



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**GMM alias WM v SAS (Family Appeal E026 of 2023)
[2023] KEHC 27384 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27384 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E026 OF 2023
G MUTAI, J
DECEMBER 20, 2023**

BETWEEN

GMM ALIAS WM APPELLANT

AND

SAS RESPONDENT

RULING

1. Before the Court are two applications dated 29th August 2023 and 6th September 2023 filed by the Appellant and the Respondent respectively.
2. The application by the Appellant is dated 29th August 2023 and seeks the following orders: -
 1. Spent;
 2. That pending the hearing and determination of this application, this honourable Court be pleased to lift the warrant of arrest issued on 28th August 2023 against the Appellant/Applicant.
 3. That pending hearing and determination of this application, the Respondent herein be restrained from alienating or removing the children from the custody of the Appellant;
 4. That pending hearing and determination of the appeal herein, the honourable Court be pleased to confirm orders number 2 and 3 above restraining the removal of the subject minors from the physical custody of the Appellant herein; and
 5. That costs of the application to be in the appeal.
3. The application by the Respondent, which is dated 6th September 2023, seeks the following orders: -
 1. Spent;



2. That this honourable Court be pleased to set aside the orders of the Court issued on 4th September 2023 and, more particularly, granting custody of the minors to the Appellant and all consequential orders pending hearing and determination of this application;
 3. That the appellant and her counsel be ordered to appear in Court physically with minors at the earliest date possible in Court for examination as soon as possible in compliance with the orders of the trial Court of 11th August 2023 and 25th August 2023;
 4. That the Court does declare the Appellant a contemnor and proceeds to punish her for contempt of Court;
 5. That the Court does declare the application dated 29th August 2023 and the entire appeal an abuse of the process of Court and dismisses the same with costs to the Respondent; and
 6. That costs of this application be borne by the Appellant.
4. Both applications are opposed. On 5th October 2023, I ordered that the applications be canvassed by way of Written Submissions. The submissions were highlighted on 27th October 2023.
 5. This is a very contentious child custody matter. The litigants have battled each other in the court below as well as before this court over the last 4 years.

Submissions of the Appellant

6. Mr Kiroko Ndegwa, learned counsel for the Appellant, submitted that this appeal stems from Children Case No. 107 of 2018 between the parties herein. In the said matter, the Court granted the Appellant custody, with the Respondent getting reasonable access. He submitted that the Respondent used a forged social inquiry report to have the orders reviewed to the detriment of his client. He urged that the Respondent was charged with forgery in Makadara Criminal case No. 1781 of 2021. He submitted that the Children Officers tasked by the court below with the responsibility of conducting social enquiry kept recanting their reports. The Courts did not give his client an opportunity under Article 47 of the *Constitution* to submit in opposition to the recanted reports. I was referred to the case of *Sospeter Ojaamong Versus Linet Amondi Otieno Nairobi* HCCC No. 31 of 2004 for the proposition that children of tender age should remain with the mother unless there are exceptional circumstances warranting disentitling the mother from exercising her natural right of nurturing her child or children. I was asked to lift the warrants of arrest issued against the Appellant unconditionally. Counsel also prayed that the children be in the custody of the Appellant during half the school holidays. Regarding the Respondent's prayer for the Appellant to be punished for contempt of court, counsel denied that there had been disobedience of court orders.

Submissions by the Respondent

7. Mr. Anaya, learned counsel for the Respondent, opposed the application made by the Appellant. He relied on the Replying Affidavit and the Further Affidavit of the Respondent, as well as on the Written Submissions. He submitted that the Appellant converted to Islam upon marriage and that the children were born and brought up as Muslims. Mr. Anaya further submitted that I lacked jurisdiction as the vacation Rules of the High Court were not followed. It was submitted that there is a similar application before the lower Court and, therefore, that this application is res subjudice.



Response by the Appellant

8. Mr Ndegwa submitted that there was a religious tension between the parties. He urged that the High Court has supervisory jurisdiction over the lower Court. The Court he submitted has the obligation under the *Children Act* to consider the best interest of the children when making determinations about them.

Analysis and Determination

9. Article 53(2) of the *Constitution* states that:-

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

10. This is echoed in section 8(2) of the *Children Act* which states 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. 19 No. 29 of 2022 *Children Act*
- (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.
- (4) The Cabinet Secretary shall issue guidelines to give effect to this section

11. My understanding of the above provisions of the *Constitution* and the law is that the primary duty of this court is to ensure that the best interest of the children, the subject of this cause is upheld and the interests of the parents are secondary.

12. M. Thande, J when considering a similar appeal in *MAA versus ABS* [2018] eKLR stated as follows in paragraph 32

“What is stated in Section 4 (3)(b) of the *Act* is the paramouncy principle which is vital in all matters concerning children and must be given prominence. While considering this matter, this Court was alert to the welfare of the child herein who is of tender years. The matter is not about the Appellant and the Respondent and their interests are secondary to those of the child. The foregoing provisions require this Court to treat the interests of the child as the first and paramount consideration and must do everything to *inter alia* safeguard,



conserve and promote the rights and welfare of the child herein. Acting in the best interest of the child, I am of the view that his welfare will best be served if he remains with his mother the Respondent.”

13. Applying the best interest principle, it is my opinion that the best interest of the children will not be served by protracted, bad-tempered litigation over the custody of the children. The children require love, affection and certainly. That is lacking at present.
14. The best interest of the children will also not be served by the punishment of the mother for contempt of Court. In any case, the Appellant gave an explanation for her failure to comply with the orders of the court. Her explanation is plausible. The Court, therefore, gives her the benefit of the doubt and declines to punish her.
15. In the circumstances, this Court sets aside the warrants of arrest issued against the Appellant on 28th August 2023. I decline to allow prayers 3 and 4 of the said Notice of Motion.
16. Regarding the Respondent’s application, it is my view that allowing the same will not be in the best interest of the children. The foregoing notwithstanding the Court notes that the parties appeared in court with the children. The court had the opportunity of interviewing the children in camera. The court declines to determine whether the appeal is an abuse of the process of court at this juncture. The upshot of the foregoing is that the application dated 6th September 2023 is dismissed.
17. This being a children’s appeal, each party shall bear here/his own costs.
18. In the interest of justice, I order that the appeal be fast-tracked for hearing on a priority basis.

Orders accordingly.

DELIVERED, DATED, AND SIGNED THIS 20TH DAY OF DECEMBER 2023 AT MOMBASA VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr. Anaya for the Respondent;

Mr. Nani for the Applicant; and

Arthur – Court Assistant.

