FB v ZCN (Civil Appeal E072 of 2022)
[2022] KEHC 13231 (KLR) (Family) (29 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13231 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL E072 OF 2022

AO MUCHELULE, J

SEPTEMBER 29, 2022

BETWEEN

FB ..... APPLICANT

AND

ZCN ..... RESPONDENT

((Being an appeal from the Ruling of the Chief Magistrate's Court at Nairobi delivered by the Hon. J. Kibosia (Ms) PM on 26th July 2022 in Children' Cause No. 266 of 2019))

RULING

1. There is an appeal filed by the appellant/applicant FB against the respondent ZCN following the ruling delivered on 26th July 2020 and the grounds are as follows:-

> " 1. Thatthe learned magistrate erred in law and in fact by advancing the interest of the respondent over those of the minors herein.
>
> 2) Thatthe learned magistrate erred in law and in fact by granting custody of the minors herein to the respondent who intends to travel out of the jurisdiction of the Kenyan courts without taking into consideration that it will have no means to enforce an order for the return of the minors to its jurisdiction.
>
> 3) Thatthe learned magistrate erred in law and in fact by failing to acknowledge that once the minors have been removed from its jurisdiction, no satisfactory means have ever been devised of ensuring and or enforcing their return.

4) That the learned magistrate erred in law and in fact by failing to acknowledge the fact that relocating the minors herein for a period of only 11 months would be prejudicial to the best interest of the minors.

5) Thatthe learned magistrate erred in law and in fact by failing to sufficiently appreciate the fact that her ruling had undesired effect of stripping the appellant/applicant his biological right as the father of the minors.

6) That the learned magistrate erred in law and in fact by failing to acknowledge that at this formative stages in the minors' lives it would be in their best interest for their father (the appellant/applicant herein) to have unlimited access to them.

7) Thatthe learned magistrate erred in law and in fact by failing to appreciate that from the respondent's conduct previous complained of, her ruling would in effect make it hard for the appellant/applicant to access the minors herein.

8) Thatthe learned magistrate erred in law and in fact by failing to appreciate the fact that lack of sufficient bonding between the appellant and the minors herein was caused by the respondent's wilful refusal of obeying court orders to wit; granting the appellant access to the minors.

9) Thatthe learned magistrate failed to consider the fact the the appellant has been complying with the court orders and judgment issued on 23rd July 2021 to the letter while the respondent has been treating the same with disdain; to wit, while the appellant has been making prompt monthly upkeep payments, the respondent has denied and or frustrated his desire to access and bond with the minors herein.

10) Thatthe learned magistrate erred in law and in wholly relying on the evidence adduced by the respondent in making her determination and disregarding the appellant/applicant's evidence contained in his statements, affidavits and oral evidence.

11) Thatthe learned magistrate erred in law and in fact by failing to analyse the issues before it properly and considered irrelevant and extraneous matters while leaving out the relevant ones in making her ruling.

12) Thatthe learned magistrate erred in law and in fact by failing to consolidate and consider all the pending applications before her thereby disenfranchising the best interest of the minors to wit; the learned magistrate failed to determine the appellant's application which was filed on 4th June 2022 but instead dealt only with the respondent's application which was filed later on 13th June 2022.

13) Thatthe learned magistrate erred in law and in fact by failing to discern that in an effort to defeat the cause of justice, the respondent has been making numerous frivolous applications before the lower court.

14) Thatthe learned magistrate erred in law and in act by failing to consider, appreciate and give weight to the appellant/applicant pleadings and evidence as presented vide affidavits.

15) Thatthe learned magistrate erred in law and in failing to sufficiently appreciate that the respondent has only been contracted to work for 11 months in the United States.

16) Thatthe learned magistrate erred in law and in fact by failing to determine the fate and welfare of the minors after the respondent's contract in the US is terminated upon the conclusion of her contracted period of 11 months.

17) Thatthe learned magistrate failed to consider the fact that if the respondent would be with the minors during their school going days, it would only be judicious if the appellant was exclusively granted their custody during all their custody during all of their school holidays.

18) Thatthe learned magistrate erred in law and in fact by failing to consider the fact that the minors who have while within the court's jurisdiction being left in the care of the different nannies while the mother travels will at their stay in the US will only be left under the care of different nannies, a scenario which could be avoided if the appellant was granted their custody for the 11 months that would be away.

19) Thatthe learned magistrate erred in fact and in law when she failed to consider the fact that the respondent had not provided any particulars of her residence in the US and also the specifics of the schools in which the minors will be attending.

20) Thatthe learned trial magistrates' ruling was arrived at in a cursory and perfunctory manner without due consideration of the issues presented before her by the appellant hence her decision thereof is devoid of any justification but a serious miscarriage of justice against the appellant.

21) Thatthe learned magistrate erred in law and in fact by failing to comprehend the extensive damage her orders have on the minors."

2. The prayers in the appeal are that:-

"i). The appeal be allowed.

ii). The appellant be granted physical custody of the minors herein pending the return of the respondent to the jurisdiction of this Honourable Court.

iii). If this Honourable Court will be obliged to allow the respondent relocate with the minors, then the issue of sleepovers during their visits while on vacation should be determined as a matter of utmost urgency.

iv). All parties herein shall engage each other in all decisions affecting the wellbeing of the minors herein.

v). Such further or other orders as this Honourable Court may deem just to grant.

vi). That costs of this appeal be awarded to the appellant."

3. Along with the appeal was the present application dated 26th July 2022 that sought the stay of the execution of the ruling delivered on 26th July 2022 by the Children Court Case No. 266 of 2019. The application was essentially brought under Order 42 Rules 6 and 51 (1) of the *Civil Procedure Rules.* The

orders appealed against granted the respondent leave to travel to the United States of America (USA) with their two children NB and MB, age about 8 and 5, respectively, as she had found employment as a Strategic Partnerships Officer with the World Food Programme in Washington DC. It was ordered that the applicant should access the children before travel; the respondent should furnish the applicant with physical address of the children before leaving the country; the respondent should provide unlimited phone access, including video calls at reasonable time while in USA; the respondent should avail school holiday schedule to enable the applicant access the children when in Kenya for holidays and to avail the children to him while in Kenya for holidays; the parties to share equally access to the children while on holidays; and the orders given on access in the judgment delivered on 23rd July 2021 were to subsist. The respondent was directed to deposit into court money equivalent to the applicant's return ticket to the USA for him to travel to the USA in the event the children do not return to Kenya for him to access them. Kshs.130,000/= was deposited.

4. The ruling followed an application dated 13th June 2022 by the respondent that sought to vary the judgment to be able to allow the respondent to move with the children to the USA and to waive the consent of the applicant regarding the children's revocation. The application was allowed in the terms indicated in the foregoing.

5. The background of the dispute is that the applicant and the respondent got married on 16th August 2014. The marriage was blessed with the two children. In July 2017 the parties parted ways following irreconcilable differences. The respondent sued the applicant before the Children Court at Nairobi seeking physical custody of the children with limited and supervised access to the applicant. The applicant was to meet school fees, medical insurance cover, housing and maintenance of the children. The trial court heard the parties and delivered the judgment of 23rd July 2021 granting joint legal custody to the parties; actual custody, care and control to the respondent; unsupervised access to the applicant on alternate Saturdays and Sundays; and the parties to have custody during school holidays on a 50:50% basis.

6. It was the review and/or variation of the orders that led to the appeal and application. The applicant's case in the application that was the ruling will deny him the right to enjoy the rights that had accrued to him in the judgment in which the children were not to be removed from the jurisdiction of the court without his consent. He had not provided the consent. He was apprehensive that his relationship with the children was going to be affected as the respondent had in the past not allowed him to communicate with the children. He stated that the orders for the respondent to relocate with the children were not in the circumstances in the best interests of the children. It is notable that in the prayers in the appeal, the applicant had asked that:-

> " iii. If this Honourable Court will be obliged to allow the respondent to relocate with the minors, then the issue of sleepovers during the visits while on vacation should be determined as a matter of utmost urgency."

7. In the judgment, the Court had decided that there shall be no sleepovers for the first three months to create better bonding and enable the applicant make better sleepover arrangements for the children. The Court was to reconsider the issue after three months. It is clear that the applicant was not completely opposed to the respondent relocating with the children on the terms set out in the ruling. He was willing to live with the children having sleepovers during the visits. If that is the case, then he cannot be heard to argue that if the execution of the orders is not stayed he will suffer substantial loss. His demonstration of the substantial loss was at the core of his application for stay of the orders in the ruling.

8. It is also material to point out that the Children Court has the primary responsibility to oversee and regulate all matters relating to the custody, maintenance, education and well-being of a child. It is the court that is at the forefront of seeking to realise the best interests of a child brought before it.

9. I do not want to go into the merits of the appeal but, having looked at the facts and the written submissions by the counsel, I am unable to order the stay of the orders of the Children Court.

10. I ask that each side pays costs of the application.

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

A.O. MUCHELULE

JUDGE