



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**GJ (Prince TK (Minor)) v EKM (Civil Appeal E171 of 2025)
[2025] KEHC 11914 (KLR) (11 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 11914 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E171 OF 2025
RN NYAKUNDI, J
AUGUST 11, 2025**

BETWEEN

**GJ APPELLANT
PRINCE TK (MINOR)**

AND

EKM RESPONDENT

RULING

Representation:

M/s Manyoni Orina & Co Advocates

M/s Cherono J & Co Advocates

1. What is pending before this court for determination is a Notice of Motion Application dated 24th July 2025 brought pursuant to section 3A, Order 42 rule 6 of the *Civil Procedure Act*, section 4, 97 of the *Children Act* 2022 and Article 159(2)(d) of the *Constitution* in which the Applicant is seeking the following orders;
 - a. Spent
 - b. That there be a stay of execution of the orders and all other consequential orders issued by the trial magistrate on the 22nd July 2025 in Eldoret Children Case No. E041 of 2025 pending the hearing and determination of this application inter partes and thereafter the intended appeal.
 - c. That pending the hearing and determination of the intended appeal, this Honourable Court to exercise its powers as enshrined under section 97 of the Child Act as read with section 4 in quantifying the maintenance amount payable by the respondent towards the upkeep of the minor herein and provision of other basic needs.



- d. That there be a stay of execution of the ruling order (decree) and all other consequential orders issued by the trial magistrate on the 22nd July 2025 in Eldoret Children Case No. E041 of 2025 pending the hearing and determination of the intended appeal.
 - e. That the orders issued by the trial magistrate on the 22nd July 2025 be varied, reviewed and or set aside.
 - f. That the costs of this application be provided for.
2. The Application is made on the following grounds on the face of it among others;
- a. That the trial court in Eldoret Children Case No E041 of 2025 vide its decree dated 22nd July 2025 vested access orders to the Respondent during alternative weekends and half of the school holidays yet the minor is of ill health and needs the applicant's constant care and monitoring as he gets recurrent attacks of bronchospasms which makes it breath abnormally, this critical care has always been ministered to him by the Applicant who is a nurse specializing in critical care.
 - b. That the applicant has been the minor primary care giver since birth and the respondent has no knowledge of handling the minor in cases of an emergency, as he has been an absentee father, unconcerned and a drunkard who is never at home and or comes home at the wee hours of the night.
 - c. That the Applicant is apprehensive that if the minor is away from her for long period, even on one overnight visit as granted by the said orders, the minor might suffer irreversible health consequences due to the Respondent negligent behaviour.
 - d. That no prejudice will be occasioned to the respondent if the orders sought herein are granted as prayed.
 - e. That being aggrieved by the above, the applicant has filed an appeal herein against the said orders in the best interest of the child.
 - f. That the Applicant will suffer irreparable loss and damage if the execution of this decree is effected which might be as soon as this coming weekend on the 26th July 2025whic is only one day away.
3. The Application is supported by the annexed affidavit dated 24th July sworn by GJ who deponed as follows: -
- a. That the trial court in Eldoret Children's Case No. E041 of 2025 vide its decree dated 22nd July 2025 vested overnight visits and long periods of access of the minor who is of tender years (6 years) in the respondent who is in the process of effecting the said decree. The orders granted the respondent access of the minor during alternative weekends and half of the school holidays. The minor is of ill health having been born with recurrent childhood illness which makes it difficult for him to breath at times, a condition which the respondent does not know how to handle in case of an emergency having been negligent, an absentee and a hands off father to the minor.
 - b. That the minor has been under my care since birth and I have been his primary care giver. Taking him away for overnight visits by the respondent will greatly prejudice his health and even cause irreversible health consequences. The minor is prone to bronchospasms attack mostly at night or early mornings when he experiences difficulty in breathing, necessitating



that he gets urgent and critical care which the respondent may not be able to provide, which can serious risk the life of the minor.

- c. That I am hence apprehensive that my child will undergo extreme physiological torture and neglect from the Respondent if he stays for overnight visits and long periods away from me. I am a nurse by profession, specializing in critical care and I have been managing the minor's condition well over the years including nebulizing him at home and giving him first aid before we get to the hospital in case of emergencies when he has difficulty in breathing.
 - d. That the Respondent and I have separated due to his violent nature and constant assaults on me despite my disabled nature, sometimes in the presence of the minor. He has constant female visitors some of whom have called me through his phone threatening to kill the minor. His home environment is therefore not suitable for the minor's social and physiological well-being especially in his sickly condition.
 - e. That I am informed by my counsel on record which information I verily believe to be true that the trial court disregarded my replying affidavits and submissions and did not give reasons to justify its findings and ruling despite the length I went into establishing the unsuitability of the respondent to have long access of the minor especially at night.
 - f. That the orders in force are also conclusive and the respondent's suit might as well be termed as having been spent, as access of the minor was the essence of the said suit, hence making the said suit pre-emptive with such substantive orders having been given at an application stage without hearing and analyzing all the evidence by the parties for a just determination to be arrived.
 - g. That I am informed by my counsel on record which information I verily believe to be true that this Honourable Court is vested with powers under section 97 of the *Children Act* to compel a parent to provide financial assistance to the child on the interim, as the intended appeal is likely to take time to conclude and the minors needs on a regular basis. The counterclaim filed in the said trial suit is also yet to be heard and determined and therefore urge this court to exercise its discretion in quantifying the amount payable by the respondent towards the minor and order the respondent to continue paying school fees for the minor, pending the hearing and determination of the intended appeal.
4. The Application is vehemently opposed by the Respondent vide a Replying Affidavit dated 31st July 2025 sworn by the Respondent who avers as follows;
- a. That I am opposed to prayers b, c, d and e of the Appellant's/Applicant's instant application.
 - b. That the appellant has attached a letter from a private hospital which letter she had attached in support of her case at the trial court where I subsequently put her to strictly prove the validity of the letter but she never did and has failed to adduce, any treatment notes, or medical report to clarify the minor's condition.
 - c. That the Appellant has barred and blocked any communication between the minor and myself and as such I am unable to monitor his well-being.
 - d. That the appellant has denied some access to the minor which actions have caused me mental anguish and probably the minor is affected too.
 - e. That the minor is of good health and even if the minor has a medical condition, I am an equal parent and very capable of taking care of my son despite of a medical condition if any.



- f. That I am used to the appellant's, habit of trying to taint or bring down my character before court by calling me a drunkard amongst other unkind names and making unfounded allegations against me.
 - g. That I have been paying all the school fees of the minor and I have never been an absentee father, it is only when the appellant moved out of our home, that is when, I could no longer access my son.
 - h. That I am ready to support my son to the best of my capability and I moved the trial court seeking access of the minor and I believe the issue of maintenance amongst other requirements, shall be determined at the hearing of the main suit.
 - i. The instant application is meant to deny me access to my son when I am an equal parent, as the applicant herein.
 - j. That I am advised by my advocates on record, that the ruling on access as granted by the court is interim and as such, the applicant has the avenue to pursue the issues raised at the hearing of the main suit.
5. The Application was canvassed by way of written submissions.

Summary of the Applicant's submissions

6. The learned counsel for the appellant submitted that the minor, aged 6, suffers from recurring health issues since birth and needs constant monitoring by the appellant, who has been the sole and primary caregiver. Medical records show the appellant has consistently accompanied the minor for treatment. The court was urged to consider the minor's delicate health in granting interim relief.
7. Counsel submitted that the respondent is unfit for unrestricted access due to his admitted alcoholism, nocturnal lifestyle, violent behavior even towards the disabled appellant in the presence of the minor and overall lack of involvement in the child's care. A social inquiry into his suitability has not been conducted. Counsel prayed that the High Court stay the trial court's orders granting the respondent extensive access, pending the appeal in Eldoret Children's Case No. E041 of 2025, arguing that the child's life could be endangered if left in the respondent's care.
8. The appellant also prayed for interim orders under Section 97 and Section 4 of the *Children Act*, 2012, compelling the respondent to provide Kshs. 15,000 in monthly maintenance, plus school fees and educational needs, until the appeal and counterclaim are heard. The urgency of the matter was emphasized, citing the looming court vacation and the child's ongoing needs. The application was filed promptly and served on time. The appellant is willing to continue providing for the minor's basic needs and accepts limited daytime access for the respondent even on weekends but strictly not at night, due to safety and health concerns. She stressed this position is not indefinite, and may change if the child's condition improves or if the respondent reforms and becomes actively involved in the child's welfare.
9. Finally, the appellant proposed that pickup/drop-off arrangements be handled by advocates due to the strained relationship and her fear of the respondent following prior assault incidents.

Summary of respondent's submissions

10. The Respondent's Learned counsel Mrs. Cherono submitted that section 33(1) of the *Children Act* 2022 provides that parents of a child who are not married to each other may either enter into a parental responsibility agreement in the prescribed form whereby both in the interests of the child shall designate



and agree on, clear individual responsibilities towards the child such agreement under subsection (1) may be in the nature of a parenting plan in which the parents specify

- (a) how the child or children shall spend time with each parent,
- (b) how the parents shall make joint decisions on matters relating to their respective parenting responsibilities including religious upbringing
- (d) visitation schedule,
- (e) holiday and school break schedule and
- (i) the manner in which decisions relating to the education of the child shall be made.

11. The Learned Counsel made reference to the following authorities supporting his case;

- a. [*RK vs AN*](#) (2022) eKLR
- b. [*LAK vs COO*](#) (Civil Appeal No E056 of 2023) (2024) KEHC 7968 (KLR)
- c. [*MAK vs RMAA & 4 others*](#) (2023) KLR
- d. [*USA vs IAO*](#) (2024) KLR

Analysis and Determination

12. I have read and considered the notice of motion application, the replying affidavit and the rival submissions by both counsels on record. There is one issue for determination; Whether the Application is merited.

13. The crux of this application at hand calls for a look at the legal framework of stay of execution pending appeal. Stay of Execution is provided under Order 42 Rule 6 of the [*Civil Procedure Rules 2010*](#) as follows;

- “(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under sub rule (1) unless;
 - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”



14. From the above provisions of the [Civil Procedure Rules](#), three conditions can be adduced as to warrant an order of stay of execution;
 - a. That substantial loss may result to the applicant unless the order is made.
 - b. Application has been made without unreasonable delay.
 - c. Security as the court orders for the due performance
15. These principles were enunciated in [Butt Vs Rent Restriction Tribunal](#) [1979] where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:
 - a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
 - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.
16. I take note that the Applicant relies on Order 42 Rule 6 of the [Civil Procedure Rules](#), Section 3A of the [Civil Procedure Act](#), and Article 159(2)(d) of the [Constitution](#) which enjoins courts to administer justice without undue regard to procedural technicalities. The court takes note of the Appellant's argument that the child suffers from a recurring respiratory condition (bronchospasms) requiring constant care and supervision particularly during nighttime and that the Respondent, being an absentee and allegedly violent parent, is not competent to provide such specialized care. The risk of irreversible health consequences to the child if left unattended at night is serious enough to meet the threshold of substantial loss. With this, I put reliance in the case of [Century Oil Trading Company Ltd vs. Kenya Shell Limited](#) Nairobi (Milimani) HCMCA No. 1561 of 2007 where Kimaru J stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”



17. Moreover, the application was filed promptly, on 24th July 2025, just two days after the trial court ruling. This court thus finds the appeal and this application for stay of execution has been filed without undue delay. In view of the above, Applicant meets the conditions for stay under Order 42 Rule 6(2), and this court is persuaded that the stay of execution of the orders issued on 22nd July 2025 is necessary pending the appeal.
18. On interim maintenance orders, the Applicant invokes section 97 and Section 4 of the Children Act, 2022 urging the court to compel the Respondent to provide Kshs. 15,000 monthly and to meet school fees and other educational expenses of the minor. The Respondent, in response, claims that he has always paid school fees and is willing to continue supporting the child. With this, I wish to put reliance in section 4(3) of the Children Act 2022 which provides as follows; (3) A judicial or administrative institution or any person making an interpretation as to conflict of any provision or laws shall have regard to the best interests of a child. The principles applicable in handling Applications for grant of stay of execution in children’s matters was well set out in the case of Bbutt Vs Bbutt Mombasa HCCC NO. 8 of 2014 (O.S.) where the Court stated 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 overriding consideration of the best interest of the child in accordance with Article 53 (2) of the Constitution.”
19. I also wish to make reference to section 110 of the Children Act 2022 which provides for joint maintenance of children. In particular, it states that;
- Unless the Court otherwise directs, and subject to any financial contribution ordered by the Court to be made by any other person, the following presumptions shall apply with regard to the maintenance of a child—
- (a) it shall be the joint duty and responsibility of both parents to maintain the child whether or not the parents are married to each other;
 - (b) where two or more guardians of a child have been appointed, it shall be the duty of all the guardians to maintain the child whether jointly with the parents of the child or not;
 - (c) where two or more custodians have been appointed in respect of a child, it shall be the joint responsibility of all custodians to maintain the child; (d) where a residence order is made in favour of more than one person, it shall be the duty of those persons to jointly maintain the child; or
 - (e) where the mother and father of a child were not married to each other at the time of birth of the child, and have not subsequently married and where the father or mother of the child have acquired parental responsibility of the child, it shall be the joint responsibility of the mother and father of the child to maintain that child.
20. In view of the foregoing, this court finds it reasonable to issue interim maintenance orders in the best interests of the child. Pending the appeal, the Respondent shall contribute Kshs. 15,000 monthly, and continue paying the child’s school fees.
21. On whether access and custody should be stayed or varied, I note that the orders granted by the trial court awarded the Respondent alternative weekend and holiday access, including overnight visits.



The Appellant has challenged this citing: the minor's fragile health requiring specialized care at night; her role as a critical care nurse with knowledge and experience managing the condition and the Respondent's history of violence and irresponsibility. On the other hand, the Respondent claims equal parental rights under the law and denies the severity of the child's condition. The *Children Act 2022* under Section 33(1) allows non-married parents to enter into parental responsibility agreements which has an impact on parenting plans determining visitation and responsibilities. In particular, this section provides as follows: -

- (1) Parents of a child and who are not married to each other may enter into a parental responsibility agreement, in the prescribed form, whereby both, in the best interests of the child, designate and agree on clear individual responsibilities towards the child.
- (2) An agreement under subsection (1) may be in the nature of a parenting plan in which the parents specify-
 - (a) how the child or children shall spend time with each parent;
 - (b) how the parents shall make joint decisions on matters relating to their respective parenting responsibilities, including religious upbringing;
 - (c) contact information;
 - (d) visitation schedule;
 - (e) holiday and school break schedule;
 - (f) transport and travel within and outside Kenya;
 - (g) responsibility for health insurance and healthcare services;
 - (h) the need for notification of parental movement in cases where either or both parents relocate or change residence;
 - (i) the manner in which decisions relating to the education of the child shall be made; and
 - (j) the joint and several responsibilities expenses for extra-curricular activities of the child.

22. However, I note that in the absence of a mutual parental responsibility agreement, the court must intervene invoking the best interest of a child principle. In the case of *DOB Vs DMA* [2021] eKLR, the court addressed itself on the issue of staying maintenance orders as follows: "In matters concerning children, the best interests of the child are of paramount importance. The accepted principle in applications for stay of execution of maintenance orders in children's cases is that the suspension of the maintenance order is not in the best interests of the child." Article 53 (1) (e) of the *Constitution* of Kenya 2010 provides; Every Child has a right-to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not. Accordingly, the principle of the best interests of the child is the North pole that will guide the court in matters concerning the welfare of a child such as the question of the custody of the subject child/children. Given the evidence of the minor's health complications, the lack of any rebuttal medical evidence by the Respondent, and the strained relationship between the parties, this court finds that overnight and extended visits should be temporarily suspended pending the appeal. However, in line with the principle of child's right to parental contact, limited daytime access on weekends may be allowed, under supervision or with defined pickup/drop-off protocols.



23. In the case of *IMM v JMN* (Civil Appeal E033 of 2023) [2024] KEHC 4766 (KLR) (Family) (19 April 2024), the Court held as follows;

“ 40. At the heart of this case is what is the best interests of the child. In my view the best interests of the child require that she be given an opportunity to know her father and to establish a relationship with him. Further no satisfactory basis has been laid to deny the father the right to provide for the Child.

41. On the 2nd Issue I find that the trial magistrate erred in ignoring the report of the Children officer and granting sole, legal and actual custody, care and control of the minor to the mother. It is not lost on me that the father has performed dismally as a father and that the reunification may pose a challenge to the minor. This concern in my view will be addressed by providing for supervised visits in the first instance and then reviewing the orders at the opportune moment.

42. In conclusion the appeal succeeds on the following terms;

- a. The child, AC, shall remain in the physical custody of the mother, JMN.
- b. The father, IMM and mother, JMN shall have joint legal custody of the child and shall be consulted on the child's welfare, maintenance and upkeep.
- c. The Appellant will have supervised access to the minor in a public place on Saturdays and Sundays for a maximum of 6 hours, details to be agreed upon between the parties under the supervision of the Children's Officer, Sub County Westlands.”

24. Moreover, I note that the Appellant has proposed limited daytime access only with pickups/drop-offs facilitated by the parties' advocates due to their acrimonious relationship and her past experience of assault. It is my view that this is reasonable and aligns with the child's best interests. Consequently, this notice of motion application is merited and the following orders shall abide: -

- a. That a stay of execution of the trial court's orders dated 22nd July 2025 in Eldoret Children Case No. E041 of 2025 be and is hereby granted pending hearing and determination of the appeal.
- b. The Respondent shall pay interim monthly maintenance of Kshs. 15,000 and continue covering the child's school fees and educational needs pending the appeal.
- c. Overnight access and extended holiday access by the Respondent is suspended pending the appeal.
- d. The Respondent is granted daytime access only, every weekend from 9:00 AM to 5:00 PM subject to arrangement by counsel for both parties.
- e. Status conference on 23/9/2025.
- f. The costs shall abide the outcome of the appeal.

25. Orders accordingly



DATED, SIGNED AND DELIVERED VIA EMAIL AND CTS AT ELDORET THIS 11TH AUGUST
2025

.....

R. NYAKUNDI

JUDGE

