



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. E031 OF 2020

CAO.....APPELLANT

V E R S U S

RWA.....RESPONDENT

RULING

1. On 10th August 2020, Hon. H. M. Mbatia (Mrs) Senior Resident Magistrate Milimani Children's Court made orders in **Milimani Children's Court Case No. 368/2020** in the matter of A.G.A (a minor) between RW A (Plaintiff) (herein referred to as "the Respondent") and CAO (Defendant) (herein referred to as "the Applicant") directing that;

1. Interpartes hearing be on the 31st day of August 2020 in open court at noon.

2. Both parties and minor do attend court.

2. Aggrieved by the said directions, the defendant (applicant/appellant) filed a Memorandum of Appeal dated 21st August 2020 challenging the same. Contemporaneously filed with the Memorandum of Appeal is a Notice of Motion of even date seeking orders as hereunder;

(1) That this application be certified urgent, heard in the first instance and on a priority basis.

(2) That in the interim and pending the hearing and determination of this application, the Honourable Court be and is hereby pleased to stay the Ruling/orders given by the Hon. H. M. Mbatia (Ms) on the 20th August 2020 in Children's Court Case No. 368 of 2020.

(3) That pending hearing and determination of this Appeal, this Honourable Court be pleased to stay the proceedings in the Nairobi Children's Case No. 368 of 2020.

(4) That this Honourable Court be pleased to recall the lower court's file being Nairobi Children's Case No. 368 of 2020.

(5) Costs be provided.

(6) This Honourable Court be pleased to make any further orders and directions that it may deem fit and just in the circumstances and in the best interest of the minors.

3. The application which is filed pursuant to Articles 25, 47(1), 48 & 50(1), 165(6) of the 2010 Constitution of Kenya, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act Cap 21, Order 51 Rule (1) of the Civil Procedure Rules 2010 and Section 4(2) of the Children Act, is premised upon grounds set out on the face of it and an affidavit in support sworn on 21st August 2020 by the applicant.

4. It is the Applicant's averment that proceedings in respect of the said file have always been held virtually. That the subject (minor) is of tender age hence at high risk of exposure to Covid 19 Virus. He also averred that his counsel is suffering from underlying or pre-existing conditions hence at high risk as well to exposure to Covid 19.

5. According to the applicant, it will be unsafe to attend a physical session especially after the closure of the Milimani Law Courts for a

fortnight after a member of staff at the said premises tested positive for the virus.

6. He further deposed that the World Health Organization and other reliable sources have since made it clear that majority of the population is asymptomatic while the incubation period is two weeks. That it is in the best interest of the child and justice that the orders be granted.

7. In response to the application, the respondent filed a replying affidavit sworn on 4th September 2020 stating that; the application is incompetent, bad in law and brought in deception of the court process as it amounts to an appeal against court's directions.

8. She further averred that, the Honourable Court had on 6th May 2020 granted her interim custody of the minor now aged 10 years with visitation access rights to the applicant during weekends pending interpartes hearing of the application (See annexure RW 2). That the applicant/appellant having refused to comply with the court order by releasing the minor, she was forced to file an application dated 16th July 2020 seeking production of the child before the court and citation of the applicant for contempt of court proceedings.

9. She went further to state that, despite having been directed to produce the child before court on various dates, the appellant was adamant hence the impugned orders. It was deposed that the applicant has exhibited utter disrespect to the trial court by refusing to produce the baby before court and that he has not come to court with clean hands.

10. She contended that the applicant has deserted their matrimonial home in an effort to keep hiding the child from one relative to the other. She stated that, to stay the orders for production of the child before the trial court will amount to denying her the fruits of justice.

11. During the hearing, Mr. S. Wambui counsel for the applicant submitted orally reiterating the averments contained in the affidavit in support of the application. He urged the court to take into account the Chief Justice's Practice Directions of 20th March 2020 in which he directed Courts to conduct electronic proceedings in view of the Covid 19 Pandemic. Counsel submitted that for the trial court to direct physical appearance of parties and more especially a minor, the appellant and his counsel who have pre-existing conditions, will be exposed to risky and prejudicial health conditions.

12. Learned Counsel invited the court to take judicial notice of the fact that the spread of Covid-19 has not gone down and that by directing the physical appearance of parties amounts to abuse of discretion. Counsel further stated that the applicant/appellant is not opposed to the release of the baby. Mr. Wambui went further to state that, all courts are conducting court proceedings virtually hence there should not be any exception to any court.

13. On his part, Mr. Mukungu appearing for the respondent opposed the application reiterating the averments contained in the affidavit in reply to the application. Counsel contended that the application is an abuse of the court process. In his view, the application is filed with the sole purpose of avoiding compliance of the court orders under the guise of Covid 19 and the Chief Justice's directions.

14. Mr. Mukungu submitted that under Section 114 of the Children Act, a Magistrate has powers to order production of a minor to court. He asserted that the appellant should not be allowed to enjoy court's audience while he has disobeyed it's orders. Learned counsel observed that the appellant is running away from contempt proceedings before the lower court.

15. Counsel urged the court to protect the sanctity of court orders and its authority. In support of this proposition, counsel referred the court to a decision made in **H.C.C Civil Appeal No. 14/17** where this court held that, court's orders must be obeyed in order to preserve the integrity, sanctity and, authority of court's decisions.

16. Mr. Mukungu submitted that, Covid 19 does not take away exercise of court's direction. That it is in the interest of justice that parties do appear physically so that the baby is presented before court. Lastly, counsel opined that there was no medical proof that the appellant and his counsel have any pre-existing conditions.

Determination

17. I have considered the application herein, response thereto and oral submissions by both counsel. Issues that fall for determination are:-

(a) Whether physical court appearance during this era of Covid-19 Pandemic is prejudicial to the minor, parties and their respective counsel.

(b) Whether the appeal raises arguable grounds to warrant stay.

Whether physical court appearance during this era of Covid-19 Pandemic is prejudicial to the minor, parties and their respective counsel

18. It is a matter of local notoriety and indeed confirmed that Kenya as part of the global world is affected by the Covid-19 Pandemic. Like any other responsible and concerned government owing a duty of care to its people, certain health preventive measures were put in place after the first covid-19 case was reported in Kenya on 6th March 2020.

19. Among the Ministry of Health advisory and precautionary measures put in place were; 1.5 metre social distancing; wearing masks at all times; sanitizing and washing hands; mass testing and imposition of curfew to limit on interaction of people. As a result, individual ministries and or government departments took up the challenge and issued further directions to their respective employees. It was further emphasized by the Ministry of Health that people with pre-existing conditions, expectant mothers, minors and people aged above 58 were at a higher risk to contracting or exposure to the virus.

20. Consequently, the Honourable the Chief Justice issued Practice Directions on 20th March 2020 guiding on Electronic Case Management rules to guide integration of ICT in judicial proceedings. As a result, courts scaled down their normal court operations by operating from home as they conducted and still continue conducting proceedings electronically save for exceptional circumstances.

21. On 1st April 2020, the National Council on the Administration of Justice chaired by the Honourable Chief Justice issued a press statement further guiding on court operations during this period of corona pandemic. At part 2 of its statement sub-titled “**HANDLING OF CIVIL MATTERS**” (A). **On filing of urgent matters and pleadings.** The Council at roman (ii) directed as follows;

“Urgent applications are forwarded to the Judges and Magistrates who give direction as to hearing or issue orders as necessary.”

22. Under Part 3 of that statement sub-titled “**SAFETY OF STAFF AND LITIGANTS**” the Council advised that:-

“For the safety of the public attending court proceedings, some proceedings may be held in open places within the court premises in order to maintain the required social distances.”

23. Under Rule 6(2) of the practice directions of 20th March 2020, it provides that; “**in every Judicial proceedings, the court shall employ the use of technology to expedite the proceedings and make them more efficient**”. Among the technology referred to in the rules is, video and audio conferencing.

24. As a consequence, on 9th June, 2020 the Presiding Judge Family Division also issued Practice Directions. Under Part 5, the Presiding Judge directed that all matters will be heard virtually and that children matters that are coming up for notice to show cause why a Judgment debtor should not be jailed will be heard physically.

25. From the above cited guidelines and practice directions, it is clear that, the existence of Covid-19 did not and does not create a general or blanket ban on physical appearance in court. From the Family Division Presiding Judge’s aforesaid directions, there are exceptions when a litigant may be forced to physically attend court e.g when there are proceedings for enforcement of a Judgement Decree. This position shall apply mutatis mutandis to contempt proceedings such as in this case where there is a pending application for the applicant/appellant to show cause why he should not be committed to Civil jail for failing to honour a court order in releasing the child to the respondent.

26. Besides, the Chief Justice’s Practice Directions on electronic filing and case management issued on 20th March 2020 provides for video conferencing in hearing cases but did not bar physical appearance of parties in court as purported by Mr. Wambui.

27. Further, the NCAJ directions of 1st April 2020 (Press Conference) did not stop generally parties’ physical appearance in court. Under those directions, it was left to the discretion of the court to give appropriate directions as to the hearing or issue orders as necessary. With these guidelines, it is up to the trial court to judiciously exercise its discretion in the interest of justice to issue and make appropriate orders as to the hearing of the case.

28. Considering the nature of the application requiring the appellant to show cause why the court orders issued on 6th May 2020 granting interim custody of the baby to the mother should not be obeyed, it was prudent that the appellant / applicant be compelled to appear physically in court to show cause why the baby should not be released. In the same vein, it was necessary for the minor who had been withheld from the mother be surrendered to the court for necessary directions to be made.

29. It is trite that trial Judges or Magistrates are the best managers of their courts and any decision regarding management and control of court proceedings lies purely within the ambit and discretion of the individual court. Unless the trial court makes outrageous or unjust decision on issues requiring prudent exercise of discretionary powers, an appellate court has no business interfering with such orders – **See Mbogo v. Shah (1968)EA Page 93** where the court held that:-

“I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

30. It is wrong for this court to interfere with the exercise of the trial Magistrate’s discretion merely because this court’s decision would have been different. Also **See Price and Another v. Hilder (1984)eKLR.**

31. The applicant’s contention is that the minor and the applicant’s counsel are vulnerable persons under the World Health Organization and Ministry of Health guidelines and or persons of high risk on exposure to Covid 19. However, the same Ministry of Health did conduct an evaluation exercise at Milimani Law Courts and advised on how litigants should be allowed to sit in a court room while observing social distancing.

32. Further, it is trite law that children matters are heard in camera and therefore protected from any possible contact to any persons suspected to be Covid 19 positive. The trial court is pretty aware of the Ministry of Health guidelines. In any event, it is common knowledge that courts country wide are conducting open court proceedings in certain cases at the discretion of the presiding officer but subject to strict observance of the Ministry of Health guidelines.

33. What prejudice will the appellant suffer by appearing physically in court which session will in any event be conducted in open space

outside court rooms but inside a tent as is the practice currently in milimani law courts? There are already necessary precautionary measures put in place within the Family Division to ensure that litigants are not exposed to Covid 19.

34. For the applicant to refuse physical attendance in court under the guise of Covid 19 after disobeying a lawful court order is to say the least an act of disrespect to the court and therefore deserves no protection from this court. Appellate courts cannot micro manage lower courts in the manner in which they conduct court proceedings. The applicant is simply frustrating court operations while hiding behind Covid-19.

35. Obedience to court orders is a command by the law itself and parties will not be left to choose when to obey and when not to. To allow such scenario will amount to inviting and condoning anarchy and uncertainty in the legal system. **See Refrigeration and Kitchen Utensils v. Gulabchand Popatlal Shah and Another Civil Appeal No. 39/1990** where it was observed that;

“A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it.... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question.....he should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.”

36. Having found as above, it is my holding that the directive for the appellant to physically appear in court and produce the minor in court is purely a matter of discretion of the trial court and that physical appearance in the circumstances of this case and the demand for justice to be done is necessary and therefore inevitable. Further, the applicant will not suffer any prejudice by so appearing. In any event, in the revised ministry of health guidelines, people between 6yrs and 65 are allowed to attend church service with a crowd not less than 100 people. Courts hearing children matters have in attendance not more than five people hence a safe environment. Covid 19 is not an excuse not to administer justice as courts may deem necessary. Litigants will not choose when to come to court or not to. The upshot of it all is that, the orders made by the trial court were lawful and the appellant and the minor should appear as directed with or without counsel.

Whether the appeal raises arguable grounds to warrant stay

37. Among the grounds a court ought to consider before granting stay orders in respect of an impugned order is the possibility or likelihood of an appeal raising good grounds with a possibility of success and that the appeal may be rendered nugatory should the appeal succeed. Proof of these twin conditions is crucial.

38. I am however alive to the fact that an arguable appeal is not one which must necessarily succeed but one which must be fully argued and that which is not frivolous. In arriving at this position, I am guided by the decision in **Stanley Kangethe Kinyanjui v. Tony Ketter and Five Others (2013)eKLR** where the court held that, an arguable appeal is not one which must succeed but one which ought to be argued fully before the court, and one which is not frivolous.

39. From the facts of this case and without delving into the merits of the pending appeal, I do not find the appeal arguable in the circumstances. To issue stay orders will be detrimental to the spirit of Article 159 of the Constitution and the Oxygen Principle under Sections 1A and 1B of the Civil Procedure Act on expeditious delivery of justice.

40. In a nutshell, I do not find any merit in the application herein and therefore, the same is dismissed with costs to the respondent. Order accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF SEPTEMBER, 2020.

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J. N. ONYIEGO

JUDGE