



**RTNMK v AOK (Civil Appeal E062 of 2024)
[2024] KEHC 13649 (KLR) (Civ) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13649 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E062 OF 2024**

**SN RIECHI, J
OCTOBER 31, 2024**

BETWEEN

RTNMK PLAINTIFF

AND

AOK RESPONDENT

RULING

1. The appeal herein arises from a judgement delivered on 24th May 2024 by Hon. Jackie Kibosia the Principal Magistrate in the Chief’s magistrate Court at Milimani in Children Case No. E436 OF 2021.
2. In this matter the Plaintiff who is respondent herein filed a claim against the Defendant/Appellant through a Plaint dated 7TH August 20223 seeking orders;
 - i. The legal custody of the Minor be awarded to the Plaintiff and the Defendant jointly.
 - ii. The physical custody of the Minor be awarded to the Plaintiff and the Defendant jointly.
 - iii. The Plaintiff does have access to the Minor on alternate weekends during the school term and for half of the school holidays when the schools are closed.
 - iv. The Plaintiff and the Defendant do contribute to the upkeep and maintenance of the Minors.
 - v. The Plaintiff and the Defendant be restrained from travelling with the Minor out of the country without the written consent of the other parent and in default an Order of the Court.
 - vi. The court do issue an order for the minor’s name to revert back to MNK as registered at the time of birth and for his Birth Certificate, Passport and School registration to be issued and or registered bearing the name MNK



- vii. The Court does issue an Order cancelling Birth Certificate No. xxxxxxxxxxxxxx, Entry No xxxxxxxxxxxxxx in the name of MGK i) The Court do issue an Order cancelling Passport Number xxxxxxxxxxxxxx issued on 31st October 2019 in the name of MGK
- viii. The Court do issue an Order restraining the Defendant from changing the names of the Minor from MNK to any other name.

Costs of this suit.

11. In response the defendant filed an amended statement of defence and counterclaim dated 30th August 2023 seeking orders that the plaintiff's claim be dismissed and the court to compel the plaintiff to pay the minor's upkeep and the defendant be allowed to relocate with minor to Canada among other prayers.
12. Upon hearing the parties, the trial court delivered a judgement as follows;

“Final Orders

- i. That both parties shall have joint legal custody of the minor herein
 - ii. That the Plaintiff/father to be granted actual custody once a home assessment is conducted and a report filed in Court within 60 days, from today's date
 - iii. That in the intervening period the child shall remain in the current home environment so as not to interfere with school schedule
 - iv. That the Plaintiff/ father is granted access in the following manner:
 - Friday School pick up and Monday Morning school drop off on alternate weekends
 - Half school holidays alternating special holidays
 - v. That the defendant/mother is granted access in the following manner: unlimited video and audio access at reasonable times (EAT) • Unlimited physical contact while in Kenya
 - vi. That the child's name to revert to the name given at birth since due process was not followed in name change
 - vii. That the Birth Certificate and Passport to reflect the original name of the child
 - viii. That none of the Parties shall leave the Court's jurisdiction with the child without the express consent of the other or order of the Court
 - ix. That once the name is changed, the child's passport to be deposited in Court for safekeeping and immigration Department served with stop orders
 - x. That this being a family matter, no order as to costs
 - xi. Parties at liberty to apply
- Apportionment of Parental Responsibility:
- Plaintiff
- School fees & School related expenses



- Comprehensive medical cover

Defendant

- Food
- Clothing
- Shelter & utilities at the current home

*the Court will make a final determination on parental responsibility once the child transitions to the Plaintiff's home. And after the defendant files an updated affidavit of means (post relocation)"

13. The appellant being aggrieved by the trial court's decision, lodged an appeal through a memorandum of appeal dated 12th June 2024. In her memorandum of appeal, she raised seventeen (17) grounds of appeal. Together with the Memorandum of appeal the appellant filed this instant notice of Motion dated on even that is before this court for determination in which she is seeking orders;

- i. That pending hearing and determination of this Application this Honourable Court do STAY Execution of the Judgment and consequential orders granted by Hon. J. Kibosia on 24th May 2024.
- ii. That pending hearing and determination of the Appeal this Honorable Court do STAY execution of the Judgment and Consequential Orders granted by Hon. J. Kibosia on 24th May 2024.
- iii. Costs of this Application.

The application is premised on the grounds that;

- i. That on 24th May 2024 the subordinate Court, delivered a Judgement whose effect was to grant the actual custody of the issue to the Respondent herein.
- ii. That since the birth of the minor up to now, the actual custody and care of the said issue was with the Appellant/ Applicant.
- iii. That the Learned Magistrate delivered a Judgement with directions for further processes in it. The Court which is now functus officio is still seized of the matter.
- iv. That the Judgement issued is a Preliminary Decree which both parties must be heard but no provision has been made for such fair hearing.
- v. That the Learned Magistrate in her Judgement directed that a home assessment be done to ascertain the suitability of the Respondent's home. The home assessment is to be carried within sixty (60) days, thereby giving an indication that the Court does not even know where or how the Respondent lives and if indeed his home is conducive for a child to live in.
- vi. That the Learned Magistrate has effectively denied the Appellant / Applicant a right to respond to the findings of the report and therefore denied her a chance to a fair hearing as there are no directions on her involvement in the said assessment and the report filed thereafter.
- vii. That the Learned Magistrate seems to have made a prejudicial decision on the suitability of the Respondent to have custody before rendering her Judgement.



- viii. That the best interests of the child have not been considered, bearing in mind all that had been submitted by the Appellant/ Applicant throughout the entire trial.
 - ix. That the Judgement rendered has no reasons and has ignored the testimony of the witnesses during hearing, and particularly the testimony of the Appellant/ Applicant.
 - x. That the Learned Magistrate in her Judgement improperly used a proposal for settlement by both parties to make her final order on custody and did not give any other reason for her Judgement.
 - xi. That the Learned Magistrate equally directed that the Appellant/ Applicant file an Affidavit of Means stating that the Court does not know what she does and cannot rule on her obligations.
 - xii. That the Appellant/ Applicant actually filed an Affidavit of Means twice and even testified what her job was during trial and where she will be living. This directive by court signifies lack of good faith.
 - xiii. That the Learned Magistrate failed to give any answer on the Respondent's mental capacity to take custody of the minor. She even did not give any reason for not considering the question itself.
 - xiv. That the Appellant/ Applicant has appealed by filing a Memorandum of Appeal against the entire Judgment of the Trial Magistrate Court.
 - xv. That the Appeal is meritorious and raises serious issues of law which require adjudication and determination of this Honourable Court.
 - xvi. That the Appellant/ Applicant and the minor in this issue stand to suffer prejudice if the Orders sought herein are not granted.
 - xvii. That the Respondent shall not suffer any harm at all.
 - xviii. That this Application has been brought without unreasonable delay.
 - xix. That it is in the interest of justice that this Application is allowed.
14. The application is further supported by a supporting affidavit sworn by the applicant on even date in which she reiterated averments in her grounds of the application.
 15. In response to the application the respondent filed a replying affidavit sworn on 28th June 2024. The respondent briefly stated that the minor is the one to be prejudiced by an order of stay. The respondent stated he is available as a father to the minor to have actual custody of the minor and allow him to have needed parental responsibility. The respondent stated the appellant is not resident in Kenya and he is able to take care of the minor.
 16. By consent of Parties this appeal was canvassed by way of written submissions. The applicant filed written submissions dated 8th October 2024 through the firm of Ndindi & Nadida LLP Advocates.
 17. The respondent filed written submissions dated 20th October 2024 through the firm of TripleOKLAW LLP Advocates
 18. The Appellant briefly submitted through Ms.Ndindi who submitted that the applicant has demonstrated sufficient cause to stay the execution and substantial loss that the minor will suffer if the execution of the judgement is not stayed.



19. The respondent submitted briefly through Mr. Odour who submitted that the application for stay is not supported by evidence. The respondent's Advocate submitted that the court should dismiss the application for stay of the orders in the judgment for reasons that if the same is set aside there is risk that minor will be taken out of country and not returned if the appeal is dismissed.
20. From the pleadings the main issue arising for determination is whether or not this court should grant orders of stay of execution of Judgement and consequential orders granted on 24th May 2024.
21. The law governing stay of execution orders is anchored under order 42 rule 6 (2) of the Civil Procedure Rules. Before stay orders can issue, it is incumbent upon the applicant to prove that; he is likely to suffer substantial loss in the event that orders sought do not issue; the application has been filed without inordinate delay and that security for the due performance of the decree has been deposited.; See Carter and Sons Ltd vs Deposit Protection Fund Board and 2 others C A No. 291 of 1997
22. It is trite law that issuance of stay of execution orders is at the discretion of the presiding judge or magistrate depending on the merits of the individual case without losing sight of the fact that a stay order is intended to preserve the purpose of an appeal. This position was succinctly held in the case of Butt vs Rent Restriction Tribunal Nairobi Civil Appeal No 6/1979 and Shell Ltd vs Kibiru and another (1986) e KLR
23. In the instant case, the applicant is claiming that the impugned orders issued on 24th May 2024 by trial magistrate did not consider the best interests of the child and that the trial magistrate made a prejudicial decision on the suitability of the respondent to have custody of the minor.
24. Proof of likelihood to suffer substantial loss is the corner stone for grant of stay orders. See James Wangalwa and another vs Agnes Naliaka Chesato (2012) e KLR.
25. Assuming for a moment that the court was to grant the order of stay, what will happen to the children's needs which cannot wait. All those needs cannot be suspended unless under exceptional circumstances. In the case of KKPM Vs SWW (2019) e KLR the court had this caution to make when dealing with an application for stay of execution touching on the welfare of children;

“I agree that where the duty to maintain a child is imposed on a parent by statute, it is not in the best interest of the child to suspend a maintenance order particularly where parentage is not in dispute and that an expedited hearing of the appeal might be a solution where there is a challenge on quantum of maintenance rather than staying the orders of the trial court”
26. Relying on the above authorities and relevant provisions of law. I find that the the trial magistrate took into consideration best interests of the child while issuing the orders on 24th May 2024. The best interests of the child being vulnerable persons must always reign. In the circumstances, and, in view of the above holding, I don't find it prudent to issue stay orders. This application is found without merit and is hereby dismissed. Each Party to bear his/her own costs. The appellant to expediate hearing of the main appeal.

DATED AT NAIROBI THIS 31ST DAY OF OCTOBER 2024

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S.N.RIECHI

JUDGE

