



REPUBLIC OF KENYA



KENYA LAW
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**NWM v EASC (Civil Appeal E100 of 2022)
[2022] KEHC 16672 (KLR) (Family) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16672 (KLR)

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

**FAMILY
CIVIL APPEAL E100 OF 2022**

MA ODERO, J

DECEMBER 20, 2022

BETWEEN

NWM APPELLANT

AND

EASC RESPONDENT

RULING

1. Before this court are two application for determination. The first is the Chamber Summons dated October 5, 2022 by which the appellant and NWM seeks the following orders:-
 - “1. Spent.
 2. This Honourable court be pleased to order stay of execution of the judgement and orders of the Nairobi Children’s Court in NWM Versus EAS C Nairobi Milimani Children’s Case E1441 of 2022 pending the hearing of this Appeal.
 3. This Honourable court be pleased to direct the minor EWM (a minor) be maintained in the jurisdiction of this court pending the hearing of the Appeal.
 4. This Honourable court be pleased to make any other orders that it deems fit in the best interest of the minor and of justice.”
2. The summons was premised upon article 53 of *the Constitution* of Kenya 2010, section 8 and 101 of the *Childrens Act* and all enabling provisions of the Law and was supported by the affidavit of even date sworn by the appellant.



3. The matter came up before the court virtually on October 5, 2022 for consideration of the application and the court directed that the application be served upon the respondent and that the matter would be mentioned for directions on November 17, 2022.
4. The Appellant then filed a second application dated October 7, 2022 seeking the following orders:-
 1. Spent
 2. This court be pleased to review its orders of October 5, 2022 and grant a temporary stay of execution pending the hearing the application dated October 5, 2022.
 3. The court be pleased to make any orders it deems fit in the best interest of the minor.
5. This second application was premised upon article 53 of *the Constitution* of Kenya, section 8 and 101 of the *Childrens Act* and all other enabling provisions of Law and supported by the affidavit of Dr Elvis B.N. Abenga the Advocate having conduct of this matter on behalf of the Appellant.
6. The respondent EASC opposed both applications through her replying affidavits dated October 18, 2022 and November 10, 2022. The court directed that the two applications be canvassed by way of written submissions. The Appellant/Applicant filed the written submission dated November 13, 2022 whilst the Respondent relied upon their written submissions dated November 10, 2022.

Background

7. This matter arises from Nairobi Children Court Case No. E 144 of 2022 in which plaintiff in that suit [the Applicant herein] vide a Complaint dated September 23, 2022 sought the following reliefs.
 - “1. That the legal custody of the minor EWN be jointly shared between the Plaintiff and the Defendant.
 2. That the Plaintiff be granted physical custody of the minor.
 3. That the Defendant be granted visitation rights over the minor within Kenya: and
 4. That neither party should take the minor out of the jurisdiction of the court without leave of the court.”
8. On 5th October 2022 Hon Terer Senior Resident Magistrate delivered his judgment in the Children Case. In that judgment, the trial court made the following orders:-
 - “a. That the Plaintiff is directed to forthwith hand over the minor EWM and all travel documents to the Defendant.
 - b. That the Defendant is allowed to travel with the minor to New Jersey USA forthwith.
 - c. That the OCS [of the] nearest police station and the Directorate of Immigration Services to facilitate compliance with this order: and
 - d. That the custody of the minor be dealt with as per the Law of the USA.”
9. Being aggrieved by the decision of the Childrens Court the Applicant filed a Memorandum of Appeal dated 5th October 2022. He also filed the application dated 5th October 2022 seeking a stay of the orders



made in the Children Court. When the High Court failed to grant interim stay orders of stay the Applicant filed the application for review dated 7th October 2022.

10. As stated earlier the Respondent who is the biological mother of the subject child vehemently objected to both applications.

Analysis and Determination

11. I have carefully considered the two applications filed in this court, the replies filed by the Respondent as well as the written submissions filed. The two issues which arise for determination are –
- (i) Whether the judgment of the Childrens Court dated 5th October 2022 ought to be stayed.
 - (ii) Whether the application for review dated 7th October 2023 is merited.

(i) Stay of Execution

12. Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) provides for guiding principles that one must satisfy before the court can grant a stay of execution, it provides as follows:-

“No order for stay of execution shall be made under subrule (1) unless—

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

13. It is appreciated that stay of execution is a discretionary power however the court in setting out the guidelines for granting a stay, stated in the case of [Butt - vs - Restriction Tribunal](#) [1979] eKLR as follows:-

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- 2. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements.” (own emphasis

14. In the case of [Loice Khachendi Onyango – vs Alex Inyangu & another](#) [2017] eKLR it was stated:-

“The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the Court should be guided by the three pre-requisites



provided under order 42 rule 6 of the Civil Procedure Rules. Firstly, the Application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted; and thirdly such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.....”

15. In this case the impugned judgment was delivered on October 5, 2020. The application for stay was filed on the very same day. Accordingly, I find that the application for stay was indeed filed in a timely manner.
16. In determining this application this court will be careful not to pre-judge the pending appeal. The only issue for determination is whether the application for stay of execution has merit.
17. The orders made by the Children Court allowed the Respondent to travel with the minor to the USA. The Applicant argues that if no stay is granted then his entire appeal will be rendered nugatory as the minor will have been removed from the jurisdiction of this court. That even if the appeal is successful the court will not be able to enforce the orders as the child will already be out of the country.
18. The Respondent on the other hand submits that the minor was residing with her in the USA. That the Applicant picked up the child during the Summer Vacation and using a Kenyan passport acquired for the child and without the knowledge and consent of the mother brought the child to Kenya. That the child is a student at [Particulars withheld] School in New Jersey and has missed several months of school because the Applicant has been holding her here in Kenya.
19. The Respondent states that she has made several requests to the Applicant to return the child to the USA but the Applicant kept prevaricating and finally filed the suit in the Childrens Court.
20. This court is mindful of the fact that this a matter which concerns the welfare of a child. The minor herein is said to be only six (6) years old. It is trite law that in all matters concerning the welfare of children, courts have an obligation to give priority to the best interest of the child.
21. The Constitution of Kenya 2010 provides at article 53 (2) as follows:-
 - “(2) A child's best interest are of paramount importance in every matter concerning the child.” (Own emphasis)
22. Section 8(1) of the Childrens Act of 2022 provides as follows:-
 - “8(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; (own emphasis)
23. In the case of Bhutt vs 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)



24. The applicant avers that in coming to its decision the trial court failed to take into account the report filed by the Director of Childrens Services recommending that the child remain in Kenya as the child is a Kenyan citizen.
25. Firstly, that averment is not factually correct. I have carefully and anxiously perused the judgment delivered by the trial court. The record clearly shows that the learned trial magistrate did in fact consider the report made by the Director Childrens Services but ultimately did not agree with the said report.
26. Secondly the question of the citizenship of the minor is neither here nor there. The minor was born in the USA and as such is an American citizen. The minor also qualifies to be a Kenyan citizen by virtue of her father's citizenship. Therefore, it would appear that the minor is a dual citizen. In any event, there is no law that states that a child must reside in their country of citizenship. The world is now a global village, one can reside and work in any country.
27. The report prepared by the Directorate of Childrens Services is in no way binding on a court. The court is only required to consider such report but the final decision is left to the court. Contrary to the averments of the applicant, I find that the trial court did in fact consider said report.
28. As stated earlier the duty of this court is to give priority to the best interest of the child. This is a child who was born in the USA and has lived there all her life. The child has a younger sibling in the USA and she is enrolled in a school in that Country. By keeping the child in Kenya the Applicant is effectively interfering with the childs stability and education.
29. Further it is apparent that this dispute commenced in the USA. The parties entered into a Parental Responsibility Agreement (PRA) before the Family Court in New Jersey USA. By this Agreement, the Applicant would have access to the child during the long summer vacation when he would travel with the child to Kenya. By attempting to keep the child in Kenya even after the summer vacation has ended, the Applicant is acting contrary to the Agreement endorsed by the American Court. The Applicant is trying to misuse the Kenyan Court system to renege on the PRA, which the parties entered into in the USA. This court will not sanction any breach of the PRA. If the Applicant wishes to review and/or set aside that Agreement then he must go back to the courts in the USA to do so.
30. The Applicant in my view will not suffer any prejudice if the stay is not granted. The evidence is that he is an American citizen and that he runs businesses and owns property in the USA and frequently travels there. In any event, with modern communication via Skype, FaceTime etc., the Applicant is able to have regular communication with the child.
31. Finally, this court is very disheartened by the attitude and behavior of both parents who are using this innocent child as the fodder for their supremacy battles. The parents who are the adults in this situation ought to be more concerned in ensuring that their child grows up in a stable environment. Children can only thrive in an atmosphere of stability, peace and predictability. To expose a six (6) year old to constant fights, quarrels and hostility and to keep shuttling her from one continent to another is proof that the parents are only thinking of themselves. It is high time they both put the child's best interest above their egos.
32. In conclusion, I find no merit in this application for stay. The Chamber Summons dated October 5, 2022 is dismissed in its entirety.
33. Having decided as above I find no merit in the application for review dated October 7, 2022. The same is similarly dismissed in its entirety. This being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 20TH DAY OF DECEMBER, 2022.



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MAUREEN A. ODERO

JUDGE

