



Kombo v Hauck (Civil Appeal E013 of 2025) [2025] KEHC 11470 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11470 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CIVIL APPEAL E013 OF 2025**

**JN NJAGI, J
JULY 31, 2025**

BETWEEN

MUHAJI MOHAMED KOMBO APPELLANT

AND

STEPHANIE JUNE HAUCK RESPONDENT

RULING

1. The Appellant/Applicant has filed an application dated 2nd June 2025 seeking for orders that:
 - [1] Spent
 - [2] Spent
 - [3] Pending the hearing and determination of the appeal, this Honorable court be pleased to stay execution and /or set aside the ruling and consequential orders of Hon Mursai Sisi [Kadhi] delivered on 29th May 2025 in Lamu Kadhi's Court Misc. Application No.E001 of 2025.
 - [4] Pending determination of the appeal, the Respondent be restrained from removing the minor child from the jurisdiction of Kenya.
 - [5] The Respondent be compelled to surrender all travel documents of the minor to the court.
 - [6] The costs of this application be provided for.
2. The application is based on grounds stated on the face of the application and supported by the affidavit of the Applicant wherein he states that the Hon. Kadhi in his ruling of 23rd May 2025 granted the Respondent custody of a minor child, EMK. That the Applicant was aggrieved by the ruling and filed the appeal herein. That the appeal raises serious legal and factual issues, including: Violation of the Appellant's right to fair hearing under Article 50[1] of *the Constitution*. Lack of jurisdiction of the Kadhi's Court under Article 170[5] of *the Constitution*, as custody falls under the Children's



Act. Failure to consider the best interests of the child as required under section 4[3] of the Children's Act.

4. The Applicant further avers that the Respondent is a foreign national and is actively making arrangements to leave Kenya with the minor herein thereby depriving the Applicant of his parental rights permanently; rendering the appeal nugatory by taking the child out of Kenyan jurisdiction yet there is no alternative remedy available to him if the child is taken away.
5. The Applicant says that if the orders sought are not granted, he will suffer irreparable harm, including loss of custody and access to his child, inability to enforce parental rights if the child is taken abroad and violation of the child's best interests, as no proper assessment has been conducted on the suitability of the Respondent's proposed relocation.
6. It is the contention of the Applicant that it is in the interest of the minor that the orders sought herein be granted:
7. The application was opposed by the Respondent through her replying affidavit sworn on 5th June 2025 in which she avers that she filed an application for legal custody of the minor but the Applicant failed to file a response to the application despite being served, consequent to which the court proceeded to issue the custody orders. That the Applicant filed an application to set aside the said orders but the same was dismissed by the court for lack of merit. That the Applicant was given sufficient time to put in a response and failed to do so and there was therefore no violation of rights.
8. The Respondent avers that the present appeal does not raise any arguable grounds and is a ploy to defeat the respondent's efforts to get legal custody of the minor. That the Kadhi's court by dint of Article 170[5] of *the Constitution* and section 5 of the Kadhi's Court Act grants the Kadhi's court jurisdiction on custody within Islamic marriage law.
9. That it is in the interest of the minor that he be granted a US passport and be allowed to travel as per Article 39 and 53[2] of *the constitution*.

Submissions

10. The Applicant submitted that the application meets the threshold for grant of orders for stay of execution under Order 42 Rule 6[2] of the Civil Procedure Rules, 2010, which are that substantial loss may result to the applicant unless the orders sought are not granted; that the application has been made without unreasonable delay and that the applicant has given security as the court orders for due performance of the decree or order as may ultimately be binding on him.
11. On the first issue the Applicant submitted that he will suffer substantial loss if the orders sought are not granted as he stands to lose access and custody of the minor if the minor is relocated to a foreign jurisdiction. That the loss cannot be quantified nor compensated by damages.
12. The applicant submitted that the application was filed without delay as it was filed within the 30 days of delivery of the ruling.
13. On the third test, it was submitted that the court may in its discretion decline to order security for costs under the circumstances of this case. The applicant urged the court to allow the application.
14. The Respondent filed submissions but the same were confined to arguing the merits of the appeal and not the application dated 2nd June 2025.



Analysis and determination

15. The application for stay of execution pending appeal is brought pursuant to the provisions of Order 42 Rule 6[2] of the Civil Procedure Rules consequent to which the applicant was required to satisfy the following conditions;
 1. That the application was brought without unreasonable delay.
 2. That the Applicant will suffer substantial loss unless the orders sought are granted.
 3. That the Applicant has given security for due performance of the decree as may be binding on him.
16. The ruling of the trial court in this matter was delivered on 23/5/2025 and the instant application filed on 2/6/2025, which is 9 days after the delivery of the ruling. There was thus no delay in the filing of the application.
17. On the issue of substantial loss, the applicant says the Respondent wishes to remove the minor out of the jurisdiction of this court which will render the appeal nugatory. That he will suffer substantial loss as he will be denied access to the minor.
18. The Respondent admits that she intends to relocate the minor to the US and that she has sought to apply for the minor's passport but the same has been delayed by objections from the Applicant. There is no doubt that if the minor is removed from the jurisdiction of this court before the appeal is heard and determined, it will render the appeal nugatory and an academic exercise. In addition, the act will deny the Applicant his right of access to the minor. The Applicant has thereby demonstrated that he will suffer substantial loss if the orders sought are not granted pending the hearing and determination of the appeal.
19. On the issue of security, the matter involves custody of a minor. The dispute is between the parents of the child. There may not be need to deposit security for due performance of the decree.
20. I find that the appeal raises no arguable issue on whether the Kadhi's Court has jurisdiction to determine issues pertinent to custody of minors.
21. In view of the foregoing, I find the application herein to be merited and consequently make the following orders:
 - [1] Stay of execution of the ruling and consequential orders of Hon. Mursai Sisi [Kadhi] delivered on 29th May 2025 in Lamu Kadhi's Court Misc. Applicatipo.E001 of 2025, is hereby granted pending the hearing and determination of the appeal herein.
 - [2] The Respondent is hereby restrained from removing the minor EMK from the jurisdiction of Kenya pending the hearing and determination of the appeal herein.
 - [3] Each party to bear its own costs to the application.
23. Orders accordingly.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 31ST DAY OF JULY 2025.

J. N. NJAGI

JUDGE

In the presence of:



N/A for Applicant

Applicant: Absent

Respondent: Absent

Court Assistant: Kambi

