



REPUBLIC OF KENYA



AA v LO (Civil Appeal E005 of 2023) [2023] KEHC 2407 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2407 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY**

CIVIL APPEAL E005 OF 2023

KW KIARIE, J

MARCH 28, 2023

BETWEEN

AA APPELLANT

AND

LO RESPONDENT

RULING

1. The respondent/applicant moved the court by way of notice of motion dated January 26, 2023. It was brought under sections 1A, 1B & 3A of the Civil Procedure Act, section 4(3) of the Children Act, order 36 rule 7, order 10 rule 11, order 51 rule 1 of the Civil Procedure Rules & article 53 of the Constitution of Kenya. The applicant is seeking the following orders:
 - a. That this application is fit to be certified urgent and fit to be heard *ex-parte* and service be dispensed with in the first instance.
 - b. That pending the hearing *inter-partes* of this application the honorable court do order the respondent to avail the school going child back to Homa Bay to resume school.
 - c. That the court do find it fit and reasonable to cite the appellant for contempt of the court order dated the January 26, 2023.
 - d. Costs of this application should be provided for.
2. The application was premised on the following grounds:
 - a. That the respondent is a husband to the appellant herein married since 2007.
 - b. That the appellant disobeyed the court order dated January 26, 2023 requiring her to avail the child on the January 29, 2023 to resume school.
 - c. That the child has not been going to school since the January 23, 2023 when schools re-opened.



- d. That it is in the interest of justice and to the best interest of the child fairness if the honorable court issues an order that the appellant to avail the child to resume school.
 - e. That application is brought in good faith and without malice.
3. The respondent opposed the application on the following grounds:
- a. That the applicant has failed to comply with the orders of the trial court.
 - b. That the application is malicious.
 - c. That the application lacks merit.
4. On March 2, 2023, the appellant filed another application by way of notice of motion. It was brought under sections 81, 82 & 83 of the *Children Act*, & article 53 of the *Constitution of Kenya*. The appellant/applicant is seeking the following orders:
- a. That the court do find it fit to cite the appellant for contempt of court's order dated January 26, 2023.
 - b. That costs be provided for.
5. The application was premised on the following grounds:
- a. The appellant/respondent disobeyed the court order dated January 26, 2023 requiring her to avail the child on the January 29, 2023 to resume school.
 - b. That the child has not been going to school since January 2023.
6. In the application dated January 26, 2023 which I dealt with on January 27, 2023, I made an order for maintenance of *status quo*. When it is pleaded that the court made an order for the child to be availed on the January 29, 2023 to resume school, this is not correct. It would be a deliberate misinterpretation of the order of the court. There has been no attempt to demonstrate what the *status quo* was at the time.
7. Whenever there are disputes of this nature, the interest of the child who is the subject of the dispute is paramount. The consideration is not who between the two claimants has more rights than the other. In order to avoid disruption of the child and her learning, this court made the order for maintenance of *status quo* pending the hearing of the application dated January 26, 2023.
8. The application dated January 26, 2023 is seeking similar orders that will flow from the appeal should it succeed. I will therefore decline to grant the orders sought and for avoidance of doubts the *status quo* obtaining before January 26, 2023 to obtain. The appellant to ensure that the record of appeal is filed within 30 days of this ruling.
9. Each party will bear own costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

