



PPRK (Suing as a Next Friend to JK and FAK Minor) v AK (Civil Appeal E086 of 2024) [2024] KEHC 16082 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16082 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E086 OF 2024
LM NJUGUNA, J
DECEMBER 19, 2024**

BETWEEN

PPRK (SUING AS A NEXT FRIEND TO JK AND FAK MINOR) APPLICANT

AND

AK RESPONDENT

RULING

1. The applicant filed a notice of motion dated 22nd October 2024, being supported by the grounds set out on its face and the facts deposed in the supporting affidavit thereof. The orders sought are as follows:
 1. That the honourable court to call for and move to the High Court Embu children case no. E006 of 2023 and be pleased to exercise its discretion and examine the record thereon for the purpose of satisfying itself on correctness, legality and propriety of the findings and orders as to the proceedings and make a determination as to the issue of propriety, suitability and legality of the Resident Magistrate presiding over court no. 5 in Embu Law Courts to handle the matter having shown open bias against the plaintiff/applicant
 2. That the honourable court call for and move to the High Court Embu children case no. E006 of 2023 and be pleased to exercise its discretion and examine the record thereon for the purpose of satisfying itself on the impartiality of the said court which is in dispute such that when the application dated 09th October 2024 was filed, the magistrate acted as an advocate of the applicant/defendant and heard the application as if it was filed under certificate of urgency whereas no such certificate was filed by the applicant. The court acted ultra vires and disregarded the rule of law thus abusing the process of court to the detriment of the applicant herein;



3. That the honourable court do issue an urgent order of stay of all proceedings in Embu children case no. E006 of 2023 pending hearing of the applications and appeal to the high court;
 4. That matter in Embu children case no. E006 of 2023 be forthwith transferred to the high court at Embu for hearing and disposal since the CM's court is biased;
 5. That an order be issued against Hon. D. Endoo (Resident Magistrate) from conducting any proceedings or presiding Embu children case no. E006 of 2023 now and in the future because she has shown open bias in determining the issues between the parties; and
 6. That the costs be provided for.
2. The substantive appeal herein seeks to quash the orders of the trial court. On the day when the appeal was filed, the respondent moved Hon. D. Endoo, sitting as a Resident Magistrate for a review of the judgment delivered on 23rd May 2023. The said Resident Magistrate reviewed the orders issued by the trial court without any formal application for review being filed by the respondent. The applicant alleges that the said magistrate had been in communication with the respondent outside the suit and the applicant has lodged a complaint at the Judicial Service Commission about the same issue.
 3. It is the applicant's case that throughout the case, she was dissatisfied by the conduct of Hon. D. Endoo and had severally asked her to recuse herself since the respondent had been openly bragging that he had already compromised the Magistrate. She averred that the said magistrate offered a deaf ear to her preliminary objection but entertained oral and written applications by the respondent, thus denying the minors justice.
 4. The court directed that the application be canvassed by way of written submissions but only the respondent filed his submissions on the application at hand.
 5. It was his argument that the application does not meet the requirements for issuance of orders of stay of proceedings. He relied on the case of *Ndabi v Kimotho & another* [2023] KEHC 17717 (KLR), *Re Global Tours & Travel Ltd Winding Up* (2001) 1 EA 195 and *Ibrahim Ahmed v Halima Guteti* High Court at Mwanza Number 128 of 1967) 1968 THCD. He argued that the substantive appeal does not raise any arguable case thus the applicant is undeserving of the orders sought.
 6. The issue for determination is whether the application has merit.
 7. The crux of the appeal is that the applicant herein challenges the decision by the trial court to review its judgment. Herein, the applicant seeks stay of proceedings on the same basis, citing impropriety on the part of the trial magistrate. On 30th May 2023, the trial court issued its judgment in Embu CM Children Case no. E006 of 2023.
 8. The respondent then moved the court through an application dated 27th April 2024 seeking, inter alia, reapportionment of the ratio of school fees and other expenses for the minor. Through its ruling delivered on 23rd September 2024, the trial court determined the application, dismissing the applicant's preliminary objection and ordering, inter alia, that she pays Kshs.70,000/= towards school fees for the minor every year. That is largely the issue on appeal herein.
 9. Before a determination is made to stay proceedings in any case, the court must satisfy itself that the order will not be given haphazardly and at the expense of justice. The case herein stems from a children



case at the Chief Magistrate's court. According to the Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332,

"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."

10. Stay of proceedings is not a trivial matter and its determination must be carefully considered. The court in the case of *Kenya Wildlife Service v. James Mutembei* (2019) eKLR held that: -

"...Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent..."

11. Further, in the case of *Re Global Tours & Travel Ltd HCWC No.43 of 2000* the court held that:

"...As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously..."

12. This court had already granted temporary stay of proceedings pending hearing of the application. However, given the issues raised in the application and their seriousness, it is my view that it is necessary to stay any further proceedings in that case until the appeal is determined. The applicant has raised the issue of impropriety on the part of the trial magistrate and she has argued that the trial magistrate showed open bias by failing to determine her preliminary objection. She has also accused the trial magistrate of being in communication with the respondent outside the case and that the respondent has been gloating about how he has compromised the court, to the applicant's disadvantage.

13. That on this basis, she repeatedly asked the trial magistrate to recuse herself. Now, the applicant wants this court to make the order ideally barring the trial magistrate from hearing the case now or in the future. The applicant states that she has raised the issue before the Judicial Service Commission. The issue of whether or not a judicial officer should recuse him/herself is one that should be raised before the same judicial officer, not the high court. At the risk of pre-empting the findings of the Judicial Service Commission, I shall safely avoid to delve into that issue as I lack the capacity to determine it.

14. Moreover, this court has found it best to stay proceedings in the trial court until the substantive appeal herein is determined. In my view, that is enough recourse at this point in time, considering that the case is a children matter, whose best interests are to be elevated. The applicant has also prayed that Embu CM children case no. E006 of 2023 be transferred to the high court. This is not practically possible



in light of section 18(1) of the Civil Procedure Act since there is already an appeal pending before this court.

15. Therefore, the application partially succeeds with an order that the proceedings in Embu CM children case no. E006 of 2023 are hereby stayed pending hearing and determination of the appeal herein. There shall be no order as to costs.
16. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF DECEMBER, 2024.

L. NJUGUNA

JUDGE

..... for the Applicant

..... for the Respondent

