SKM v LMK (Suing as Mother and Next Friends of NM & AK (Minors)) (Family Appeal E001 of 2025) [2025] KEHC 5054 (KLR) (25 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5054 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

FAMILY APPEAL E001 OF 2025

FN MUCHEMI, J

APRIL 25, 2025

BETWEEN

SKM ..... APPELLANT

AND

LMK ..... RESPONDENT

SUING AS MOTHER AND NEXT FRIENDS OF NM & AK (MINORS)

RULING

Brief Facts

1. The application for determination dated 28th January 2025 seeks for orders of stay of judgment in Thika Chief Magistrates Court Children's Case No E131 of 2024 delivered on 18th December 2024 pending the hearing and determination of the appeal.

2. In opposition to the application, the respondent filed a Replying Affidavit dated 1st March 2025.

Appellant's/Applicant's Case.

3. The applicant states that the judgment in Thika Chief Magistrates Court Children's Case No E131 of 2024 was delivered on 18th December 2024 whereby the learned magistrate granted custody of NM to the mother of the minor and granted the applicant unlimited access. The learned magistrate further directed that the applicant was not allowed to take the said child away from the respondent unless with the consent of both parties or the court.

4. The applicant avers that the minors were abandoned by their mother, the respondent about three years ago and he has solely been taking care of them. Furthermore, the respondent had at one point tried to commit suicide which he reported to Mikinduri Police Station vide OB Number 18/07/04/2022. The applicant further avers that granting actual custody of a minor to someone who can think of taking

away her own life is endangering the life of the child which is against the provisions of the law that guarantees child safety and security.

5. The applicant states that it was not in the best interest of the minors to interfere with their normal life and subject them to emotional stress. The applicant argues that by the trial court granting actual custody of NM to the respondent, was not in the minor's best interests as the respondent disrupted her normal life and neglected her for three years.

6. The applicant states that he is in actual custody of the minors who are currently in school and they are peacefully and happily enjoying their right to education.

7. The applicant avers that it is in the best interest of justice and in the minors best interests that the court stay execution of the judgment delivered on 18th December 2024. Furthermore, there is no prejudice that will be occasioned or visited upon the respondent if the orders sought are not granted.

The Respondent's Case

8. The respondent states that the children were forcefully taken away from her by the applicant and she has been visiting the children whenever she is allowed by the applicant.

9. The respondent states that the OB as attached by the applicant only shows a missing person report was made and no evidence of attempted suicide is attached. Furthermore, an OB is not an indictment or conclusive finding and the police dismissed the same.

10. The respondent states that the applicant does not deserve actual custody to stay with the children as he does not obey the law and is very promiscuous with many women thus not suitable to be granted actual custody.

11. The respondent states that the applicant is not responsible and has refused to pay school fees contrary to court orders as he is hiding behind the instant appeal by falsely alleging that the child was taken to Thika without his consent yet he sent Kshs 5,000/- for the initial payment.

12. The respondent avers that the applicant knew the school where the child was as he asked for the Mpesa pay bill number which she sent and he paid the initial school fees of Kshs 5,000/-. The respondent further states that the applicant has refused to pay Kshs 16,000/- school fees balance and Kshs 7,000/- transport costs.

13. The respondent states that the applicant paid Kshs 73,500/- on 9th January 2025 for the older child, AW who is at Ripples International Christian School which shows that he is capable of paying school fees for the younger child NM who is in her custody.

14. The respondent states that she should be granted actual custody of both minors as she is a responsible mother and both children are of tender age.

15. The respondent states that she is not comfortable of the applicant knowing her place of residence as he has beaten her before and will likely stalk her aggressively and has a pattern of compulsive behaviours.

16. The applicant filed a Further Affidavit dated 12th February 2025 and states that he enrolled the minor at Tender Brains Academy in Tigania West where he has been receiving stable education and friendly environment contrary to the respondent's assertion that he resides in Thika. The applicant further states that the minor has displayed discomfort in the new school by constantly being uncooperative with the teachers and constantly crying owing to the sudden shift in environment and parenthood.

17. The applicant avers that the best interests of the minor as enshrined in the *Children Act* require that he remains under his custody where he has received consistent care, education and emotional stability rather than being relocated to an unstable and unfamiliar environment.

18. The applicant states that the respondent has not disclosed her permanent physical residence.

19. The respondent filed a Further Affidavit dated 3rd March 2025 and states that she has never lived in Kianjai location and neither does the chief of that area know her, thus he cannot testify on her character.

20. The respondent states that she is agreeable to the applicant being granted supervised visitation rights at a neutral place.

21. Directions were issued that parties put in written submissions and the record shows that the respondent complied by filing submissions. The applicant on the other hand had not filed his submissions by the time of writing this ruling.

The Respondent's Submissions

22. The respondent relies on Article 53 of the *Constitution* of Kenya and the cases of Midiwa v Midiwa [2002] 2 EA 453 and Githunguri v Githunguri (1979) KECA 2 KLR and submits that the children's interests are of paramount importance and it is trite law that the custody of minors of a tender age should be granted to the mother. Relying on the case of Bhutt v Bhutt (no citation given), the respondent submits that the best interests of a child are superior to the rights and wishes of parents.

23. The respondent relies on the case of MN v TAN & another [2015] eKLR and submits that the applicant has not approached the court with clean hands as he has refused to comply with the orders directing him to pay school fees and therefore deserves no audience. The applicant was cited for contempt of court and warrants of his arrest were issued on 3/2/2025 therefore confirming his character. The respondent argues that the applicant has a pattern of disobeying court orders and thus he should not get any prayers granted until he is able to demonstrate full compliance of the judgment.

The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

24. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-

    1.

> "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.

2. No order for stay of execution shall be made under sub rule 1 unless:-

   a. The Court is satisfied that substantial loss may result to the 1st 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.

25. Beyond the requirements of Order 42, this being a matter concerning children, this Honourable Court is enjoined by the *Constitution* of Kenya 2010 and the *Children Act* to consider the best interests of the children. the *Constitution* of Kenya 2010 provides at Article 53(2) that:-

A child's best interests are of paramount importance in every matter concerning the child.

26. The *Children Act* on the other hand provides at Section 8(1) that:

In all actions concerning the children, whether undertaken by public or private or social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

27. As was observed in Bhutt v Bhutt Mombasa HCCC No.8 of 2014 (OS), 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 an overriding consideration of the best interests of the child in accordance with Article 53 (2) of the *Constitution* which provides:-

In exercising its jurisdiction to grant stay of execution, the High Court is required by Order 42 Rule 6(2) of the Civil Procedure Rules to be satisfied that:-

a. The applicant will suffer substantial loss if stay is not granted;

b. The application for stay has not been brought without undue delay; and

c. The applicant has provided security for the due performance of the decree.

28. Similarly in Z.M.O v E.I.M. [2013] eKLR Musyoka J. stated:-

> As a matter of principle, grant of stay of execution of maintenance orders in children's cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute. To my mind, once a maintenance order is made where parentage is undisputed it should not be suspended pending appeal, where the appeal is on the quantum payable.

29. The applicant argues that the minor stands to suffer substantial loss as the custody order seeks to uproot him from a life and home he has known all his life yet the respondent abandoned him for three years when she left the matrimonial home.

30. On perusal of the record, the respondent confirmed that she left her matrimonial home in 2022 and later went to pick NM, the 7 year old minor in November 2024. Further, it is evident that the minor is 7 years old. According to the Children's Act, a child of tender years is a child under the age of ten years. It is trite law that when it comes to the question of deciding custody of children of tender years, in the absence of any exceptional circumstances, the custody of children of tender years should be awarded to the mother. In K.M.M. v J.I.L [2016] eKLR the court held:-

> .....a child of tender years' best interest and welfare are where the legal custody is awarded to the mother barring extenuating circumstances that would prevent the mother from providing protection and care of the child. Caselaw lends credence to the proposition that in cases of a child of tender years of less than 10 years as defined under Section 2(1) of the Children's Act 2001, custody is granted to the mother.

31. Similarly in Githunguri v Githunguri [1981] KLR 598, the court stated that:

> The prima facie rule (which is now quite clearly settled) is that other things being equal, children of this tender age should be with their mother, and where a court gives custody of this tender child to the father, it is incumbent on it to make sure that there are really sufficient reasons to exclude the prima facie rule.

32. In Sospeter Ojaamong v Lynette Amondi Otieno Civil Appeal 176 of 2006 the court outlined what would constitute exceptional circumstances and held:-

> The general principle of law is that custody of such children should be awarded to the mother unless special and peculiar circumstances exist to disqualify her from being awarded custody....the mother's disgraceful conduct, say her immoral behaviour, drunken habit, bad company are some of the factors which would disqualify her from being awarded custody of a child of tender age.

33. In the instant case, the only reason the applicant has given for him to be awarded full custody is that the respondent abandoned the minor for three years when she left their matrimonial home. The applicant has further alleged that the respondent tried to commit suicide and therefore she ought not to be granted custody. From the record, it is evident that the reasons adduced by the applicant are not peculiar or exceptional circumstances to warrant the court to grant him custody of the minor of tender years. In my view, the applicant has not shown that he will suffer substantial loss if the orders sought are not granted. Instead he states that it is the minor who us likely to suffer substantial los if he is moved to a new environment.

34. The judgment of the court below was delivered on 18th December 2024. The applicant filed his Memorandum of Appeal on 6th January 2025 and the current application on 29th January 2025. Thus it is my considered view that the application has been filed timeously.

35. On the issue of security, the applicant has not offered any security. The grant of stay of execution is discretionary and this court shall exercise its discretion depending on the circumstances of the case and while balancing the rights of the parties to ensure justice. Relying on Section 95(3) of the Children's Act, it is my considered view that granting stay of execution would militate against the best interests of the children herein. Section95(3) provides:-

> In any proceedings in which an issue on the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child.

36. I am also persuaded by the decision of Z.M.O. v E.I.M [2013] eKLR where the court held:-

> " The solution ideally lies in expediting the disposal of the appeal and staying the matter before the children's court to wait the outcome of the appeal. Tinkering with the quantum at this stage would amount to determining the appeal before the arguments are heard from both sides on the merits of the same."

37. In the interests of justice and in the best interests of the children herein, it is my considered view that the appeal be heard expeditiously so as to determine the issues of custody between the parties. I do not find it prudent to move the child from where he is schooling now as things could change in the determination of the appeal.

Conclusion

38. From the foregoing reasons, I find that the application dated 28th January 2025 has no merit and is dismissed with no order as to costs.

39. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 25TH DAY OF APRIL 2025.

F. MUCHEMI

JUDGE