



**In re JAOO (5 Years) (Civil Appeal E008 of 2022)
[2023] KEHC 20835 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 20835 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E008 OF 2022**

JN KAMAU, J

MAY 31, 2023

**IN THE MATTER OF AN APPLICATION UNDER THE
CHILDREN’S ACT NO 8 OF 2001 LAWS OF KENYA**

AND

IN THE MATTER OF: (JAOO)-5 YRS

BETWEEN

EWA APPELLANT

AND

FN RESPONDENT

(Being an appeal from the Ruling and Order of Hon S. N. Telewa (SRM) delivered at Kisumu in Chief Magistrate’s Court Children’s Case No 52 of 2019 on 26th January 2022)

RULING

Introduction

1. In her Notice of Motion dated and filed on 24th February 2022, the Appellant sought orders that pending the hearing and determination of the appeal herein, the court be pleased to issue an order of temporary injunction restraining the Respondent, his agents, servants, employee or anybody claiming through him from withdrawing the minor JAOO from his school ([Particular Withheld] Academy) and taking him to school in Malawi and/or removing him out of jurisdiction of this court.
2. She swore an affidavit in support of the said application on 24th February 2022. She averred that she filed a children’s case at the Trial Court regarding the wellbeing and custody of the three (3) children she had with the Respondent herein and that by consent, the said case was compromised to the effect that the children would stay with the Respondent in Malawi while she had visitation rights.



3. She averred that their children's step mother, step brother and step sister joined them in Malawi in September 2020 but JAOO (hereinafter referred to as "the child") complained of being mistreated by the said step mother and being bullied by the said step brother and step sister who were elder to him.
4. She stated that she raised that issue with the Respondent and requested him to let her stay with the child but that he ignored her plea. She asserted that when the children came back to Kenya for holidays in July 2021, the child was still adamant that he wanted to stay with her and not with the Respondent and his step mother.
5. She contended that having failed to resolve the issue on what was in the best interest of the child, the Respondent filed an application dated 4th August 2021 in the Trial Court seeking to have her release the child's passport while she filed an application dated 11th August 2021 seeking to review the terms of the consent as regards the child.
6. She further stated that in her application, she had asked the Trial Court to interview the child independently on his preference or the same to be done by a children's officer and a report be filed in court before the said two (2) applications could be heard. She pointed out that the minor was interviewed by the Trial Court and he confirmed that he preferred to stay with her. She added that the two (2) applications were heard jointly and a Ruling was delivered on 26th January 2022 in favour of the Respondent.
7. It was her contention that upon being aggrieved by the said decision she filed the appeal herein. She asserted that the Learned Trial Magistrate ignored the child's wishes in considering what was in his best interest and determined that the child was too young to express his views, which she asserted was an error. She pointed out that the Respondent had informed her that he would pick the child at the end of February which would have interfered with his schooling.
8. She was emphatic that it was important that the child be kept in a comfortable environment which he preferred with the Respondent being given visitation rights. She argued that unless an injunction was granted, there was a likelihood that the substratum of the appeal would be wiped away as the child would go back to Malawi which would render the appeal nugatory.
9. She asserted that no prejudice would be occasioned to the Respondent should the orders sought be granted as the child would not miss anything as he had joined grade 1 and international schools in Malawi also had the same calendar and grade 2 was to start in August 2022 by which time she expected that the court would have determined the appeal, if heard expeditiously.
10. She further contended that the application had been made without inordinate delay, in good faith and was deserving in equity. She added that her appeal was not frivolous and had raised several arguable points and should therefore be determined on merit. She averred that she was willing to abide by any conditions as the court may direct.
11. In opposition to the present application, the Respondent swore a Replying Affidavit on 11th April 2022. The same was filed on 22nd April 2022. He averred that he worked for [Particulars withheld] which had a scheme in which children of staff members were fully sponsored to the international schools dependent on where the staff was deployed. He asserted that there had never been any grounds to warrant the setting aside, varying and/or discharging the consent order which had clearly stated that he would be living with the children during the school holidays while the Appellant would stay with them during the school holidays and that he would provide her with an air ticket to visit the children in Malawi.



12. He asserted that his union with the Appellant was blessed with three (3) issues and that it was not logical that the step mother, step brother and step sister would only be cruel to the child only. He averred that the Appellant was simply clutching at straws to win the court's sympathy. He added that the Appellant was only out to malign the name of a person who was not a party to the proceedings since she would not have a right of response to the accusations that were being levelled against her.
13. He stated that he had the best interest of the child herein and asserted that the Appellant had never complained about his ability to safe guard the best interests of the children. He pointed out that she reneged on the consent by returning the child back during the school holidays and confiscated the child's Yellow Fever Card and Passport forcing him to file an application to compel her to release the said documents. He termed her application to review, vary and/or set aside the consent was an afterthought.
14. He contended that she did not live in Malawi to say that the child was sometimes withdrawn, depressed and lived out of fear. He stated that he spent most of the time at home owing to the challenges of Covid-19 that required him to work from home and that the child was always agile and jolly around his siblings as he observed them as they did their homework.
15. He was categorical that the Ruling was sound as the Learned Trial Magistrate interviewed the child independently and that the Children's officer equally did her assessment and compiled a report regarding him staying with the child. He added that the child who was aged five (5) years could not be said to have been intelligent so as to decide what was best for him. He asserted that he visited the child during the December 2021 holidays and discovered that he was dejected due to the separation from his siblings and that he had expressed strong feelings of going back to Malawi. He invited the court to interview the child after he had tested living in both Kenya and Malawi.
16. He contended that he only discussed with the Appellant when he could pick the child and take him to school but never expressed intentions of forcefully taking him from her as he believed in rule of law and obedience of court orders.
17. He was emphatic that he had demonstrated good faith before when he complied with the consent order. He asserted that it was neither him nor the Appellant who would suffer the prejudice but rather, that it was the best interest of the child which was at stake.
18. He contended that the appeal herein was frivolous since there were no plausible reasons to warrant setting aside of the consent order. He added that the application had been made bad faith, was full of malafides and that the Appellant demonstrated bad faith in confiscating the child's Yellow Fever Card and Passport to prevent him from travelling against AN explicit consent order.
19. It was his averment that the substance of this appeal could not be wiped away or the appeal rendered nugatory since the subject matter of the appeal, being the child, would be in his safe custody. He asserted that should the appeal succeed, he would obey the orders of court and return the child to the Appellant. He urged the court to exercise its discretionary powers judiciously and dismiss the Appellant's application with costs.
20. The Appellant's Written Submissions were dated and filed on 12th July 2022 while those of the Respondent were dated and filed on 11th October 2022. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.



Legal Analysis

21. The Appellant invoked Order 42 Rule 6(6) of the Civil Procedure Rules and Section 79G of the [Civil Procedure Act](#) and placed reliance on the case of *Mrao vs First American Bank of Kenya Limited & 2 Others* [2003] eKLR where it was held that the power to grant or refuse an order of injunction was discretionary and that such discretion was on the basis of law and evidence.
22. She also relied on the case of *Patricia Njeri & 3 Others vs National Museum of Kenya* [2004] eKLR where the court held that an order of injunction was discretionary, that the discretion would be refused where it would cause more hardship than it would avoid, that the applicant had to show that refusal to grant the injunction would render the appeal nugatory and that the court should be guided by the principles in the case of *Giella vs Cassman Brown* [1973] E.A. 358 which were that before an interlocutory injunction could be granted, the applicant had to show a prima facie case with probability of success, that he was likely to suffer irreparable injury which would not be adequately compensated by an award of damages and that if the court was in doubt, it would decide an application on a balance of convenience.
23. She further relied on the cases of *Mrao vs First American Bank of Kenya Limited & 2 Others* (Supra) and *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR where the common thread was that a prima facie case was one where on the face of it, the applicant would more likely than not succeed at the conclusion of the case.
24. She was categorical that her appeal raised meritorious issues both on fact and law which ought to be heard and that an arguable appeal was not one which must necessarily succeed but one which ought to be argued fully before the court and a determination made as was held in the case of *Kenya Commercial Bank Limited vs Nicholas Ombija* [2009] eKLR. She asserted that the determination of the court on whether she had a prima facie case with chances of success called for a consideration of the prospects of success on the pending appeal since the ultimate objective was to safeguard her rights in the appeal by maintaining the status quo where need be.
25. It was her case that the Trial Court ignored the principles of law provided for under Article 53(2) of [the Constitution](#) of Kenya, 2010, Section 4(2) and 3(b) of the Children's Act. She pointed out that the Trial Court also failed to take into consideration that when it came to the question of deciding custody of children of tender years, it was the law that in the absence of any exceptional circumstances, the custody of children of tender years should be awarded to the mother as was held in the case of *J.O vs S.A.O* [2016] eKLR. She contended that the said issue was a prima facie issue for consideration by the court.
26. She argued that if the she had orders sought were not granted, a greater social and psychological impact would be inflicted on the child more than the parties and would cause him greater hardship.
27. On his part, the Respondent submitted that the principles for injunction pending appeal was that it was a discretionary power that should not be exercised whimsically as was held in the case of *Mohammed Abubakar vs Benjamin Sila t/a Legacy Auctioneers Services & 3 Others* [2022] eKLR which cited with approval the case of *Patricia Njeri & Others vs National Museum of Kenya* (Supra) that had outlined how the discretionary ought to be exercised.
28. He argued that the Appellant's appeal was frivolous and did not stand any chance of success noting that it was a camouflaged appeal against a review application yet in real sense, it was an appeal against the consent order. He invoked Section 67(2) of the [Civil Procedure Act](#) and Section 76 of the Children's Act and argued that there was no evidence that the child was abused since there were no marks on his



body and that the Appellant did not make a report to the police to substantiate the claim being that child abuse was a criminal offence.

29. It was his contention that the granting of the orders sought would inflict greater hardship than it would avoid and that the said hardship would be that the Appellant would constantly engage him in unnecessary court battles and applications whereas the suit had been compromised by consent. He termed the instant application an abuse of the court process. He asserted that he had secured fully paid scholarships for the children in international school in Malawi and that the Appellant wanted to deny the child the opportunity to attend best schools and without the burden of payment of fees.
30. He was emphatic that allowing the child to travel to Malawi would not render the appeal nugatory but that would be in his best interest as he would bond, develop and grow with his siblings as well as attend international school with fees fully paid by his employer. He invited the court to be guided by the principles in *Giella vs Cassman Brown*(Supra) and asserted that there was no doubt that the child was a child of tender age and that over time, Kenya's legal system had automatically granted mothers custody of children of tender years.
31. He invoked Article 53 of *the Constitution* of Kenya, 2010 and argued that a purposive interpretation of the said Article was that biological parents have equal authority and rights over the child and no parent could claim to hold superior rights over the minor as was held in the case of *SMM vs ANK* [2022] eKLR.
32. He further cited the case of *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR where the court held that a consent order could only be set aside on grounds which would justify the setting aside of a contract. He argued that the Appellant had not demonstrated that the consent at the Trial Court was procured by fraud, misrepresentation or concealment of material facts and neither was the consent contrary to the law. He asserted that the Appellant's allegations that he had carried out a DNA and established that he was not a biological father of the child and that he was being abused by his step mother were unsubstantiated.
33. It was therefore his case that the Appellant had failed to establish a prima facie case as was defined in the case of *Mrao Limited vs First Assurance Bank of Kenya & 2 Others* (Supra) and cited in the case of *Acquinas Wasike & 2 Others vs Sidian Bank Limited (Formerly K-Rep Bank) & Another* [2016] eKLR.
34. He contended that by permitting the child to travel to Malawi by consent while interim order of injunction subsisted the risk, danger or fear that would have been caused to the child had been extinguished by the Appellant and that the balance of convenience therefore tilted in his favour and in dismissal of the application together with the appeal. He was emphatic that the Appellant had failed to meet the threshold of granting an injunction pending appeal.
35. Notably, as was stated hereinabove, an applicant seeking an injunction was required to demonstrate that he had met the three (3) conditions that were set out in the celebrated case of *Giella vs Cassman Brown* (Supra).
36. *The Constitution* of Kenya, 2010 requires that in all matters concerning children, the best interest of the child shall be of paramount importance. Article 53(2) of *the Constitution* of Kenya provides as follows:-

“ A child's best interests are of paramount importance in every matter concerning the child.”



37. Section 4(2) and 4(3)(b) of the [Children Act](#), 2001 (now Section 8 of the [Children Act](#), 2022) echoes the constitutional imperative that:-

“In all actions concerning children whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration...

All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

- a. Safeguard and promote the rights and welfare of the child;
- b. and promote the welfare of the child”

38. Further, Section 85 of the [Children Act](#), 2001 (now Section 101 of the [Children Act](#), 2022) provides for the principles to be applied in making custody order, which said principles include the best interest of the child.

39. This court noted that it was the child’s interests that were at stake herein and not that of the Appellant or the Respondent herein. It attempted to have the parties resolve this matter out of court but the same failed. Notably, although the law has been that except where exceptional circumstances exist, the custody of such children should be awarded to the mother as was held in the case of *Re: S (an infant)* [1958] 1 All ER 783, at 786 and 787 and *J.O. vs S. A.O.* [2016] eKLR, there is also a shift in the jurisprudence in Kenya that courts must consider the best interest of the child principle as provided in Article 53 (2) of [the Constitution](#) of Kenya and Section 8 (1)(a) of the [Children Act](#).

40. The question of whether or not the Appellant was seeking to set aside the consent and/or if it was to vary it in view of subsequent circumstances after the arrival of the child’s step mother, step bother and step sister in Malawi was a matter of appeal. Indeed, the crux of the Appeal herein was whether or not the Learned Trial Magistrate considered the best interests of the child before delivering the Ruling that the Appellant now wished to appeal against.

41. This was not an application that could strictly be considered on the basis whether or not damages would be adequate compensation in the event the interlocutory injunction was not granted because the subject matter was a child.

42. The court could not also with certainty state that the Appellant had established a prima facie case because Article 53 (1)(e) of the [Children Act](#) provides that every child is entitled “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” and more particularly because every case has to be determined on the basis that a child’s best interests were of paramount importance in every matter concerning him or her as has been stipulated in Article 53 (2) of [the Constitution](#) of Kenya and Section 8(1) (a) of the [Children Act](#).

43. This court recognised that there was danger in the child being tossed up and down between Kenya and Malawi while the Appellant and the Respondent ventilated the Appeal herein. In the event the Appeal herein was successful and the child would have already gone to study in Malawi, much trauma would be visited on him if he was to be uprooted from an environment that he was already used to and relocated to Kenya to live with the Appellant herein. In the event, the Appellant was not successful,



he would also suffer the trauma of being relocated from Kenya to Malawi to live with the Respondent pursuant to a court order.

44. The child was five (5) years old at the time the application herein was filed. He was still attending school in Kenya. A perusal of the proceedings before the Learned Trial Magistrate of 12th August 2021 showed that he had expressed his wishes to live with the Appellant in Kenya. To avoid the disruptions in the child's life, it was this court's finding that it was in the best interest of the child that the minor remains with the Appellant pending the hearing and determination of the Appeal herein.
45. Indeed, no prejudice would be occasioned to the Respondent if he lived with the Appellant while the Appeal herein was being heard as he could still attend school in Malawi if the said Appeal herein was not successful as he was still a young child and would still benefit from the fully paid scholarships that the Respondent enjoyed as part of his employment terms. If there was any prejudice, the Respondent did not demonstrate the same.
46. This court therefore determined that it ought to proceed on the basis of what would be convenient at this point. Accordingly, the balance of convenience therefore tilted in favour of granting the temporary injunction in favour of the Appellant pending the hearing and determination of the Appeal herein.

Disposition

47. For the foregoing reasons, the upshot of this court's decision was that the Appellants Notice of Motion application dated and filed on 24th February 2022 was merited and the same be and is hereby allowed in terms of prayer No (3) herein. In view of the fact that this is a family matter, each party will bear its own costs of this application.
48. As this court has since been transferred, matter will be mentioned on 20th July 2023 with a view to giving directions on the hearing of the Appeal herein.
49. It is so ordered.

DATED AND SIGNED AT KISUMU THIS 25TH DAY OF MAY 2023

J. KAMAU

JUDGE

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF MAY 2023

M.S SHARIFF

JUDGE

