SOM v VMM (Civil Appeal E105 of 2022)
[2023] KEHC 23257 (KLR) (Family) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23257 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL E105 OF 2022

PM NYAUNDI, J

SEPTEMBER 29, 2023

BETWEEN

SOM ..... APPELLANT

AND

VMM ..... RESPONDENT

(Being an Appeal aganst part of the ruling of the Children's Court at Milimani by HON. R.O. Mbogo delivered on the 23rd of September, 2022 in Children's Case No. E121 of 2022)

JUDGMENT

Introduction

1. Vide memorandum of appeal dated October 24, 2023 the appellant seeks orders that:
    a. This appeal be allowed;
    b. The ruling and orders if the Children's Court at Nairobi by Hon. R. O. Mbogo delivered on 23rd September 2022 be set aside;
    c. This Court be pleased to remit Children's Case number E121 of 2022 for hearing and determination of the suit before a different Magistrate.
2. The Appeal is premised on the following grounds;

    That the Trial Magistrate erred in law and in fact by:
    a. Issuing orders of a final nature at the interlocutory stage;
    b. Allowing the Respondent's application and further granting orders that were not in the best interest of the Subject minor;

c. Finding that the Respondent had argued her case to the required standard in the absence of any evidence on record to support the same;

d. Allowing the Respondent's application while at the same time failing to consider the Appellant's response and submissions in their entirety; and

e. Allowing both prayers 2 & 3 in the Respondent's Application whereas one of the orders (prayer 3) was sought as an alternative to the other (prayer 2).

3. Parties agreed to canvass the Appeal by way of written submissions, the Appellants submissions are dated 18th May 2023 and those of the Respondent are dated 19th July 2023.

Summary Of The Appellant's Submissions

4. The Appellant framed the issues for determination as: -

a. whether the trial court was right in issuing orders sought in the application at the interlocutory stage

b. whether the Appeal should be allowed and the ruling of the trial court set aside.

5. On the first issue, the Appellant submitted that the Court should be careful not to delve into issues that are in the realm of the main suit to avoid dispensing away of the suit at an interlocutory stage. He submitted that at interlocutory stage, the Court could only order interim custody and not full custody. He relied on the Court of Appeal case of Olive Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others [2016] eKLR where the court was persuaded by the dicta in the Indian case of Deoray -v- State of Maharashtra & Others where it was stated that:

> " Situations emerge where the granting of an interim relief would be tantamount to granting the final relief itself. And then there may be converse cases where withholding of an interim relief would be tantamount to dismissal of the main petition itself; for, by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the Petitioner though all the findings may be in his favour. In such cases, the availability of a very strong prima facie case ...the court may grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and exceptional cases."

6. The Court was also persuaded by the Court's comment in the Indian case of In Ashok Kumar Bajpai -v- Dr. (Smt) Ranjana Bajpai, where the Court held that:

> " In exceptional circumstances, where for one reason or other the court feels compulsion to grant an interim relief which amounts to final relief, the Court must record the reasons for passing such interim relief."

7. He submitted that the Children's Court did not give reasons why it gave final orders at an interlocutory stage.

8. He also submitted that prayer for custody is also contained in the Plaint, an indication that it is a prayer of final nature, leaving nothing for the court to determine at the final stage. He relied on the Court's finding in the case of Muslims For Human Rights (Muhuri) & 2 Others V Attorney General & 2 Others [2011 eKLR where the Court held that:

> " The court must be careful for it not to reach final conclusions and to make final findings. By the time the application is decided, all the parties must still have the ability and flexibility

to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis- a-vis the case of either parties. This principle is similar to that in temporary at or interlocutory injunctions in civil matters."

9. He submitted that the Prayer for Full Custody was an alternative to the court granting the prayer for the Appellant's consent to the Minor's traveling, yet the court granted both prayers.

10. The Appellant referred the court to Article 53 (1) of *the Constitution* of Kenya 2010 which entitles each and every child to parental care and protection, which includes equal responsibility of the mother and the father, whether married or not. He submitted that granting full custody to the mother who would permanently be in New Zealand, denied the Appellant the opportunity to spend time with the minor and be with him through the milestones of life is in violation of Article 53(1). He added that he is in every way willing to be a present father to the minor. He relied on the finding in the matter of Noordin v Karim [1990] eKLR where the Court held that:

> " The paramount consideration in this type of case is the welfare of the children. To deprive a parent of access is to deprive a child of an important contribution to his emotional and material growing up in the long run."

11. The Appellant also invoked section 32(1) of the Children's Act 2022, which provides that:

> " Subject to the provisions of this Act, the parents of a child shall have parental responsibility over the child on an equal basis, and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility whether or not the child is born within or outside wedlock."

12. And Section 32 (2)(c) of the same act which stipulates the duties of a parent to include, "facilitate or restrict the migration of the child from or within Kenya."

13. The Appellant pointed out that although the application sought the consent of the Appellant to allow the minor to stay in New Zealand, the minor had been removed from Kenya without his consent or knowledge and the Respondent had not adduced any evidence to prove that the said consent had been sought and withheld by the Appellant.

14. On the second issue, the appellant submitted that this court should uphold the appeal as the trial court's ruling was unconscionable as the Magistrate did not consider the Appellant's right as a father and parent of the minor, and that the custody order would keep him from the minor's life since the Respondent travels a lot.

15. The minor would be denied fatherly love and the Appellant would be denied access to him which might negatively affect the child. The trial court had also failed to consider the Appellant's response and submissions and that the issue of full custody should have been left for argument in the substantive hearing upon hearing both parties.

16. The Appellant urged this court to allow this Appeal and remit Children's Case number E121 OF 2022 for hearing and determination before a different Magistrate.

Summary Of Respondent's Submissions

17. The Respondent framed the issues for determination as:

a. whether the trial court was right in issuing orders sought in the application at the interlocutory stage and

b. whether the Appeal should be allowed and the ruling of the trial court set aside.

18. On the first issue, the Respondent submitted that the Appellant had an opportunity to grant consent when the application was filed but he allowed the application to be heard and the Court to make orders.

19. She acknowledged that the court gave orders of a final nature only because the circumstances were special in that, the minor had already settled in New Zealand, had a set routine, and if the orders sought were no granted, the minor's life would have been disrupted. The Respondent went on to quote part of the ruling where the Learned Magistrate stated:

> " I have considered the response and am of the considered view that the interests of this child should be served and protected more than the interests of the litigants, considering that the child has been away for three years and is now settled in New Zealand. The Court shall have the only option of upholding his interests so that he can be left to enjoy the benefits of schooling and growing there."

20. The Respondent submitted that the Best interest of the Child would not have been served if the Court denied the Respondent custody of the minor and urged this Court to find that the trial Magistrate was right in issuing the orders.

21. On the second issue, the Respondent submitted that the current appeal lacks merit and is brought in bad faith and should be dismissed. She explained that the before the minor left for New Zealand, she had sought the Appellant's consent countless times to allow the minor to travel out of the country, but he withheld it.

22. That the Appellant had chosen not to participate in the minor's life, and made no attempts to exercise his parental responsibility over the minor. The Appellant had never sought custody of the minor prior to filing of the matter in the Magistrate's Court.

23. The Respondent urged the court to consider that the minor was already settled in New Zealand, and allowing the appeal would disrupt his life, the Appellant had not demonstrated how the minor's relocation to New Zealand would negatively affect the minor, the Appellant can still practice his parental rights over the minor while he is in New Zealand, and the Appellant is free to provide for the minor and visit any time.

24. The Respondent further submitted that this appeal is an attempt to drag her into unnecessary protracted proceedings and interfere with the minor's status which is not in the minor's interest. She urged the court to dismiss the appeal and uphold the ruling of the trial court.

Analysis And Determination

25. Having reviewed the pleadings herein, the Submissions filed, authorities cited and the applicable law, I discern the following as the issues for determination;

a. Whether this court should interfere with the discretion of the trial magistrate

b. Whether the appeal should be allowed

c. Which party should bear the Cost of this Appeal.

26. On the first issue, in Coffee Board of Kenya V. Thika Coffee Mills Limited & 2 Others [2014] eKLR, it was stated that the court ought not to interfere with the exercise of such discretion unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

27. In the instant case it is urged by the Appellant that the trial court erred in issuing final orders at the interlocutory stage and further the court erred in allowing both prayers that had been sought in the alternative.

28. On whether the Court erred in allowing both prayers when they had been sought in the alternative. I am guided by the decision of the Court of Appeal in National Bank of Kenya v Anthony Njue John [2019] eKLR in which the Court cited with approval the decision in Alex Wainaina T/A John Commercial Agencies Versus Janson Mwangi Wanjihia Civil Appeal No. NA 297 of 2014, in which the court held

> "On the first issue, we think it is trite law that where relief is prayed for in the alternative, a court of law has to choose on the facts, whether to grant the main relief or the alternative and give reasons either way. Both ought not to be granted in a blanket form. On this the trial court was in error."

29. I find that the trial court should have either allowed prayer 2 of the application seeking consent or prayer 3 of the Application seeking full custody, as the application clearly stated that the subsequent prayer was sought in the alternative.

30. On the issue of granting final orders at the interlocutory stage the Court in the case of Olive Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others [2016] eKLR(supra) discourages courts from granting final orders at interlocutory stage unless there are special circumstances which the Court must take note of.

31. I am persuaded that matters that touch on the welfare and well-being of minors constitute special circumstances. In the instant case, the minor is in New Zealand with the Respondent who has been the primary caregiver for three years and faces the threat of being deported if his visa is not regularized.

32. There are two avenues, either the Appellant grants his consent or the Respondent demonstrates to the authorities in New Zealand that she has physical, legal and sole custody of the minor. From the record it is evident that the Appellant is not willing to grant consent.

33. I find that the Court did consider these circumstances. I have also looked at the defence filed by the Appellant where he in paragraph 5 and 23 he denies paternity of the child and in the submissions of the Appellant and he is reluctant to give his consent at this stage.

34. The minor's situation is however timebound as his VISA has to be regularized before 21st January 2024. If the matter is left to await the outcome of the trial, it may mean that that the Child will be unable to renew his VISA at all. It is in the minor's best interests that the status quo be maintained pending the hearing and determination of the main suit.

35. It is the Respondent who has moved the Court. The Special circumstances in the instant case are that the minor's visa is set to expire by January 2024. The Appellant has withheld his consent to allow the minor to stay on in New Zealand, a country he has stayed for 3 years. The immigration laws are clear, for the child to get the visa extended the Respondent needs orders that show she has sole custody of the

minor, absent the consent of the father. In this case there is a likelihood that as raised by the Appellant, the DNA test may show he is not the father of the minor.

36. I do not imagine that it is the Appellants intention to frustrate the minors continued stay in New Zealand, especially if as he contends he is not the father of the minor, he therefore cannot have his cake and eat it. Application of the best interest principle in the case necessitates that the Court grant orders that enable the Respondent renew the VISA of the minor.

37. For the aforestated reasons the Appeal partially succeeds

38. I find that the Court erred in granting both prayers 2 and 3 when they had been pleaded in the alternative

39. Accordingly, I set aside the Courts ruling with regard to prayer 2 and allow only prayer 3 thereof

40. For the avoidance of doubt the Appeal succeeds only to the extent that the order allowing prayer 2 of the Notice of Motion dated 4th April 2022 is set aside.

41. I uphold the orders of the Court granting prayer 3 and grant physical, actual and legal and sole custody to the Respondent to enable her process the VISA for the minor.

42. The matter is remitted back to the Trial Court for hearing of the main suit. I see no basis to transfer the matter to another Court.

43. Each party will bear their own costs

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2023.

P. NYAUNDI

JUDGE

In the presence of:

Sylvia Court Assistant