



**Thiong'o v Washika (Family Appeal 63 of 2019)
[2024] KEHC 204 (KLR) (Family) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 204 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
FAMILY APPEAL 63 OF 2019
PM NYAUNDI, J
JANUARY 19, 2024**

BETWEEN

STELLA THIONG'O APPELLANT

AND

ADRIAN WASHIKA RESPONDENT

RULING

1. The Application before Court is the Application dated 8th June 2024 and presented under Article 53 of the *Constitution*, Sections 8 of the *Children's Act*, Sections 1A, 1B and 3A of the *Civil Procedure Act* in which the Applicant seeks the following orders
 - a. Spent
 - b. That this Honourable be pleased to compel the Respondent herein to comply with the judgment of this Honourable Court delivered on 24th June 2021 which has not been stayed, varied or set aside.
 - c. That this Honourable Court be pleased to compel the Respondent herein to release with immediate effect the minor's passport and his British Resident Permit for purposes of the Child's travel back to the United Kingdom.
 - d. That this Honourable Court be pleased to allow the Respondent to make travel arrangements for the subject minor.
 - e. That this Honourable Court be pleased to order any other relief it may deem fit in the best interests of the Child.
 - f. That the costs of this Application be provided for.



2. The Application is based on the grounds on the face of the Application and Supported by the Affidavit of the Applicant sworn on 8th June 2023. The Respondent opposes the Application vide affidavit sworn on 10th July 2023.
3. The Court gave directions that the parties file written submissions and both parties complied.

Summary of Applicants' Case

4. It is the Applicant's case that the Respondent has failed to comply with the judgment of the Court delivered on 24th June 2021, which gave the following orders
 - a. The Respondent and Applicant granted joint legal custody of the subject minor
 - b. The Appellant granted actual custody, care and control of the child
 - c. The Respondent granted unlimited but reasonable access during half of the child's school holidays and that both the Respondent and Applicant would contribute towards the travel expenses of the child in respect of the order
 - d. The Appellant granted leave to relocate to the United Kingdom with the Child.
 - e. The Respondent to continue contributing towards the welfare of the child in terms of maintenance and school expenses.
5. It is the Applicants averment that the judgement has not been stayed or varied and that the Respondent having failed to comply with the conditional stay granted by the Court of Appeal on 4th March 2022, the stay lapsed and there are no effective orders of stay in the matter.
6. It is further deponed that the Applicant pursuant to the judgment of 24th June 2021 relocated with the Child to the UK in August 2022 and enrolled him in School. During the school holidays, she released the child to travel to visit the Respondent expecting him to return by December 31, 2022, ahead of the new term in January 2023. This it is stated was in accordance with the judgment of 24th June 2021.
7. The Applicant avers that the Respondent has failed to release the Child to return to the UK, thus necessitating this Application. This action by the Respondent is not in the Child's best interest as he has lost his slot in school that he was attending and the athletics clubs that he was enrolled in.
8. In their submissions the Applicant reiterates that the Respondent having failed to comply with the conditional stay of execution, the same lapsed automatically. It is therefore not true that the Applicant's move to take the Child to the UK was in disregard of the orders of the Court.
9. The Applicants rely on the decision in *Hadkinson vs Hadkinson* 919520 AER 567 cited in *Daniel Nderi Njogu vs Lydia Muthoni Kibage* [2010] eKLR and the provisions of Order 42 rule 6 of the *Civil Procedure Rules*
10. The Applicant also relies on the decision in *Moses P N Njoroge & Others vs Reverend Musa Njuguna & Another* [2004] eKLR and *Wildlife Lodge Ltd v County Council of Narok & Anor* [2005] Vol 2 EALR p. 344 as cited in *Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 others* [2017] eKLR
11. In view of the foregoing, it is submitted that there are no orders in relation of stay of execution and the enforceable judgment is that of 24th June 2011, The Applicant submits that the ruling referred to by the Respondent granted leave to file and serve a supplementary record of appeal and did not stay execution.



12. Finally, the Applicant submits that the Respondent should meet the costs of the Application.

Summary of Respondent's Case

13. The Respondent contends that on March 23rd, 2023, the Court of Appeal granted him leave to file a supplementary record of Appeal and that the issues being canvassed in the current application are subject of the substantive appeal before the Court of Appeal.
14. It is the Respondent's position that it is in the best interests of the minor that the issues raised in the current application await the outcome of the pending Appeal.
15. The Respondent takes issue with the decision of the Applicant to process a resident permit for the minor instead of a visitor visa. He is apprehensive that if the Court directs that the Child travels to the UK then Applicant will detain him irregularly as she did in the past and he will not have access.
16. He is only willing to have the Child travel on a visitor visa and not a resident permit. It is submitted that if the Application is allowed the Appeal will be rendered nugatory.
17. In his submissions the Respondent reiterates the averment in his replying affidavit. It is submitted that the Applicant seeks 'to steal a match from the Court of Appeal' and reliance placed on the decision of the Supreme Court in *Kenya Hotel Properties Limited v Attorney General & 5 Others* (Petition 16 of 20200 [2022] KESC 62 (KLR) (Civ) (7th October 2022) Judgment.
18. In conclusion the Respondent submits that the Applicant's application be dismissed with orders to the Appellant.

Analysis and Determination.

19. Having reviewed the pleadings, submissions filed herein and the relevant law , I identify the following as the issues for determination-
 - a. Whether there is an order staying the execution of the Judgment delivered on 24th June 2021 along with the Consequential orders arising therefrom?
 - b. Who should bear costs of the Suit?
20. On the 1st Issue, it is not in dispute that the Court delivered its judgment on 24th June 2021. The Parties are also in agreement on the import of the judgment of Court as relates to the minor. It is common ground too that there is an appeal pending before the Court of Appeal. It is not disputed that in ruling dated 4th March 2022 the Court granted conditional stay.
21. There is no challenge that the orders of the Court of Appeal lapsed when the Respondent failed to comply.
22. Vide Application dated 17th October 2022, the Respondent sought leave to file a supplementary record of appeal. In paragraph 17 of the Ruling Hon. L D Ogombe, Deputy Registrar granted the following order

For reasons I have given above, I find the Application has merit. Leave is hereby granted. The Applicant is directed to file and serve the supplementary record of appeal within 7 days hereof.



23. I have carefully looked at this order from all possible directions and none of the available interpretations can import into this order an intention to stay the execution of the Judgment delivered on 24th June 2021.
24. The Respondent is aggrieved by this judgment however the provisions of Order 42 Rule 6 do not afford him any wiggle room. As is well articulated by judicial precedent Court orders are not mere suggestions, they are not to be complied with at the convenience of the parties. I find that there is an existing and enforceable Court order and for this reason I find that it is in the Child's best interests for the Court to enforce the existing Court order.
25. The Respondent contends that he will only release the Child to travel on a visitor's visa and not a resident permit. This position calls for a restatement of the guarantees that the Constitution 2010 and the Children Act afford children when they recognise them as Subjects and not objects of the rights.
26. The Law recognises children as individuals in their own right and not the property of their parents or any other adult. For this reason, a parent cannot unilaterally determine the identity documents or documents of travel that a Child can hold especially if by law he is entitled to them.
27. In this matter, the child qualifies for a resident permit and the convenience that that affords him when he is travelling. It is not in the Child's interest therefore to deny him this travel/ identity document on account of the Respondents protestations.
28. For this reason, I allow the Application dated 8th June 2024 in its entirety and make the following orders-
 - a. The Respondent to release to the Applicant within 14 days from the date hereof the minor's passport as well as residence permit
 - b. Pursuant to judgment of the Court delivered on 24th June 2021, the Applicant to leave with the minor and travel to the UK
 - c. The matter be mentioned 15 days from the date hereof to confirm compliance on 16th February 2024 before Hon. Chemitei J
 - d. Given the nature of the matter and the conduct of the Respondent he will pay the costs of this Application assessed at Kshs 30000 within 30 days from the date hereof.

It is so ordered

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 19TH DAY OF JANUARY , 2024.

P. NYAUNDI

JUDGE

In the presence of

Ms Tole for the Applicant

Sylvia - Court Assistant

