



**JNM v BPW (Family Appeal E086 of 2024)
[2024] KEHC 11024 (KLR) (Family) (21 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 11024 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
FAMILY APPEAL E086 OF 2024
HK CHEMITEI, J
AUGUST 21, 2024**

BETWEEN

JNM APPLICANT

AND

BPW RESPONDENT

RULING

1. In her Chamber summons application dated 6th August 2024 the applicant prays for the following orders;
 - a. That the court be pleased to order stay of execution of the ruling and orders of the Milimani children’s court in BPW v. JNM E1213 of 2011 pending the hearing of the appeal.
 - b. That this court be pleased to direct the minor MZW (a Kenyan child) to be maintained in this court’s jurisdiction pending the hearing of the appeal.
 - c. Any further orders of the court.
2. The application is based on the grounds thereof and the sworn affidavit of the applicant of even date. The same is also premised on the supplementary affidavit sworn on 10th August 2024.
3. The respondent filed his replying affidavit dated 11th August 2024.
4. The court when the matter came up for interpartes hearing directed the parties to file written submissions which they have complied.
5. The issues herein are clear and discernible. Both the applicant and the respondent are the parents of the minor herein although they are not married. The applicant is a Kenyan by birth while the respondent



is a British citizen with a permanent residence in the United States of America. The minor holds a diplomatic passport.

6. By a judgement of the court vide a consent, both parties were on 22nd May 2015 given joint legal custody of the minor. The parties later agreed that the minor would move to America where she will stay with the respondent and pursue her education. The parties further agreed that the minor would visit the applicant during holidays and the applicant would as well visit her in America whenever she desires.
7. The minor visited Kenya in July this year courtesy of the tickets purchased by the respondent. While in Kenya the applicant filed an application at the children's court in which she sought orders that the minor should not leave the jurisdiction of this court and that she should stay with her and pursue her education in Kenya.
8. Her reasons for such prayers were that the minor was uncomfortable staying with the respondent and his family in America and that she was not safe at all. She said that the minor was threatening to harm herself should she be forced to board the flight back to the States. She went on to deposed that the minor from the period she learned that she was to go back to America had secluded herself and refused to eat.
9. The trial court conducted a camera interview with the minor in court and the court concluded that "she does love living with her father but was more comfortable living with the mother."
10. The court found that the child would have loved staying with her mother more. It however found that despite the challenges of the distance the respondent had done all that was necessary to facilitate the minor to meet the applicant.
11. It was however the applicants case that the minors school in the States was of inferior quality compared to the [Particulars Withheld] School which she wanted the minor enrolled. That the [Particulars Withheld] School in America was a public school contrary to the agreement with the respondent that they would enrol her in a private school.
12. The response by the respondent through his replying affidavit was to the effect that the child had a diplomatic passport which meant that she could travel whenever she wanted and that the respondent was a holder of a B1/B2 visa which allowed her multiple entries and long stay in America whenever she wanted.
13. He said that he had facilitated twice her travel to the States and left her his home so that she could have sufficient time with the minor. Further that she had met all the travelling expense of the minor without any input from the applicant. He added that he was meeting all the educational needs of the minor alone.
14. That the issue of enrolling the child at [Particulars Withheld] School was an afterthought and there was no such evidence of enrolment presented to the trial court. As a matter of fact, the applicant in her supplementary affidavit had changed tact and introduce another school namely, [Particulars Withheld] School which she was planning to enrol the minor.
15. The respondent argued that the minor ought to be released to go back to the states for the reason that the school holiday was coming to an end by 25th August 2024 and any change of schooling will disrupt the minor's academic performance.
16. As regards the quality of the school the respondent deposed that the same though public was superior and the minor had exemplified this when she appeared in the roll of honours in sports. In any case the



private school was expensive and it was meant for children of the privileged in the community which he could not afford as he singlehandedly supported the minor.

Analysis and Determination.

17. The court has perused the parties' pleadings and the submissions. Both submissions generally lean and gravitates towards the issues raised in their lengthy rival affidavits. I do not see the reasons to reproduce them here for want of time.
18. The issue before me is premised on Order 42 rule 1 of the Civil Procedure Rules. Ideally the question is whether there would be any prejudice if stay pending appeal is not granted and in particular whether the appeal shall be rendered nugatory.
19. I have anxiously looked at the issues raised by the applicant and the response thereof and the history of the parties herein vis a vis the rights of the minor. What runs through this matter is the consent entered by the parties on 22nd October 2015 granting legal custody of the minor to both parties. It appears that things went very well till the minor came to Kenya to visit the applicant for this year's summer holiday. The applicant found that the child was not willing to go back to America.
20. There is no evidence it appears to show that when the applicant went to the States twice she found the child uncomfortable and was willing to relocate back to Kenya.
21. On the other hand, there is no evidence that the respondent has denied the minor the opportunity to travel back to Kenya to see her mother as agreed. He has paid the tickets both ways. Equally with her B1/B2 visa there is no evidence that the applicant has travelled to the States and has been denied access to the minor or at all.
22. The issue of the schooling has been explained by the respondent. There is no *prima facie* evidence that the quality of the schooling the minor was undergoing in the States was inferior to that of [Particulars Withheld] School in Kenya.
23. This court nonetheless will be jumping the gun if it begins analysing the pros and cons of the evidence presented to the trial court. It should await a full record of the appeal.
24. Is the application meritorious based on the available evidence.? Will the minor or the parties herein suffer any harm or prejudice if the same is not granted.? Will the appeal be rendered nugatory.?
25. I do not think so for several reasons. First of all, the trial court when it conducted a camera interview with the minor did not find any reasons that the minor was in distress and therefore was in the verge of harming herself. The conclusion by the court was that the minor would have loved to have sufficient time with her mother although she had no problem staying with the father.
26. Secondly and more importantly i think the respondent on his part has not breached the part of ensuring the child visits the applicant during school holidays. This is exemplified by the open tickets which he purchased for the minor. Neither has any evidence been demonstrated that the applicant was denied any travel to America to see the minor. Her B1/B2 visa which she has not denied states as much.
27. The issue of enrolling the minor at [Particulars Withheld] School was not backed by any tangible evidence. The enrolment subsequently at NIS was an afterthought as the same was not raised at the trial court. As a matter of fact, the issues raised in the supplementary affidavit appears new and i think the court will take it up at the hearing of the main appeal.
28. One may ask himself why the applicant waited till the minor came to Kenya so as to make the application she did at the trial court. There is sufficient paper trail to indicate that she had been in



- constant conduct with the minor and if indeed she was under some distress she ought to have raised it as soon as the child lands in Kenya and not some few days before the end of the holiday.
29. Needless to state that the applicant had the opportunity of raising the issues of any mistreatment of the minor or any distress any time before this court whether the minor was in the country or not.
 30. For now, I find that the trials court finding was sound. The camera interview of the minor clearly brought out her position. It must be noted that the position of the parties as it is, is not normal. This is not the usual family set up where the parents and child relationship is defined. The parties have invited themselves to the courts and they must leave with the consequences including the inconveniences.
 31. The court nonetheless must take the interest of the minor seriously. Any abrogation of her rights will be vigorously defended. I do not see any such abrogation. The minor has a diplomatic passport. She is free to access any of the two countries where her parents live. Her father has demonstrated his ability to travel whenever it is appropriate. The same applies to her mother. She is free to travel to see her in America whenever she desires.
 32. Finally, I do not think the appeal will be rendered nugatory should this application be denied. This matter is live and the issues can be raised at any moment by the parties.
 33. Taking the totality of the above i find no reasons to upset the trials court's ruling at this interim stage.
 34. The application herein is disallowed with no order as to costs.
 35. Considering the time frame the minor is to report to the school it is ordered that;
 - a. The interim orders of stay herein are hereby set aside.
 - b. The applicant do release the child forthwith with all the relevant documents including her passport so as to travel to the United States of America for her schooling.
 - c. In the event of non-compliance, the Officer in charge of the nearest police station (OCS) together with the nearest children's officer do facilitate compliance of this order.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 21ST DAY OF AUGUST 2024.

H. K. CHEMITEI
JUDGE.

