AL v NK (Family Appeal 26 of 2022) [2022] KEHC 12762 (KLR) (24 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12762 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

FAMILY APPEAL 26 OF 2022

JN ONYIEGO, J

AUGUST 24, 2022

BETWEEN

AL ..... APPLICANT

AND

NK ..... RESPONDENT

(An appeal from the ruling of honourable Viola Yator (P M) delivered on August 1, 2022 at Mombasa in Tononoka MCC NO 93 OF 2014)

RULING

1. Vide an application dated June 16, 2022 filed before Tononoka children's court, the respondent herein moved the court seeking orders that; the minor IL the subject of these proceedings be allowed to travel to UK with the applicant (now the respondent) to join [particulars withheld] college in the UK for her two year program; the respondent does supply to the child all the documents required and execute all admission documents, affidavits and consents where necessary as required by the British Immigration department and [particulars withheld] college to enable the minor IL to process her visa application and admission documentation in default the same be executed by the court; the court to grant any other relief it may deem necessary and; the applicant to pay costs of the application.

2. The appellant who is a father to the minor now aged 16yrs opposed the application citing grounds that he was not consulted; the conduct and background of the person sponsoring the minor was not clear nor known; it was not safe for the minor to travel outside the country and that for one year now, the respondent had denied him access to the minor.

3. Having listened to both parties' sentiments, the court delivered its ruling on August 1, 2022 thereby holding that it was in the best interests of the child that she travels to UK to pursue her further studies. The court further observed that the safety of the child was guaranteed as she was to stay in college as a boarder. That at the age of 16yrs, she was capable of managing her affairs unlike a child of tender age.

4. Aggrieved by the said ruling, the appellant filed a memorandum of appeal dated August 4, 2022 citing seven grounds. He urged the court to rescind the orders of the court. Simultaneously filed with the appeal is a notice of motion seeking the court to issue a temporary stay of execution of the orders of the honourable court pending *interpartes* hearing and subsequently pending hearing and determination of the appeal.

5. The application is anchored on the grounds set out on the face of it and averments contained in the affidavit in support thus stating that; unless the impugned order is stayed, the child is likely to be taken out of the jurisdiction of the court without him being consulted hence denying him parental care and custody; the appeal has high chances of success; if the application is not allowed, it will be rendered nugatory and become a mere academic exercise and; that it will be just and equitable that the application be allowed.

6. In response, the respondent filed a replying affidavit sworn on the August 5, 2022, stating that the appeal before court and the instant application are incompetent and bad in law as they have been filed by counsel who was not on record in the lower court without leave of the court taking into account that there is already a judgment in place ; the orders sought are not in the best interest of the child; if the prayers sought are granted, the child will lose an opportunity in joining a prestigious college courtesy of a scholarship; the child will be accompanied by the mother and not the sponsor hence no fear on her safety; the applicant will not suffer any substantial loss as he has refused to pay school fees for the minor for the last two years even when schooling here in Kenya; the applicant has all along been informed of the scholarship application by the minor via an e-mail addressed to him sometime in Dec.2021; the application is intended to revenge against the minor who testified against him in an assault case where he was accused of assaulting the respondent and; there is no arguable appeal.

7. In his rejoinder, the applicant filed a further affidavit sworn on August 8, 2022 thus stating that; there is no requirement in law for the applicant's counsel to seek leave to come on record first; that his counsel has since obtained consent from the law firm of Siminyu Oduor who were appearing for him before the lower court; the impugned order is contrary to Judge Thande's judgment in civil appeal number 29 of 2019 where the court ordered that the respondent was not supposed to take the child out of jurisdiction without his consent; the minor who has finished her form four studies should join form five and six here in Kenya and not necessarily outside the country; he has faithfully been paying school fees for the child in the manner directed by the court at coast academy; the security of the minor will be compromised if she is released to a stranger in the name of a sponsor.

8. When the application came up for hearing, both counsel submitted orally. Mr Ochieng appearing for the applicant basically adopted the content contained in the affidavit in support of the application and a further affidavit in response to the replying affidavit. Counsel submitted that the applicant was not perse opposed to the minor proceeding a broad for further studies but rather the questionable process adopted in getting the admission and scholarship for the minor without consulting him. Counsel posed two questions as follows; in whose company is the child going to travel and whom is she going to stay with?

9. M/s Osino appearing for the respondent literally adopted the averments contained in the replying affidavit in response to the application. Counsel underscored the best interest of a child principle thus contending that it is in the best interest of the minor herein that the lower court's orders be retained. She contended that the applicant had failed to meet the threshold for grant of stay of execution orders and more particularly, proof of substantial loss. To support the position that in making any decision affecting a child the best interest of a child principle must apply, counsel referred the court to various

authorities *inter alia*; *M A A vs ABS* (2018), eKLR, *KMM vs J I L*(2016) eKLR and *AM vs MAM* (2012) eKLR.

Determination

10. I have considered the application herein, response thereto, and oral submissions by both counsel. Issues that emerge for determination are; whether the law firm of Ochieng and company Advocates is properly on record; whether the applicant has met the threshold for grant of stay of execution orders.

11. The respondent did question the competence of the application herein on grounds that the firm of Ochieng and company advocates did not seek leave of the court pursuant to the requirement under order 9 rule 9 of the *CPRS*. Under the said provision, when there is a change of advocate or when a party decides to act in person having previously engaged an advocate after judgment has been passed, such change or intention to act in person shall not be effected without the consent of the court or upon executing a consent between the out coming and incoming advocates;

12. The said provision only envisages a situation where there is change of advocate within the same proceedings or file in which the judgment in question was entered and not any other independent suit. Before me is an appeal which is totally an independent suit from the lower court suit. There is no judgment in place under this file to require the application of order 9 rule 9 of the *CPRS*. The lower court file and by extension proceedings herein are distinct. That is why the firm of Siminyu is not under obligation to accept service of pleadings under this file unless freshly instructed to take on the appeal. To that extent, it is my finding that leave for the firm of Ochieng to come on record is not applicable in this case.

13. Regarding the second issue on whether the threshold for grant of stay orders has been established, the burden lies with the applicant to prove that the requirements under order 42 rule 6 (2) of the *Civil Procedure Rules* have been established to the effect that; he is likely to suffer substantial should the court decline to grant the prayer for stay of execution; the application for stay has been filed within reasonable time and that security for due execution of the decree has been furnished.

14. In the case of *Vishram Ravji Halai vs Thornton &Turpin* civil application no Nai 15 of 1990(1990) KLR 365 the court of appeal held that whereas the court of appeal's powers are unfettered, the high court's jurisdiction to do so under order 41 rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely; establishment of sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, that the application must be made within reasonable time. There is no dispute that the application was filed within reasonable time as the order was made on August 1, 2022 and the instant application filed on August 5, 2022.

15. Concerning the aspect of loss of substantial loss, the court in the case of *Kenya Shell limited vs Kibiru* (1986) KLR 410 held as follows;

> "it is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence, it is difficult to see why the respondents should be kept out of their money"

16. In the instant case, there is already a judgment in place granting legal custody of the minor to both parents and actual custody to the respondent (mother) with unlimited access to the appellant. The two parties have previously engaged in a legal tussle over custody of the children, maintenance, and

payment of school fees, divorce and division of property. However, the most contentious item has been payment of school fees for their three children who were schooling at [particulars withheld] academy where they were pursuing the British system of education therefore requiring a student to go through form five and six either locally or abroad.

17. At some point, the appellant was unable to pay school fees at [particulars withheld] academy after he lost his job hence opted to transfer the children to coast academy a less costly school but offering similar system of education. The respondent vehemently opposed the move thus necessitating the court under Family appeal number 29 of 2019 to direct that should the respondent retain the children at [particulars withheld] academy, then she was to pay the fees difference between [particulars withheld] academy and [particulars withheld] academy. This arrangement seemed to have worked as the children were not transferred culminating to the minor herein completing her form four.

18. Having finished form four, and owing to her mother's financial constraints being a house wife, she managed to secure a scholarship (sponsorship) worth 10 million from a Good Samaritan to go to UK for further studies. Due to the reluctance of the father (appellant) in signing the necessary admission documentation and visa processing, the applicant decided to seek court's intervention hence the impugned orders.

19. The applicant's contention is that he is not perse opposed to the child going abroad for further studies. His major grievance is lack of consultation given that the so called sponsor has not properly been addressed and the security of the child guaranteed in a foreign country. The respondent on the hand is contended that the child is going to stay in a boarding school just like in kenya where even younger children go to boarding school.

20. I have had the advantage of handling the application for payment of school fees in appeal number 29 of 2019. The applicant has always maintained a position of financial inability in paying school fees for his children in high cost schools. It is also common knowledge that children undertaking British system of education in most cases do proceed to foreign countries especially UK for further studies. When the trial court interviewed the child to ascertain her wishes, she was quite excited to go to UK for her further studies. What substantial loss is the applicant likely to suffer should the minor now 16years proceed a broad for further studies. From the pleadings and counsel's submissions, the same was not pleaded nor submitted upon. In my view, the child will be prejudiced hence lose an opportunity that is rare.

21. The child cannot afford to lose the opportunity and then go back to the corridors of justice demanding for the father to pay school fees in a high cost school which he is not willing to pay. If the court were to grant the prayer sought, the opportunity will pass hence subject the minor to psychological trauma. Whether there was consultation between the parents or not, the court will have to look at the wider picture and the best interest of the child as the paramount consideration before making any decision affecting a minor pursuant to article 53(2) of the *Constitution*. See *KKPM VS SWW* (2019) eKLR where the court held that the best interests of a child are superior to those of the parents. Similar position was held in the case of *MJC V LAC*(2020) eKLR where the court held that while considering any disputed matters involving children it should give primacy to the best interest of the children

22. Although the father (applicant) has genuine concern over the safety of the child, there is no *prima facie* proof that by going to UK in a recognized institution it will jeopardise the security of the child. If anything the mother will be accompanying the minor. The mother as a parent cannot be said to collude with the sponsor to subject the child to any risk. Failure to be consulted in a frosty relationship between the two parties was/ is inevitable and the child cannot be made to be the sacrificial lamb for parents to settle personal scores successfully. In a nutshell, I do not find any substantial loss likely to be suffered by the applicant nor does that prayer serve the best interest of the child.

23. Touching on the question whether the appeal has high chances of success, courts have always held that the likelihood of an appeal succeeding or an arguable appeal does not necessarily mean one which must succeed but rather a frivolous, worthless, futile, trifling or an invalid one. See *Reliance bank limited v Norlake investments LTD* (2002)1 E A 227. From the history and facts of this case analysed herein above, I do not find the appeal arguable hence the prayer for stay is not appealing.

24. As to the question of depositing security, none of the parties ever submitted on the same. In any event such decision is at the discretion of the court. In view of the fact that this a family matter, I do not wish to subject any party to any further stress knowing very well where they are coming from financially. Accordingly, I am in agreement with M/s Osino that the best interest of the child demands that the order of the lower court do remain in force. To that extent, the application herein is dismissed with no order as to costs.

DATED SIGNED DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF AUGUST 2022

J N ONYIEGO

JUDGE