



REPUBLIC OF KENYA



ZM v JAM (Family Appeal E017 of 2023) [2023] KEHC 21711 (KLR) (7 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21711 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA**

FAMILY APPEAL E017 OF 2023

G MUTAI, J

AUGUST 7, 2023

BETWEEN

ZM APPELLANT

AND

JAM RESPONDENT

RULING

1. Before me is a notice motion dated June 22, 2023. Vide the said motion the appellant seeks the following orders: _
 1. The judgment delivered by the Tononoka Children Court on January 31, 2023 be set aside pending the hearing of this application;
 2. The court be pleased to stay the execution of the decree pending from the said court pending the hearing of this application;
 3. The court be pleased to hear the appeal out of time; and
 4. Costs be in the cause.
2. The appellant/applicant contends that she was not heard in the lower court as the matter proceeded ex parte as she was not aware of the case. She realized that there was a pending suit after her mother was arrested. In its judgment the Children Court made an order requiring her to hand over the children to the appellant. She is apprehensive that if the decree of the children Court is not stayed the education of the subject children will be interfered with. The appellant averred that the respondent lacks the ability to take care of the children as he is presently facing several criminal cases and has been in and out of custody on several occasions.
3. The appellant attached to the application a copy of the Memorandum of Appeal which was filed out of time without leave of the court and also of the judgment of the court below. I have perused the said judgment and it is clear that the matter proceeded by way of formal proof. The court ordered that:-



- a. A declaration is hereby made that both the plaintiff and the defendant have equal parental responsibility over the children herein;
 - b. Both parties to have joint legal custody, the plaintiff to have actual physical custody and the defendant to have unlimited access and to have the children for half of the period of all school holiday;
 - c. The children’s department and the police in whose jurisdiction the children are currently held do assist in retrieving the children and handing over the same to the plaintiff in case of resistance in the execution of order (b) above; and
 - d. No order as to costs and either party is at liberty to apply.
4. The notice of motion was opposed. The respondent filed a replying affidavit dated July 17, 2023. In the said affidavit the respondent asked for the children to be brought to court. He averred that the mother of the appellant, and not the appellant, was the one taking care of the children. He prayed that custody of the children be granted to him pursuant to the orders of the Children Court.
 5. I heard the said application July 25, 2023. Mr. Adika for the appellant submitted that the appellant and the respondent separated in 2021. The children are presently with the mother. It is the mother who provides for all their needs. The mother had to look for a job in Dubai so as to make ends meet. The proceedings before the lower Court proceeded *ex parte* as the mother wasn’t served. The appellant was not opposed to the respondent being given monitored access on weekend and all school holidays. She accused the respondent of having attempted to run away with the children in the past.
 6. The respondent opposed the application. He submitted that he didn’t know where the children are. He brought the case after she left the Country. The respondent averred that the appellant denied him custody of the children despite being the father. He contended that the children live in a bad environment unsuitable to them. He affirmed that the respondent was served. He submitted that the lower Court could not have entered judgment unless it was satisfied that service was effected.
 7. I have considered the submissions of the parties. The appellant contends that she was unaware of the case as the service was effected vide a mobile number that isn’t hers. In my view her explanation is plausible. If I don’t allow the application, there is a serious risk that an injustice will be occasioned.
 8. During the hearing the minors were brought to court. I had the opportunity of hearing them in camera. I am convinced that at this point it would be their best interest if their current residence is not changed.
 9. The interest of the respondent will be served by an expedited hearing.
 10. In my view justice will be served by affording the Applicant an opportunity to ventilate his case. *Markson Karani Muchunku versus Joseph Ngari Gituku* [2021] eKLR. Gitari J stated as follows: -

“The applicant seeks the exercise of discretion by this court to reinstate the appeal. It is trite that the court’s discretion must be exercised fairly and judiciously. It is a principle of natural justice that a party should be given an opportunity to be heard. article 50 of *the Constitution* provides that, “every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body”

It follows that every person ought not to be shut out from accessing the court or normally what is referred to as having his day in court. The right of a party to enjoy the fruits of judgment must be weighed against the right of a party to access court and to have



his dispute heard and determined by a court or tribunal with competent jurisdiction. The emerging jurisprudence is that courts should lean on doing substantive justice by determining disputes on merits other than on procedural technicalities article 159(2) (d) of *the Constitution* provides that “Justice shall be administered without undue regard to procedural technicalities.”

This is buttressed by section 1A &1B of the *Civil Procedure Act* which provides for the overriding objectives of the Act which is to facilitate the just, expeditious proportionate and affordable resolution of civil disputes governed by the Act.”

11. The upshot of the foregoing is that I allow the notice of motion dated June 24, 2023 in the interest of justice. I do not think that the respondent will be prejudiced if the appellant is given her day in court. The hearing of the appeal will therefore be expedited. Consequently: -
1. I extend the time of filing of the appeal and deem the appeal filed herein as properly filed subject to payment of the requisite fees;
 2. I stay execution of the judgment of the Court below delivered on 10th May 2023 pending the hearing and determination of the appeal;
 3. I ordered that the appeal proceeds by way of written submissions to be filed as follows: -
 - a. The appellant/Applicant shall file the Record of Appeal together with Written Submissions on or before 21st August 2023; and
 - b. The respondent shall file his Written Submissions on or before September 4, 2023.
 4. The Appeal shall be heard on September 20, 2023 when the appellant and the respondent shall highlight their Written Submissions; and
 5. I make no order as to costs in view of the nature of the matter.

Orders accordingly.

DELIVERED, DATED, AND SIGNED AT MOMBASA THE 7TH DAY OF AUGUST 2023 VIA MICROSOFT TEAMS

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GREGORY MUTAI

JUDGE

In the presence of: -

Mr. Adika for the appellant;

Mr. Myak – the respondent (in person);

Mr. Arthur Ranyondo – Court Assistant.

