



REPUBLIC OF KENYA



**KENYA LAW**  
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**RK v AN (Family Appeal E028 of 2022)  
[2022] KEHC 10970 (KLR) (Family) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 10970 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**FAMILY APPEAL E028 OF 2022**

**MA ODERO, J**

**JULY 29, 2022**

**BETWEEN**

**RK ..... APPLICANT**

**AND**

**AN ..... RESPONDENT**

**RULING**

1. Before this Court is the Notice of Motion Application dated 14<sup>th</sup> March 2022 by which the Appellant/ Applicant RK seeks the following orders:-
  1. Spent.
  2. Spent
  3. That this Honourable Court be pleased to review, set aside and/or stay the orders issued by Hon Mbogo on 11<sup>th</sup> March 2022 pending the hearing and determination of the Appeal.
  4. Spent
  5. That this Honourable court be pleased to review and/or set aside the orders issued by Hon Mbogo on 11<sup>th</sup> March 2022 and suspend any access of the minor children by the Respondent/ Respondent pending the hearing and determination of the Appeal.
  6. Spent
  7. That this Honourable court be pleased to review and/or set aside the orders issued by Hon Mbogo on the 11<sup>th</sup> March 2022 and grant the Respondent/Respondent supervised day access to the minor children every Saturday form 10.00 Hours to 16.00 Hours on every alternative weekend pending the hearing and determination of this Appeal.



8. That a comprehensive Children’s Officers Report and Psychological report be filed with the Honourable court to ascertain the mental condition of the minor children before the Respondent/Respondent can be granted unsupervised access of the minor children.
  9. Any other orders the court deem fit in the interest of justice.
  10. That the costs be in the cause.”
2. The Application was premised upon Article 53 of the *Constitution* of Kenya Sections 4,6,7,8,113 and 114(a) of the *children Act* 2001, Orders 51 of the *Civil Procedure Rules* Cap 21, Laws of Kenya and all enabling provisions of the law and was supported by the Affidavit of even date sworn by the Applicant.
  3. The Respondent AN opposed the application through her Replying Affidavit dated 28<sup>th</sup> March 2022. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated 23<sup>rd</sup> June 2022 whilst the Respondent did not file any written submissions.

## Background

4. The parties herein were involved in Nairobi Childrens Case No. 251 of 2020. On 11<sup>th</sup> March 2022 Hon R.O. Mbogo Resident Magistrate made the following ‘interim’ order in respect of custody and access to the two minor children as follows: -
  1. That father shall continue having custody of the children.
  2. That the mother shall be granted access in the following terms:-
    - a) She shall be having alternative supervised access for the 1<sup>st</sup> 3<sup>rd</sup> weekends. The access shall be unsupervised after that.
    - b) The access shall be during the day during the 1<sup>st</sup> 3<sup>rd</sup> weekend and thereafter she shall be taking the children for overnight access.
    - c) The access shall be running from Saturday 1000hrs to Sunday 1600hrs during this school holidays.
    - d) If after the 3 weekends the schools have not opened she shall share equally the remaining part of the holiday with defendant father.
  3. That these access orders shall run for 90 days and thereafter the parties to fix the suit for full hearing.
  4. That a Comprehensive Children Officer’s Report shall be filled after the lapse of the 90 days.
  5. That parties have liberty to apply.
  6. That costs of the application shall be borne by each party.”
5. Being aggrieved by these interim order the Appellant filed Memorandum of Appeal dated 14<sup>th</sup> March 2022. Contemporaneously with that Memorandum of Appeal, the Applicant filed this present application seeking that the High Court review, stay and/or set aside the orders made by the trial court.
6. As stated earlier the application was opposed by the Respondent who is the mother of the minors.



## Analysis and Determination

7. I have considered the application before me, the Reply filed by the Respondent as well as the written submissions filed by each party.
8. Order 42 Rule 6(2) of the *Civil Procedure Rules* 2010 provide for the conditions to be met in considering an application for stay of execution. The court must satisfy itself that-
  - (a) The application has been brought without undue delay.
  - (b) The Applicant stands to suffer substantial loss if the stay is not granted.
  - (c) The Applicant has provided security for the due performance of the decree.
9. In this case the judgment in issue was delivered on 11<sup>th</sup> March 2022. The present application was filed on 14<sup>th</sup> March 2022, three (3) days after delivery of said judgment. Accordingly, I find that the application was filed in timely manner.
10. The impugned orders were made in relation to the maintenance and upkeep of a minor. It is trite law that in matters concerning the welfare of children courts are required to give priority to the best interest of the child.
11. The *Constitution* of Kenya 2010 provides at Article 53 (2) that:
  - (2) A child's best interests are of paramount importance in every matter concerning the child."
12. Likewise *Children Act* at Section 4(2) provides as follows:-

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. (own emphasis)
13. In the case of *Bhutt v Bhutt* Mombasa HCCC No. 8 of 2014, the Court held as follows:-

“In determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution Order 42 Rule 6 of the civil Procedure Rules, must be complemented by overriding consideration of the best interest of the child in accordance with “Article 53(2) of the Constitution.” (Own emphasis)
14. The parties herein are the biological parents of the subject minors. The lower court granted custody of the children to the Applicant (father). *Vide* the Ruling of 11<sup>th</sup> March 2022, the court made orders regarding access to the children by their mother. It is in the best interests of the minors to have regular access to both parents. No parent has superior rights over the other and both ought to be allowed interaction with the minors. The only exception is if there exists a real threat that the children will be exposed to imminent harm. I find no evidence that the Respondent possess a threat to the minors.
15. Moreover the Respondent has averred that despite the orders made on 11<sup>th</sup> March 2022 the Applicant has persistently denied her access to the minors. The Applicant cannot come to court seeking review of orders which he has in any event disobeyed. It is trite that courts do not make orders in vain. A person to whom a court order is directed is obliged to obey said order however unpalatable it may be, unless or until the same is reviewed and/or set aside. The trial court heard from both parties before making the Ruling of 11<sup>th</sup> March 2022.



16. In the case of *Hadkinson v Hadkinson*[1952] ALL ER it was held:-

“It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharge. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

17. Nearer home, in the case of *Econet Wireless Kenya Ltd v Minister For Information of Kenya & Another*[2005] eKLR, the Court relying on the decision of the Court of Appeal in Gillab Chand Papatlal Shah& another v .....Civil Application No. 39 of 1990 stated that:-

“It is essential for the maintenance of the rule of Law and order that the authority and dignity of our courts are upheld at all time. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibilities to deal firmly with proved contemnors.”

18. Finally, on the point in *Teachers Service Commission v Kenya Union of Teachers & 2 Others*[2013] eKLR the court stated as follows:-

“It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed.”

“A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

19. I reiterate that the orders of 11<sup>th</sup> March 2022 are merely interim orders. The Applicant should pursue the determination of the suit in the lower court rather than appealing interim orders. I am not inclined to review the orders made by the Children Court.

20. Finally I find no merit in this application. The same is dismissed in its entirety. This being a family matter each side will meet its own costs.

**DATED IN NAIROBI THIS 29<sup>TH</sup> DAY OF JULY 2022.**

.....

**MAUREEN A. ODERO**

**JUDGE**

