and that the judgment will be rendered useless if the minor is moved out of the Court's jurisdiction.

14. The Respondent's application was supported by an affidavit dated 30th October, 2024 and sworn by the Respondent. He stated that his emails and communications to the Applicants seeking physical access to the minor have proved futile and the Applicants have been non-responsive. He also stated that the minor has since been moved from his previous school to unknown school. He also stated that the Applicants have concealed the whereabouts of the minor and that he is unable to supervise quality of education and participate in his welfare as his biological parent. He stated that he was eager to spend time, bond, closely monitor the welfare and cater for the minor as his father.
15. Subsequently, the Applicants filed an affidavit dated 13th November, 2024, sworn by the 2nd Applicant. The affidavit was to serve two purposes. It was to serve as a Further Affidavit to the Respondent's Replying Affidavit dated 30th October, 2024 as well as a Replying Affidavit to the Respondent's Application dated 30th October, 2024. She opposed the Respondent's application and reiterated that the Respondent and the minor were just beginning to know each other. She stated that she is living with the minor in the United Kingdom and that the minor is of good health and attends school there. She also stated that the Court should hear the minor himself and ascertain his wishes because he is now 13 years and can express himself before the honourable Court.
16. The Respondent filed a Supplementary affidavit dated 26th November, 2024 and sworn by him. He stated that the minor was illegally whisked away even before this appeal was filed and is now out of this Court's jurisdiction which was unfair to him and the minor. He also stated that the Applicants have not provided proof of consent as to how the Directorate of Immigration Services allowed the travel of the minor without his parental consent. He stated that the Applicants have deliberately not disclosed what name the minor is formally using in the United Kingdom and the name used by the minor to leave the jurisdiction of the Court.
17. He stated that he is unable to enjoy physical access as ordered by this Court on 17th January, 2024 and that the Applicants and their Advocate on record deliberately failed to disclose that the minor was already out of the jurisdiction of this Court.

He stated that he was at a loss as to how this Court intends to enforce his rights of access, its orders, and the best interests of the minor, whereas the minor and one of the perpetrators are outside the Court's jurisdiction. He stated that the Applicants ought to be compelled to file their copies of National IDs and Passports (both in relation to Kenya and if any are held with the UK) to assist with tracing of the minor with security agencies in Kenya and in the UK.
18. Directions were taken for the hearing and determination of the two applications simultaneously. Despite being given the opportunity to do so, the parties opted not to file submissions.
19. Having considered the two applications and the respective affidavits filed by the parties, there two issues for determination.
 - a. Whether the Applicants have met the threshold for grant of stay of execution orders as sought in the application dated 15/12/2023.
 - b. Whether the Respondent's prayers in his application dated 30/10/2024 should be granted.



Whether the Applicant has met the threshold for grant of stay of execution orders

20. 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.
21. The Court in *RWW v 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.”
22. 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 in children matters must exercise extreme caution 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.”
23. 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;
- QUOTE{startQuote “}
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. This principle was also alluded to by the Court in *Bhutt v 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...*"

25. This Court has analyzed the facts to determine the best interests of the minor in this case. I have read the judgment to ascertain whether its implementation would have a manifest or prima facie possible negative effect on the minor's well-being, while exercising restraint, as the main appeal is pending hearing. The lower Court ordered that the minor was to be taken for counselling in the presence of the 1st Applicant before the handover to the Respondent. I note that the judgment was rendered on 6th December, 2023 and that the Applicants were to hand over the minor by 31st December, 2023. In my calculation, the Applicants had almost 25 days to prepare the minor for the transition.
26. The Applicants argued that the transition period was too short and that the handover should have been gradual. They argued that the Respondent was more or less a stranger to the minor and needed more time for the transition. This Court is being invited to determine whether it was in the best interest of the minor to have him handed over within 25 days after the order. I have carefully considered this question to see if the implementation of the order would have negatively affected the minor psychologically and emotionally.
27. I have noted the minor's age at the time the order was made. The minor was born on 30th May, 2011, and the order was made on 6th December, 2023. This means that at the time of the judgment, the minor was 12 ½ years old. In my view, a child of that age is able to understand and appreciate what is happening around him/ her, and 25 days was, prima facie, enough time to prepare the child for the transition.
28. I have also seen photographs provided by the Respondent capturing the several times they have spent together. One of the photographs taken in December 2021 features the Respondent and the Minor. In my assessment, the minor appears happy in the company of the Respondent, his father. There is also another undated photo featuring the Respondent and the minor and the latter looks happy in the company of his father. On the face of it, it appears to this Court that the minor and the Respondent are not strangers, and thus, the transition period granted by the Court was sufficient in the circumstances.
29. Lastly, Courts have held that an Applicant for a 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.”
30. The Applicants have not demonstrated that they are likely to suffer substantial loss if the stay is not granted. They have also not demonstrated that the minor will suffer substantial loss if the stay is not granted. I have seen the judgment of the lower Court. It stated that the parties are at liberty to come up with modalities of access to the minors by the maternal parents. The Applicants did not demonstrate that the minor stood to be disadvantaged by being in the custody of the Respondent, the father.
31. Lastly, I have considered whether the refusal to grant the stay will render the appeal nugatory. I have seen all 7 Grounds of Appeal listed in the Memorandum of Appeal. I can safely conclude that the Applicants are questioning the legality and lawfulness of the judgment, and particularly the lower Court's decision to give the Respondent full actual custody of the minor. In my view, if the stay is not granted, the Appeal will not be rendered nugatory. This is because, in the event that the Appeal succeeds, this Court will order that the minor be handed over back to the Applicants.



32. For these reasons, I find that the Applicants have not met the threshold for the grant of stay of execution orders. Their application dated 13th December, 2023 is hereby dismissed.

Whether the Respondent's prayers in his application dated 30/10/2024 should be granted

33. Now, we turn to the Respondent's application dated 30th October, 2024. The issue is to determine whether the Respondent's prayers in the said application should be granted. In my view, Prayer No. 4 of the Respondent's application has been extinguished by my finding on the Applicant's application. Having dismissed the Applicants' application, this prayer automatically cannot stand.
34. The last issue to determine is whether the Prayer No. 5 of the Respondent's application should be granted. In this prayer, the Respondent is asking this Court to issue an order directed to the Director of Directorate Immigration Services to disallow the travel of the minor outside the Court's jurisdiction unless so authorized by this Honourable Court or upon the Consent of the Respondent being issued in writing to the Director of Directorate Immigration Services. This Court notes with concern that this particular prayer cannot be issued because the minor has already been relocated to the United Kingdom.
35. This Court also notes that the Applicants have not approached this Court with clean hands. An analysis of the evidence placed before the court shows bad faith on the part of the Applicants and a deliberate scheme to frustrate the Respondent and circumvent the jurisdiction of the Court. This is manifest considering the circumstances under which the minor was taken out of the country to the UK.
36. I note that, during the pendency of the children case, the trial Court had made an order prohibiting the Applicants from taking the minor outside the Court's jurisdiction.
37. However, this Court reads mischief and bad faith on the part of the Applicants. The Applicants filed the application for stay within 7 days of the judgment. The application was brought under certificate of urgency and the duty Court issued a temporary stay as prayed under Prayer No. 2 of the motion. However, the fact that the Applicants took the minor out of the country before the hearing and determination of the application is a clear manifestation of their scheme to frustrate the enforcement of the judgment and pre-empt this Court's authority. This Court will not countenance that.
38. The facts of this case are very similar to the facts of PCK v JWW [2021] eKLR, where the father had the custody of the minor, but there was a dispute in Court. The father took a minor to Canada against the order of the Court. In that case, the lower Court gave a judgment awarding the custody of a minor to the mother and ordered the father to handover the minor to the mother. The father was dissatisfied with the judgment and brought an appeal. Before the appeal could be heard, he spirited the minor out of the country, took the child outside the Kenyan jurisdiction. They now pursued the appeal and brought an application to stay the execution of the lower Court's judgment and orders.
39. The Court denied him automatic audience and imposed certain conditions before hearing both the application for stay and the Appeal. It ordered him to first immediately bring the child back and give it to the mother's custody. In addition, the Court ordered him to deposit Kshs.1,000,000/= million as security for costs and stayed the hearing of the appeal until the security has been deposited. It observed as follows;

“(31) Taking into account all relevant factors I am inclined to exercise my discretion in favour of the Applicant. Accordingly, I do hereby order that the Respondent deposit in this Court security for costs in the amount of Kshs.1,000,000/=



million pending the hearing and determination of his Appeal and Application dated 3rd June 2019.

(32) Finally this Court makes the following orders:-

- (i) The Respondent to immediately return the minor to the custody of the Applicant as per the Court orders made in Nairobi Children's Case No. 351 of 2008 on 30th April, 2019.
- (ii) The Respondent to deposit in Court the sum of Kshs. 1,000,000/= as security for costs within thirty (30) days of the date of this Ruling.
- (iii) Stay of hearing of the Appeal and Application dated 3rd June, 2019 is hereby granted pending the deposit of the security for costs."

40. Taking into account all relevant factors in this present case, I am inclined to exercise my discretion in favour of the Respondent. I read mischief and bad faith on the part of the Applicants for taking the child out of the country before the determination of the application for stay of execution.

41. This Court makes the following orders:-

- a. The 2nd Applicant to immediately return the minor to Kenya and hand over the minor to the custody of the Respondent as per the Lower Court Judgment and Orders made in Nairobi Children's case No. E352 of 2022 on 6th December, 2023.
- b. The Applicant to deposit in Court the sum of Kshs.200,000/= as security for costs within thirty (30) days of the date of this Ruling.
- c. Directions for hearing of the Appeal shall be issued once the Applicants comply with orders (a) and b) above.
- d. Mention on 7th May, 2025 at noon for further directions. The 2nd Applicant to facilitate the minor's attendance through this Court's online platform.
- e. The costs of the two Applications are awarded to the Respondent.

42. 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

In the presence of:

Court Assistant: Beryl

Mr. Ruiru Njoroge, Advocate for the Appellants/Applicants

No attendance for the Respondent

