



REPUBLIC OF KENYA



**Juma v Schulz (Miscellaneous Application E028 of 2023)
[2023] KEHC 22241 (KLR) (30 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 22241 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E028 OF 2023
G MUTAI, J
AUGUST 30, 2023**

BETWEEN

EDITH AWOUR JUMA APPLICANT

AND

HANNJO SCHULZ RESPONDENT

RULING

1. The Children Court in a decision made by the Hon Lucy Khaendi Sindani on 7th July 2023 issued warrants for the arrest of the Applicant herein following the disobedience of its orders.
2. Being aggrieved by the said decision the Applicant filed the Notice of Motion application dated 11th July 2023. The said Motion is expressed to have been brought under Article 165(6) and (7) of *the Constitution* of Kenya, 2010, sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*. The Applicant seeks the following orders:-
 1. Spent;
 2. Spent;
 3. That this honourable Court be pleased to recall the lower Court file for purposes of making directions regarding the proceedings and order of the 7th day of July 2023 issued by the Hon Lucy Khaendi Sindani Magistrate;
 4. That upon availing the aforesaid impugned record and proceedings, in particular, the proceedings and orders of the 27th June 2023 and 7th day of the July 2023 the honourable Court be pleased to review the same and declare that the same are not fair and further are not in best interest of the minor in question;
 5. That the honourable Court be pleased to order and or withdraw the proceedings and the orders of the 27th June 2023 and 7th day of July 2023, in particular and the subsequent issuance of



warrants of arrest against the Applicant herein Edith Awuor Juma be set aside and transfer the matter for trial and disposal of the Applicant's duo applications, both dated 27th July 2023 and 4th July 2023 respectively to any other subordinate Court on account of bias;

6. That the honourable Court to grant any other or further orders in line with the best interest of the minor the subject of the Chief Magistrate's Court in Tononoka Children case No. E522 of 2022; Edith Awuor Juma versus Hannjo Schulz.
3. In support of her application the Applicant filed a Supporting Affidavit. The gravamen of her affidavit was that the Respondent and the Applicant had entered into a parental responsibility agreement dated 18th May 2023. She averred that notwithstanding what the said parental responsibility agreement states the Respondent had denied her access to the child. Upon making an impromptu visit to the child on 23rd June 2023 she found him in a terrible state. On examination, it was established that the child had been subjected to sexual abuse. A report was made to the police vide OB NO 63/27/7/2023 at Malindi Police Station. The Applicant is aggrieved that despite being informed about the incident the Subordinate Court ordered the Applicant to produce the minor for purposes of handing over to the Respondent and on 7th July 2023 the said Court issued warrants for her arrest.
4. In support of the said application the Applicant attached as exhibits in her Supporting Affidavit the lower Court order, handwritten notes dated 26th June, 2023 said to be treatment notes together with Laboratory Request and Report Form and patient prescription Form, all issued by Malindi Sub County Hospital and the Notice of Motion application dated 27th June 2023 vide which the Applicant sought custody of the minor pending the hearing of the suit. The Applicant also annexed another application dated 4th July 2023 vide which similar orders were sought. The Applicant further annexed a report dated 7th July 2023. The said report recommended that the minor "be placed under the care and protection of the biological mother where the minor seems safe and comfortable."
5. The application is opposed. The Respondent filed a Replying Affidavit sworn on 24th July 2023. The Respondent denied the allegation made by the Applicant. He averred that:-
 1. There is a parental responsibility agreement dated 18th May 2023. Pursuant to the said agreement a consent was recorded in Court on 20th March 2023 (sic!). The Respondent deponed that the Applicant did not exercise her access rights until 18th June 2023, a few days before what he described as abduction took place. He further averred that since January 2023 the Applicant had exercised her right of access twice and that on both occasions she abducted the minor;
 2. The Applicant had attempted to blackmail him by alleging that he had molested the child;
 3. The Applicant after abducting the child kept him in a dilapidated cottage. The child was found by the police in a room full of marijuana with condoms thrown on the floor;
 4. The child was retrieved from the premises of Mr. Ibrahim Muktar after the Applicant disobeyed Court orders. She neglected the child and wasn't interested in his best interest;
 5. He had not molested the child as alleged. He relied on the report of Dr. Charles Mwangome that he said absolved him fully;
 6. The application is an attempt by the Applicant to defeat the proceedings pending before the lower Court. The Applicant uses the child as a leverage in her attempt to reestablish a relationship with him;



7. It would not be in the best interest of justice to allow the application filed by the Applicant as the same is an attempt on her part to delay and overcome the Tononoka Chief Magistrate's Court's decision.
6. The application dated 11th July 2023 was canvassed before me on 1st August 2023 during this Court's vacation on account of its urgency. Ms. Mwanja for the Applicant prayed that I exercise my supervisory authority over the Children Court and call for the lower Court file so that I could review the proceedings of 27th June 2023 and 7th July 2023. She relied on the grounds in the application as well as the contents of the affidavits and the annexures thereto.
7. Ms. Mwanja submitted that despite being made aware of the alleged molestation the Court below ordered that the minor be handed over to the Respondent. For that reason, the said order was not in the best interest of the minor and ought therefore to be reversed.
8. Mr. Obonyo for the Respondent opposed the application. He submitted that the instant application arose from the decision of the lower Court made after a consent judgment was entered into in 20th March 2023. The said consent judgment granted the Respondent custody of the child with access rights to the Applicant. During the proceedings in the Court below both parties were represented by duly appointed counsels. He submitted that the Applicant had not approached the Court with clean hands as she had declined to obey Court orders she had consented to. He submitted that the Applicant picked the child from his school and took him to Malindi and thus denied him his father's love.
9. It was urged that upon the child being abducted the Respondent filed an application before the Court below seeking production of the child. The Court issued the said order. It was argued on behalf of the Respondent that it was after the said order was issued that the allegation that the Respondent had molested the child was made so as to defeat enforcement of the orders of the Subordinate Court. I was referred to the sequence of events to wit that the Court order was issued a day before the allegation of molestation was made. I was invited to conclude that the said allegation was made to defeat justice.
10. Counsel submitted that the child was found in Watamu, Kilifi County, in a dilapidated room and that bhang and used condom was also found therein. There was also present a third party a Mr. Ibrahim, the Applicant's male friend.
11. Mr. Obonyo urged that a Court properly seized of the matter made a right decision. The Applicant had the option of asking for the recusal of the trial magistrate if at all she was apprehensive about her impartiality. He submitted that there are 2 applications before the lower Court which should be heard and determined.
12. It was submitted that the jurisdiction of the High Court under Article 165(6) and (7) should be used sparingly and only in the clearest of cases. In support of said contention, I was referred to the case of ENM versus SKM [2021] eKLR.
13. Mr. Obonyo further submitted that the mother of the child is unstable. She had threatened to kill herself and the child on a previous occasion. It was submitted that she had molested the child. That being so I would not be in the best interest of the child to allow the application. I was thus urged to dismiss the same.
14. In reply Ms. Mwanja submitted that the Respondent hadn't demonstrated what prejudice he would suffer if the orders sought are granted.



15. The subject of this application is a minor of tender age. *The Constitution* of Kenya, 2010 provides in Article 53(2) that “a child’s best interests are of paramount importance in every matter concerning the child”.
16. The foregoing Constitutional edict is given effect in section 8(1) to (3) of the *Children Act*, 2022 which provides that: -
- “(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—
- (a) the best interests of the child shall be the primary consideration;
- (b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.
- (2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, 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) conserve and promote the welfare of the child; and
- (c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.
- (3) In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child’s age and degree of maturity”.
17. The Applicant seeks the exercise by this Court of its Supervisory jurisdiction under Article 165(6) and (7) of *the Constitution* of Kenya, 2010. The said sub articles provide as follows:-
- “(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”
18. As this is a children matter when exercising supervisory jurisdiction, I must take into account, the best interest of the child in question. It should be noted that the interests of the Applicant and the Respondent are secondary. I must treat the child’s interest as first and paramount and do everything to safeguard, conserve and promote his rights and welfare.
19. In exercising my undoubted supervisory powers, I must be guided by the overriding objective which is that my decision should ensure the fair administration of justice.



20. I am in agreement with what the M. Thande J wrote in MNK versus AOK [2022] eKLR (paragraphs 22 and 23 thereof) that: -
- “ 22. The supervisory jurisdiction of this Court should not be used as a tool for unduly interfering with the exercise of a Court of competent jurisdiction, of its mandate. The High Court must also be careful not to be used to curtail the expeditious disposal of suits in subordinate Courts, in the name of exercising its supervisory jurisdiction”.
23. In the case of Director of Public Prosecutions v Perry Mansukh Kansagara & 8 Others [2020] eKLR, Mwongo, J. listed the following safeguards to be observed by the High Court in the exercise of its supervisory jurisdiction, and I concur:
- i. A balance has to be struck in the exercise of constitutional Supervisory Jurisdiction to ensure there is no appearance that its object is to micro- manage the trial court’s independence in the conduct and management of its proceedings;
 - ii. Ideally, constitutional Supervisory Jurisdiction should be exercised only after the parties are heard on the subject matter in question
 - iii. Supervisory Jurisdiction should not be used where the option of revision is appropriate or applicable;
 - iv. Supervisory Jurisdiction should not be used as a shortcut for an appeal where circumstances for appeal clearly pertain and are more appropriate;
 - v. Supervisory Jurisdiction should be exercised to achieve the promotion of the public interest and public confidence in the administration of justice;”
21. I have considered the matter. I note that the parties entered into a parental responsibility agreement dated 18th May 2023. In the said agreement it was acknowledged that the Applicant and the Respondent are the biological parents of the minor “HS”. In paragraph 3 of the recital of the said agreement it was stated that “the Second Party (the Applicant) has agreed to consent to full custody to the First Party including medication and education upon terms and conditions herein below mentioned”. It was agreed that the Applicant could pick up the minor once every fortnight from 5pm on Friday, and stay with him up to Sunday at 6pm, subject to prior notification. The minor was to spend half the holiday with each parent.
22. The said parent responsibility agreement was signed by the parties on 18th May 2023 before Lilian A. Oluoch, an advocated of the High Court of Kenya. It does appear to me that both parties enjoyed legal representation and knew exactly what they were agreeing to.
23. Although there is a dispute as to the sequence of events I note that the Applicant picked up the child and failed to return him to the Respondent on time. This failure caused the Respondent to seek orders from the Court below. The Respondent argues that it was only after he obtained orders those orders that the Applicant made grave allegations against him.
24. I have seen the 2 medical reports prepared by a clinical officer and a medical doctor. Both medical professionals made diametrically opposed findings. Equally baffling is the fact that the HS appears to have accused each parent of abuse.
25. The minor was retrieved from the custody of the Applicant on July 14, 2023. The report prepared by a Mr. Andrew Warui of the DCI Child Protection Unit, Mombasa. He reported that “the warrant of



arrest was executed and Ibrahim Khator was arrested but with a lot of difficulties. He revealed where the minor was hidden but the defendant appeared intoxicated with abuse of cannabis sativa (bhang) as the house was smelly with strong stench of marijuana and stinking with a small bed with old mosquito nets and condoms lying around where the minor was playing.”

26. The Court is inclined to belief what Dr. Mwangome wrote. He is a medical practitioner of good standing in Mombasa. His findings are consistent with the report of the Directorate of Criminal Investigations Children Protection Unit.
27. Given the circumstances of this matter it would appear to me that the Court below cannot be faulted. Based on what has been availed to this Court it is highly likely that these proceedings were commenced to defeat proceedings before the Court below. In the circumstances I am not satisfied that a case has been made for me to exercise the supervisory powers that the Court is given under Article 165(6) and (7) of *the Constitution* as the test in the Director of Public Prosecutions v Perry Mansukh Kansagara & 8 Others [2020] eKLR has not been met. The application must therefore fail.
28. The upshot of the foregoing is that the Notice of Motion dated 11th July, 2023 is hereby dismissed. The interim orders are vacated.
29. Ordinarily costs follow the events. As this is a matter concerning a child, between his biological parents, it is not appropriate, in my view to award costs. Each party shall therefore bear own costs.
30. I order and direct that the matter before the Subordinate Court be heard on a priority basis, by the Hon. Lucy Khaendi Sindani.

Orders accordingly.

DELIVERED AND DATED AT NAIROBI THIS 30TH DAY OF AUGUST 2023 VIA MICROSOFT TEAMS

GREGORY MUTAI

JUDGE

In the presence of:-

Mr. Obonyo for the Respondent;

No appearance for the Applicant; and

