KJH v TWW (Civil Appeal E104 of 2022)
[2025] KEHC 934 (KLR) (Family) (4 February 2025) (Judgment)

Neutral citation: [2025] KEHC 934 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL E104 OF 2022

EKO OGOLA, J

FEBRUARY 4, 2025

BETWEEN

KJH .... APPELLANT

AND

TWW .... RESPONDENT

(Being an appeal against the part Ruling and Orders of Hon. C.C Oluoch (Mrs.) Chief Magistrate, made on 23rd September 2022 in Nairobi Children's Court Case No. E.039 of 2021; dismissing the Appellant's Application dated 19th May 2022)

JUDGMENT

1. The Appellant filed an application in the trial court dated 19th May 2022. He sought issuance of a warrant of arrest against the respondent for disobedience of orders of access. The appellant averred that the respondent failed to take the minor to school on 18th May 2022 solely to frustrate him from having access to the minor. Furthermore, the respondent failed to accord him alternative weekend access on the 14th and 27th of May 2022. The trial magistrate, in her Ruling dated 23rd September 2022, held that since there had been persistent non-compliance with court orders, the issue was best canvassed and interrogated during the hearing of the main suit.

2. Aggrieved with the ruling of the trial court, the appellant filed a Memorandum of Appeal dated 21st October 2022. The grounds for the appeal were as follows:-

    a. The Learned Magistrate erred in law and in fact when she failed to punish the Contemnor/ Respondent for which the Court had expressly found her guilty on three diverse occasions (July 7th, 2021; October 19th , 2021 and April 27th, 2022) and thereby she violated the Principle of Rule of Law espoused under Article 10(2)(a) of *the Constitution* of Kenya.

b. The Learned Magistrate erred in law and in fact when, after she had rightly found that the Respondent was guilty of Contempt of Court before her for breaching express terms of the access Orders issued in the subject NAIROBI CMC Children's Case No. E039 of 2021 on January 14th 2021, and amended on July 15th 2021 and thereafter, April 27th 2022, she erred and misdirected herself in declining to issue a Warrant of Arrest against the Contemnor/Respondent as prayed by the Appellants in the application dated May 19th 2022.

c. The Learned Magistrate erred in law in failing to give effect to Section 10(6) of the Magistrates Court Act as sought before her on the issuance of the mete and just punishment against the Respondent/Contemnor in the protection of the minor's best interests, and thereby has brought odium, disrespect, and indignity to the subject Court proceedings at the hand of the Contemnor/Respondent.

d. The Learned Magistrate in dismissing the Appellant's application dated May 19th 2022 acted in violation of her Oath of Office as a Judicial Officer, and she acted in fear of the Respondent, and/or to favor the Respondent for extraneous reasons, in her failing to issue the Warrant of the arrest of the Contemnor/Respondent as ordered on April 27th 2022 in NAIROBI CMC Children's Case No. E039 of 202l in spite of the unmitigated Contempt by the Respondent.

e. The Learned Magistrate erred in law and in fact when she failed to take into consideration the imperative paramountcy of the best interests of the child subject of the proceedings before her and the protection of his welfare to have access to both parents as envisaged under Article 53 (l)(e) and (2) of *the Constitution* of Kenya when she declined to punish the Respondent/Contemnor for denying the Appellant any form of access to the minor in spite of valid and subsisting access Orders.

f. The Learned Magistrate erred in law in failing to sentence the Respondent for her blatant and defiant Contempt of Court in defying the access Orders issued in the subject NAIROBI CMC Children's Case No. E039 of 2021, which sentencing had been approved and sanctioned by this Honourable Family Division Court by an Order of the Hon. Matheka in Nairobi HC FAM Appeal No. E056 of 202l after the Respondent had unsuccessfully sought stay of her sentencing.

g. The Learned Magistrate erred in law when she failed to abide by the doctrine of stare decisis pursuant to Article 163(7) of *the Constitution* of Kenya when she irrationally departed from the host of decisions cited to her in considering the Appellant's Motion dated 19th May 2022, such as Mawani vs Mawani [|977] KLR 159, which decisions were binding on her, in the face of the Respondent's adamant failure to purge her Contempt of Court before she could or can be heard at all in the NAIROBI CMC Children's Case No. E039 of 2021 proceedings, or at all.

h. The Learned Magistrate erred in law when she failed to protect the minor's right to interlocutory access to his father the Appellant, and thereby violated the Minor's Rights under Part Il of the Children's Act.

i. The Learned Magistrate in rendering of the impugned part of the Ruling dated 23rd September 2022 dismissing the Appellant's Motion dated 19th May 2022 precipitated a breach of the Appellants' Constitutional rights expressed under Article 25(c), Article 50(1), and Article 50(2)(e), of *the Constitution* of Kenya, and the minor's rights under Article 53(I)(d) and (e) of *the Constitution* of Kenya.

j. The Learned Magistrate erred in law and in fact when she ignored the evidence tendered by the Appellant during the prosecution of the Appellant's Motion dated 19th May 2022 sufficient to order the arrest and committal of the Contemnor/Respondent, and thereby she arrived at a conclusion at variance with the facts and the applicable law.

k. The Learned Magistrate erred in law and fact when she trivialised the Children's Court proceedings before her without considering that the access Orders were issued in the protection of a growing minor whose critical need of the Appellant as his biological father is of primary consideration.

l. The Learned Magistrate erred in law when she ignored the evidence tendered by the Appellant during the prosecution of the Appellant's Motion dated 19th May 2022 sufficient to order the arrest and committal of the Contemnor/Respondent, and thereby she arrived at a conclusion at variance with the facts and the applicable law.

m. The Learned Magistrate erred in law and in fact in deciding on proceeding with the trial in Nairobi Chief Magistrates Court Civil Case No. E039 OF 2021, in spite of the Respondent/Contemnor's continuing and unabated Contempt of Court which was an oppressive and irregular decision as the Respondent had violated express Court Orders repeatedly regarding the minor, and ought to be punished.

n. The Learned Magistrate erred in dismissing the Appellant's Notice of Motion dated 19th May 2022, and she exercised her discretion perversely to the injury and detriment of the minor subject of the proceedings before her.

3. The respondent opposed the appeal in her written submissions. The appellant also filed written submissions to canvass the appeal.

Determination

4. I have considered the grounds of appeal, the rival submissions, the multiple affidavits on record, and the trial court record.

5. *The Constitution* of Kenya 2010 requires that in all matters concerning children, the best interest of the child shall be of paramount importance. Article 53(2) of provides:

> “(2). A child’s best interests are of paramount importance in every matter concerning the child.”

6. Section 4(2) and (3)(b) of the *Children Act* echo the constitutional imperative:

> “(2). In all actions concerning children whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.
>
> (3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—
>
> (a) Safeguard and promote the rights and welfare of the child;

(b) and promote the welfare of the child;

(c) ...”

7. What is stated in Section 4 (3)(b) of the Act is the paramountcy principle, which is vital in all matters concerning children and must be given prominence. While considering this matter, this court was alert to the welfare of the minor. The matter is not about the appellant and the respondent, and their interests are secondary to those of the child. The foregoing provisions require this court to treat the interests of the child as the first and paramount consideration and must do everything to inter alia safeguard, conserve and promote the rights and welfare of the child herein.

8. The main issue that arises both in the trial court and in this court is access to the child and how to actualise the same. According to the reports from the Children’s Office, the appellant, on several occasions, has not been able to access the minor. This has not been contested by the respondent. The respondent in her submissions stated that she had made positive steps to ensure that the minor agreed to meet his father. However, her efforts have been futile since the minor, according to her, is not interested in meeting the appellant. According to the respondent, the minor, on several occasions, has refused to attend school on the days the appellant is to have access to him. The respondent reiterated that the minor is embarrassed about meeting the appellant at school.

9. The minor wrote a statement as aided by Muthangari Police Station. The minor refers to the appellant as counsel (the appellant is a lawyer/counsel by profession). He stated that he feels frightened and scared when the appellant comes to his school. His reasons are that the appellant brings with him snacks such as ice cream and cake, which makes the minor uncomfortable, and that the appellant requests him to go to his house, something the minor does not like.

10. From my understanding of the minor’s statement, the father is not the issue. The issue is the location of the meeting. It is unusual for parents to meet children in school. Parents come to pick their children up from school. The minor just wants to be like the other children and not stick out. The minor, in his statement, did not mention any harm both mentally and physically appropriated to him by the appellant. Therefore, it cannot be said that the minor does not want to have a relationship with the appellant. The minor’s best interest is to be like other children and to have a simple and happy childhood away from court-arranged school visits.

11. This court with the consent of both parties also had the opportunity to interview the minor in camera. For the sake of the minor, the interview was not recorded. The minor understood the nature of the dispute and how it relates to him. The minor does not blame any of the parents. However, the minor is empathetic that he does not want to be visited by the appellant in school. He feels that the visits stigmatise him, making him stand out as separate from other children of his age. He does not like to be treated differently, and therefore, he does not appreciate the various gifts the appellant takes to him in school. He would rather not be visited in school at all, and according to him, his best interest is that school visits be stopped forthwith. The minor was of the view that the appellant could visit him at a restaurant or any other facility except at school.

12. So, should the respondent be held in contempt when the minor has expressed himself against access at school? I agree with the Ruling of the trial court. The respondent, on several occasions, has failed to comply with the court orders. Her reason is that the minor is non-cooperative. Should the respondent carry and force the minor to see his father? Will that be in the minor’s best interest? Will that aid in fostering the relationship between the minor and the father? The answer to these questions is in the negative.

13. From the court record, the interim orders of access of the minor in school have been helpful, even if not 100% satisfactory to the appellant. I, therefore, direct that the trial court orders dated 27th April 2022 be complied with, with some variation on the access of the minor in school.

14. On the prayer that the respondent should be jailed for failure to provide access for the minor, my finding is that there have been logistical difficulties with access. At one time, the court has had to unsuccessfully engage the services of the children's officer. While the respondent may not have provided ideal access procedures to enable the appellant to have access to the minor as directed by the trial court, this court is reluctant to jail the respondent because she is the mother of the minor and the primary caregiver. Further, since these proceedings began, the appellant has been able to access the minor in the school. Although the access through the school has had its challenges, there was evidence during the submissions that the appellant had access to the minor in school.

15. Further issues concerning the alleged contempt of court orders by the respondent will be canvassed during the hearing of the main case at the trial court.

Disposition

16. Arising from the foregoing, these are the orders of the court:-

    a. The Appeal is dismissed.

    b. The trial court orders dated 27th April 2022 be complied with save for prayer (3) on the access of the minor in school and prayer (5) on the dropping point. In this regard, the court hereby grants the parties an opportunity to agree or submit on a place of access, dropping and picking points other than the school. If the parties fail to agree, the court will rule on this issue. For these reasons, this matter will be mentioned on 4th March 2025.

    c. Each party to bear own costs.

17. Before I pen off, this Court appreciates that on 9th January 2025, the appellant filed a Notice of Withdrawal of Appeal on the grounds that the delivery of the judgment has taken an inordinately long period to be delivered. On this issue, the court notes that this appeal was filed in 2022. The parties have filed one application after another. On 13th April 2023, the court ordered that parties should cease filing further applications so that the appeal can be canvassed and determined. Therefore, part of the delay is attributable to the parties.

18. In my view, it is not in the best interest of the child that the appeal be withdrawn on the grounds of technicality. If the appeal was withdrawn on the grounds that the parties had amicably come to a resolution of how the appellant could access the minor, then I would have downed my tools. That being said, I reject the Notice of Withdrawal of Appeal filed herein dated 9th January 2025.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY 2025

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E.K. OGOLA

JUDGE

In the presence of:

The Appellant in person

Mr. Macharia for the Respondent

Gisiele Muthoni Court Assistant