



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 51 OF 2019

PCK.....APPELLANT

VERSUS

JWW..... RESPONDENT

(Being an Appeal from the Ruling of the Children's Court at Milimani in Children's Case No. 351 of 2008 by the Hon. F. Terer dated 30th April 2019)

RULING

(1) Before this Court is the Notice of Motion dated **16th June 2019** by which **JWW** (the Applicant) sought the following orders:-

1. SPENT

2. THAT that the Appellant do deposit in Court the sum of Kshs. 3,000,000/- as security for costs before hearing the application dated 3rd of June 2019 and hearing of the Appeal.

3. THAT pending the provision of such security the Appellants Application dated 3rd June 2019 and the Appeal should be stayed.

4. THAT in default of the Appellant furnishing the sum of Kshs. 3,000,000/- their Application dated 3rd June 2019 and the Appeal should be dismissed with costs.

5. THAT the Appellant / Respondent do pay the costs of the is application.

(2) The application was premised upon **Sections 1A, 1B, and 3A** of the **Civil Procedure Act** and **Order 26 Rule 1, 5 and 6** and **Order 42 Rule 14** of the **Civil Procedure Rules** and any other enabling provisions of the law, and was supported by the Affidavit of even date sworn by the Applicant.

(3) The Respondent **PCK** opposed the application and filed Grounds of Opposition dated **17th September 2019**. The application as canvassed by way of written submissions. The Applicant filed her written submissions dated **5th October 2020** whilst the Respondent filed written submissions dated **14th October 2020**.

BACKGROUND

(4) The Applicant and the Respondent are the biological parents of a daughter named **CNM** which child was born on **6th February, 2006**. The Applicant is a Kenyan citizen who is ordinarily resident in **Kenya**, whilst the Respondent holds joint Ugandan and Australian citizenship and is ordinarily resident in **Uganda**. The genesis of this matter is **Nairobi Children's Case Number 351 of 2008** which was a suit instituted by the Applicant in the Children's Court seeking legal and actual custody of the child **CNM** (hereinafter "**the minor**").

(5) On **12th November 2010** the parties recorded a consent in the Children's Court which consent read as follows:-

"1. Plaintiff to have care and control of the minor.

2. Defendant to cater for the minors education and school related expenses upto college.

3. Defendant to provide an inpatient and outpatient medical cover for the minor until she turns 18 years old.

4. Plaintiff to cater for all other needs of the minor.”

(6) The Applicant continued to reside with the minor in Kenya until **October 2017** when the Respondent requested that the minor visit him in **Kampala, Uganda** and promised to ensure the return of the minor to **Kenya** by **December 2017**. Accordingly the Applicant took the child to **Jomo Kenyatta International Airport** on **24th October 2017** and facilitated her travel on a Kenya Airways Flight to **Kampala**.

(7) Thereafter the Respondent requested that the minor be allowed to accompany his family on a trip to **Canada** during the festive season and promised that she would return to **Kenya** in **January 2018**. The Applicant gave written permission dated **23rd December 2017** for the minor to travel to **Canada**.

(8) Unfortunately the Respondent failed to return the minor to Kenya in **January 2018** as he had promised. On **6th February 2019** the Applicant filed an application seeking to have the Respondent cited for contempt. The Respondent also filed the Chamber Summons dated **8th March 2019** seeking a review of the consent order of **12th November 2010**.

(9) The Application for contempt of Court was duly heard in the Children’s Court and vide a Ruling delivered on **30th April 2019** the Hon. trial Magistrate found that the Respondent was in fact in contempt of Court orders. The trial Court proceeded to issue a Warrant of Arrest against the Respondent. The Court also issued a Notice to Show Cause and directed that the minor be produced in the Children’s Court on **11th June 2019**.

(10) On **11th June 2019**, the minor was duly produced before the learned trial Magistrate accompanied by her step-mother. The Respondent did not personally accompany the minor to Court. The trial Court directed that the minor be handed over to the Applicant.

(11) The minors step-mother requested that the minor be permitted to go back with her to collect her belongings and to bid farewell to her step-siblings in the presence of Counsel for both parties. The Applicant acceded to this request. The step-mother promised to deliver the minor back to the Applicant by **7.00pm** on **12th June 2019**. However contrary to these promises and contrary to the Courts orders the Respondent and the minors step-mother spirited the minor out of the country back to **Kampala** via a Rwanda Airlines flight which left at **3.00am**.

(12) In the meantime the Respondent filed a Memorandum of Appeal against the decision awarding custody to the Applicant and also filed a Notice of Motion dated **3rd June 2019** seeking a stay of proceedings pending the hearing and determination of his Appeal.

(13) The Applicant avers that to date the Respondent has failed and/or declined to comply with the Court orders. Accordingly the Applicant filed this present application seeking to be awarded security for costs prior to the hearing of the Respondents Appeal and Application.

(14) As stated earlier the Respondent opposed the application seeking security for costs.

ANALYSIS AND DETERMINATION

(15) I have carefully considered this application the Grounds of Opposition as well as the written submissions filed by both parties. The Applicant herein filed an Application dated **6th February 2019**, seeking to have the Respondent cited for contempt of Court orders. The lower Court did on **30th April 2019** find that the Respondent was in contempt of Court orders and directed that the minor be produced in Court. What followed was the fiasco that has been narrated above.

(16) The Applicant submits that even despite the finding that he was in contempt, the Respondent still orchestrated the removal of the minor from the jurisdiction of the Court and to date has failed to return the child to the custody of the Applicant as ordered by the Court. The Applicant contends that the Appeal and Application filed by the Respondent in this matter are both a sham and have merely been filed in an attempt to circumvent the orders made by the trial Court.

(17) The Applicant submits that she stands to suffer great prejudice should the Appeal proceed without security for costs. As such she seeks to be awarded **Kshs. 3,000,000/-** as security for costs before the Respondents Appeal and Application are heard.

(18) Vide the Grounds of Opposition dated **16th July 2019** the Respondent contends that this application seeking security of costs is bad in law as there has been no demonstration that the Respondent will be unable to pay any costs which may be awarded by the Court. That the application of security in the present matter is premature and untenable and is tantamount to condemning the Respondent unheard. That the claim herein is not a monetary claim which would require a deposit of security for costs.

(19) Further the Respondent submits that the Applicant has not demonstrated substantial quantifiable loss she is likely to suffer as required by **Rule 6(2)** of the **Civil Procedure Rules, 2010**. The Respondent submits that this being a Children’s matter, the best interests of the minor are to be given priority. That an award of security for costs is improper and inapplicable in the present circumstances as such orders do not promote the best interests of the child.

(20) The only issue this Court has to determine is whether the prayer for security for costs is merited in the circumstances of this case. This Court is alive to the fact that it is not required at this stage to make a finding on either the Application dated 3rd June 2019 or the Appeal which have been filed by the Respondent. Those will be determined at a later stage.

(21) It is common ground that on 30th April 2019, the learned trial Magistrate delivered a Ruling in which he made the following orders:-

- (i) **The Respondent is in contempt of the Court orders issued on 12th November 2010, 9th March 2011 and 16th October 2012.**
- (ii) **A warrant of arrest be issued against the Respondent to show cause why he should not be committed to Civil jail.**
- (iii) **The minor be produced in Court on the 11th June 2019.**
- (iv) **The Applicant was awarded costs of the application.**

(22) That said it is important to note that as things stand, given that the minor **has not** to date been surrendered back to the custody of the Applicant, the Respondent remains in active contempt of Court orders. Those orders have **not** been set aside. The orders having been made by a Court of competent jurisdiction are **binding** on the Respondent.

(23) In **RE K S (MINOR) [2017]eKLR** it was held as follows:-

“With regard to the existing orders; the Applicant ought to obey court orders; attend Court and/or present any challenges for the Court to consider on merits instead of disregarding orders.

In the case of;

ECONET WIRELESS KENYA LTD VS MINISTER FOR INFORMATION & AND COMMUNICATION OF KENYA AND ANOTHER [2005] 1 KLR 828, the Learned Judge expressed the view thus:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. 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 discharged. 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 void.” [own emphasis]

(24) I wish to remind the Respondent that Court orders are not mere suggestions to be complied with if and when he feels like so complying. Court orders are sacrosanct and must be obeyed by the party to whom they are directed. No amount of legal acrobatics will change this fact. It does not bode well for the Respondent to continue to actively disobey valid Court orders.

(25) In **HADKINSON –VS- HADKINSON [1952]2 AII ER, Lord Denning LJ** stated as follows:-

“I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the Court to ascertain the truth or to enforce the orders which it may make, then the Court may in its discretion refuse to hear him until the impediment is removed or good reasons is shown why it should not be removed.” [own emphasis]

The Respondent being inactive disobedience of Court orders cannot expect to be granted audience by the Court until the contempt is purged.

(26) Moving on to the request for security for costs in the case of **ARUNC SHARMA –VS- ASHANA RAIKUNDALIA T/A RAIKUNDALIA & CO. ADVOCATES & 2 OTHERS [2014]eKLR** the Court stated as follows:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the Judgment Debtor Civil process is quite different because in Civil process the Judgment is like a debt hence the Applicants become and are Judgment Debtors in relation to the Respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

(27) The main purpose of security for costs to ensure recompense to a party for any costs or charges payable to him. It is a common practice in Civil proceedings to guard against abuse of Court process.

(28) The issue of whether or not to grant security for costs is discretionary. This is a matter which in my view was simple and straight forward since the parties had already reached a consent regarding the custody of the minor. However the events which followed that consent which the Respondent has not denied indicate that the Respondent has either changed his mind about the consent or has decided to disregard the same altogether.

(29) As a result the Applicant has been forced to approach the Courts seeking redress and seeking the enforcement of the consent orders. All this comes at a financial cost to the Applicant. Whilst I do agree that this matter does not involve a monetary claim, the fact of the matter is that the Respondent being a **Ugandan National** is out of the jurisdiction of the Court and has no known assets in **Kenya**.

(30) Regarding the interests of the minor I hold the firm view that it does not serve the best interests of the child to be tossed about like a ping pong ball from one country to the other on the whims of her parent. A child requires stability in order to feel secure. Not to mention that it is certainly not in the minors best interest to suggest to her (by actions) that Court orders can be disobeyed with impunity.

(31) Taking into account all relevant factors I am inclined to exercise my discretion in favour of the Applicant. Accordingly I do hereby order that the Respondent deposit in this Court security for costs in the amount of **Kshs. 1.0 million** pending the hearing and determination of his Appeal and Application dated **3rd June 2019**.

(32) Finally this Court makes the following orders:-

(i) The Respondent to immediately return the minor to the custody of the Applicant as per the Court orders made in Nairobi Children’s Case No. 351 of 2008 on 30th April 2019.

(ii) The Respondent to deposit in Court the sum of Kshs. 1,000,000/- as security for costs within thirty (30) days of the date of this Ruling.

(iii) Stay of hearing of the Appeal and Application dated 3rd June 2019 is hereby granted pending the deposit of the security for costs.

DATED AND DELIVERED IN NAIROBI THIS 21ST DAY OF MAY, 2021.

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MAUREEN A. ODERO

JUDGE