



REPUBLIC OF KENYA



**AS v MM (Civil Appeal E012 of 2021) [2022] KEHC 13305 (KLR)
(Family) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13305 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E012 OF 2021
AO MUCHELULE, J
SEPTEMBER 29, 2022**

BETWEEN

AS APPELLANT

AND

MM RESPONDENT

(Being an appeal from the entire Ruling and Order of the Honourable Deputy Chief Kadhi, the Honourable Sukyan Hassan Omar delivered on 18th December 2020 in Nairobi Kadhi's Court, Divorce Cause No. 159 of 2017)

RULING

1. This dispute regarding the custody and well-being of the five children between the appellant/ respondent AS and the respondent/ applicant MM was in the Kadhi's Court at Nairobi from 2017. Eventually, the appellant, being aggrieved by the ruling delivered on December 18, 2020, appealed to this court in a memorandum dated February 4, 2021 whose grounds were as follows:-
 1. The learned trial Deputy Chief Kadhi erred in law and exercised his discretion wrongly when he dismissed the appellant's notice of motion dated August 27, 2020 without considering any or all of the appellant's grounds which implicate the minor's welfare and rights;
 2. The learned trial Deputy Chief Kadhi erred and misdirected himself in law and in fact when he failed to consider that the said application of August 27, 2020 by the appellants contained sufficient grounds warranting a review and varying of the ruling and orders of April 5, 2019 issued in the said Divorce Cause No 159 of 2017;



3. The learned trial Deputy Chief Kadhi erred and misdirected himself in law when he failed to consider that such a course would subject the minors to deplorable living conditions and therefore a breach of article 53 of the constitution;
4. The learned Deputy Chief Kadhi failed to exercise his discretion properly in considering the appellant's application and ignored all applicable principles of law and precedent in similar cases;
5. The learned Deputy Chief Kadhi erred in law and seriously misdirected himself in law and in fact he failed to look into the proper merits of the said application, hence arrived at a wrong conclusion;
6. The learned Deputy Chief Kadhi (with respect) exercised his discretion wrongly in dismissing the appellant's application dated August 27, 2020 yet the respondent had not contested the said motion and failed to provide contrary set of facts. He thereby (with respect) disregarded evidence and arrived at a decision that is not in the best interests of the minors;
7. The learned Deputy Chief Kadhi erred in fact and in finding unfairly and dismissing the appellant's application dated August 27, 2020 without any evidence by the respondent challenging the grounds and facts deponed to by the applicant. The learned Deputy Chief Kadhi thus expressed bias and in exercising his discretion, leaned to the respondent, arguing her case, and took up an imaginary position (with respect) never articulated by the respondent at all, to the detriment of the minors.
 - a. This is unjust and a violation of the principle of fairness espoused in article 10 (2) (b) of the constitution.
 - b. No evidence was tendered by the respondent to prove even on a balance of probabilities that she and or the minors stood to be prejudiced in the granting of the appellant's application dated August 27, 2020."
2. With the appeal was a motion dated February 4, 2021 seeking stay and status quo order. On June 24, 2021 Justice MA Odero gave some orders on the application, and on July 29, 2021 Justice SN Mutuku gave further orders.
3. The present application is dated December 16, 2021 by the applicant who essentially seeks that the orders issued by this court on June 24, 2021 be set aside and/or vacated and that the orders of the Kadhi issued on December 18, 2020 be maintained. The application has been opposed.
4. In NK (suing through her mother and next friend VA) v PKW. [2018]eKLR, the learned Judge AK Ndungu had this to say:-

“29. Children cases are special categories of cases. The need for expeditious disposal cannot be gainsaid. It explains why the Children Court is given a wider latitude in disposal of these cases by freeing it from the shackles of strict rules of evidence and procedure. This enables quick disposal of the cases.”
5. The Children Act has entrenched both constitutional and international provisions and principles that ensure that all matters relating to children are sensitively and expeditiously dealt with, and that the best interests of the children are given paramount consideration. The children courts do ensure that the children are protected from the sometimes selfish interests of their parents.



6. So that the children herein will finally benefit from their right to expeditious disposal of this dispute regarding their custody, care and maintenance, I direct that, instead of dealing with this interlocutory application, the appeal herein is admitted to hearing. I direct the Deputy Registrar to immediately call for the original file from the Kadhi's Court so that there will be no need for the appellant to file and serve the records of appeal. Within 7 days from today the appellant shall file and serve written submissions on the appeal. On service the respondent shall file and serve submissions within 7 days. The submissions by either side should address the question whether the Kadhi's Court had the primary jurisdiction to hear and determine the dispute relating to the five children. The matter shall be mentioned on October 28, 2022 to give the judgment date.
7. Costs of the application shall abide the appeal.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2022.

A.O. MUCHELULE

JUDGE

