EAJ v HS (Family Appeal E005 of 2024) [2024] KEHC 984 (KLR) (7 February 2024) (Ruling)

Neutral citation: [2024] KEHC 984 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

FAMILY APPEAL E005 OF 2024

G MUTAI, J

FEBRUARY 7, 2024

BETWEEN

EAJ ..... APPELLANT

AND

HS ..... RESPONDENT

RULING

1. The Appellant and the Respondent are, respectively, the Plaintiff and the Defendant in a pending children's case to with Tononoka Children Case MCCHC E522 of 2022 EAJ versus HS. The parties are the mother and father, respectively, of Master HS. I will refer to the Appellant as "E" and the Respondent as "H".

2. Vide a decision delivered on 19th January 2024, the Court below ordered as follows: -

    1. That pending the conducting of the mental assessment of the Plaintiff at Port Reitz Hospital in Mombasa, the execution of the physical supervised access in favour of the Plaintiff is hereby stayed;

    2. That the Plaintiff shall undergo a mental assessment at Port Reitz Hospital within 7 days from the date of this ruling, a report be filed within 14 days by the attending doctor;

    3. That the Court's determination on the application dated 3rd October 2023 is stayed pending the mental assessment report being filed;

    4. That the application dated 12th July 2023 is dismissed as the same has been overtaken by events;

    5. That there shall be no order as to cost; and

    6. That mention is on 5th February 2024 to confirm the filing of the doctor's report and for further directions.

3. On 14th January 2024, H filed an application. After considering the said application, the Hon. Nelly Chepchirchir, PM, issued the following orders: -

    1. That the application is certified urgent and must therefore be heard and determined within 30 days from today;

    2. That DCIO Regional Office Mombasa and the Children's Officer in charge of Kwale County are hereby directed to release the suit minor herein HS to FC and CAO, who are his appointed nominees to be in their custody pending the release of the Applicant;

    3. That the Applicant to serve the Respondent within 1 day; that is to say by close of business on 25th January 2024;

    4. That the Respondent shall have 5 days upon service to file and serve a response. That is by 30th January 2024; and

    5. That the application shall be heard via the e-platform on 31st January 2024.

4. E was aggrieved by both decisions and filed High Court Family Appeal No E004 of 2024; EAJ versus HS and High Court Family Appeal No E005 of 2024; EAJ versus HS. In the former appeal she raised 5 grounds of appeal to wit that: -

    1. The learned Magistrate erred in law and fact by making an order that the Plaintiff undergo a mental assessment at Port Reitz, yet the Respondent had not availed an iota of evidence to support the allegation complained of warranting making the impugned orders;

    2. The learned judge (sic!) erred in law and fact by failing to assess the allegation of sexual harassment subjected to the minor as availed by the appellant and instead outrightly dismissing the clear facts of defilement and instead subjecting the Appellant to mental assessment;

    3. The learned judge (sic!) erred in law and fact by openly abhorring and castigating the appellant for raising issues of defilement of the minor without any basis despite the fact that the appellant had raised genuine issues which have subsequently led to the arraignment and charging of the Appellant with the offence of sexual assault of the minor in Kwale Criminal case No 323/27/2024; Republic versus SH;

    4. The learned judge (sic!) erred in law and fact by failing to consider and properly apply the concept of the best interest of the minor and hence arriving at an erroneous decision; and

    5. The learned judge (sic!) erred in law and fact by making an order that the Appellant be denied access to the minor, even a supervised one, without laying any basis for the said decision and orders.

    The Appellant thus sought to have the ruling and orders of the Hon Opiyo Green Odera, RM, delivered on 19th January 2024, set aside.

5. The Memorandum of Appeal in High Court Family Appeal No E005 of 2024; EAJ versus HS, on the other hand, raised 6 grounds, to wit that: -

    1. The learned magistrate erred in law and fact, by the fact that knowing that the Respondent had been charged with the offence of sexually assaulting the minor the subject to the proceedings, still nevertheless allowed the application by the very accused parent to hand over the minor to persons who are strangers to the parties herein;

2. The learned judge (sic!) erred in law and fact by granting final order exparte in allowing the minor to be handed over to persons who are strangers to the biological parents until the Respondent is released, which in essence, amounts to a final order issued without first hearing the Appellant;

3. The learned judge (sic!) erred in fact and in law by making an order to hand over the minor to the Respondent's "appointed nominees", which term has no basis, validity, or definition in the *Children Act* and hence an action that is not in the best interest of the minor;

4. The learned judge (sic!) erred in law and fact by failing to protect the minor herein and hence making an erroneous decision contrary to the best interest of the minor;

5. The learned judge (sic!) erred in law and fact by failing to consider and properly apply the concept of the best interest of the minor and hence arriving at an erroneous decision; and

6. The learned judge (sic!) erred in law and fact by failing to call for and consider a report on the suitability of the said FC and CAO to safeguard the best interest or the minor before making the decision to hand over the minor to them hence arriving at an erroneous decision".

E thus sought to have the decision of the Hon. Nelly Chepchirchir, PM, delivered on 25th January 2024, set aside.

6. The two appeals arise from the same matter before the Court below. After hearing the parties' submissions on 30th January 2024, I consolidated the said appeals. I also stayed further proceedings in Tononoka MCCHC No E522 of 2022; E AJ versus HS until this Court delivers this ruling. To protect the child pending delivery of my ruling, I committed him to Furaha Phoenix Children's Home for his custody and protection until 6th February 2024, when vide my orders, he would be produced in Court.

7. The Appellant/Applicant filed the Notice of Motion dated 26th January 2024, vide which she sought the following 9 prayers: -

1. Spent;

2. Spent;

3. Spent;

4. Pending the hearing and determination of this application interpartes or further orders of the Court, an order be issued directing the Respondent, DCIO-Regional Office, Mombasa or any other person having present and actual custody and possession of HS (the subject minor) to release the minor to the Appellant/Applicant;

5. Spent;

6. That pending the hearing and determination of the appeal and or consolidated appeals herein, the Appellant/Applicant herein be granted actual custody of the subject minor;

7. Spent;

8. That this honourable Court be pleased to issue any further orders/directions as it deems fit, necessary, expeditious, and in the interest of justice; and

9. That the costs of this application be provided for.

8. E application was supported by her Supporting Affidavit sworn on 26th January 2024, to which was attached a charge sheet in Kwale PM Court SO No. E005/2024; Republic versus HS, the various orders and the decisions of the Court below and the Memorandum of Appeal.

9. The application is opposed. H filed a Replying Affidavit sworn on 29th January 2024. He attached a copy of the application dated 24th January 2024 vide which, upon his arrest, he sought to have his friends FC and CAO granted custody of the minor so that he could continue attending Trade Winds Academy while he was in custody. It is this application that gave rise to the impugned decision of 25th January 2024.

10. What did the application dated 24th January 2024 seek? It is necessary that I set out the prayers sought in the said application for reasons that shall become apparent. They were that: -

    1. Service of this application on the Respondent be dispensed with, and this application be heard exparte in the first instance;

    2. That in view of the urgency of this matter, this honourable Court be pleased to issue an order against the DCI Regional- Mombasa and or the Children Office in charge- Kwale County, to release the suit minor to FC and CAO who are his appointed nominees to be in their custody pending the Applicant's Release;

    3. That this honourable Court to fix a date for interpartes hearing of this application; and

    4. That costs of his application be provided for.

11. E filed a Supplementary Affidavit sworn on 30th January 2024, vide which she sought to have Lawrence Obonyo Advocate disqualified from representing H as he had previously acted for her.

12. Oral submissions were made on 30th January 2024. I shall refer to the said submissions briefly.

Submissions of the Appellant/Applicant

13. The learned counsel for E, Mr Ogembo, submitted that the 2 appeals should be consolidated as they arise from the same Children's matter pending before the Court below. He argued that the Children's Court, while granting orders regarding the application dated 24th January 2024, issued final orders. In his view, the effect of the orders granted on 25th January 2024 is that the Court became functus officio as there was nothing further for the Court to do. It was thus submitted that the right to a fair trial was thusly taken away.

14. Counsel urged that the said orders were not in the best interest of the child as he would be released to strangers whose suitability to take care of him had not been gauged by the Court. He argued that given the orders the court made, upon his release, H would have custody of the child he had been accused of molesting.

15. Mr Ogembo submitted that at the time, this Court considered Misc. Application No E.028 of 2023, which was between the same parties, H had not been charged. The investigative authorities had since found the criminal complaint credible and had arraigned him in Court. He also prayed that Mr. Obonyo be disqualified from representing H as he had previously represented E.

Submissions of the Respondent

16. Mr. Obonyo, learned Counsel for H, submitted that the Court must consider the best interest of the minor. I was referred to section 8 of the *Children Act*, 2022, and Article 53(2) of *the Constitution* of Kenya 2010. Counsel argued that it would not be in the best interest of the child to have him committed

to a children's home. Regarding the criminal charges currently facing the Respondent, he argued that the Respondent is presumed innocent until proven guilty.

17. Counsel denied that the Court made final orders on 25th January 2024. He submitted that the Court, in fact, listed the matter for hearing on 31st January 2024. He stated that the orders the court below made had not been complied with. It was submitted that this Court was being asked to sit on appeal against a decision that hadn't been heard interpartes.

18. Regarding the mental examination of E, it was submitted that the Court made the decision after hearing all the parties, as E was represented by her previous counsel. He argued that the application was filed to steal a match on H. He also argued that his competence to represent H was the subject of a previous application whose determination had not been appealed against.

Response by the Appellant/Applicant

19. Mr. Ogembo submitted that the appeals filed raised serious issues. The appeal wasn't idle. There was a danger, he submitted, that if the proceedings in the Court below were allowed to go on the appeals would be tendered nugatory.

20. He referred the court to sections 22 & 95 of the *Children Act* and prayed that I protect the child the subject of these proceedings.

Analysis & Determination

21. Article 53(2) of *the Constitution* of Kenya 2010 provides that: -

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

22. Section 8(1), (2) and (3) of the *Children Act*, 2024 provides that:-

(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—

(a) the best interests of the child shall be the primary consideration;

(b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.

(2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, 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) conserve and promote the welfare of the child; and

(c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.

(3) In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child's age and degree of maturity

23. I have seen the impugned decisions of the Court below. As was decided in KKPM versus SWW[2019]eKLR the best interest of the child is superior to the rights of and issues of the parents.

24. What, then, are HS best interests? The Supreme Court of the United Kingdom in ZH(Tanzania) (FC) versus the Secretary of State for the Home Department (2011)UKSC 4

> "it is a universal theme of various international and domestic instruments to which Lady Hale has returned that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interest..."

25. This is important. It would appear to me that HS's best interest would be served by the early conclusion of the custody case currently pending before the Court below.

26. Would the foregoing goal be achieved by allowing the application? I am not persuaded that that is the case. It would be better to have all the interlocutory applications determined and a final decision rendered so that any party thereby aggrieved can appeal in a single appeal rather than, as is likely in this case, the High Court gets bogged down in a multiplicity of interlocutory appeals.

27. By appealing orders made by the court exparte, even before the application was heard interpartes, the Applicant jumped the gun. To allow this kind of application, this court would, in essence, make prosecuting matters before the trial court impossible. Endless court battles in the trial court, marked with infinite detours to the appellate court, would, in my view, offend the Constitutional principle in Article 159(2)(b) that "justice shall not be delayed"

28. The undesirability of what I may call appeals by instalments has been usually raised in criminal matters. The courts' decisions in criminal cases are useful in matters of this kind where expedition is called for. I will refer to two decisions for guidance.

29. The High Court (per Kimaru, J (as he then was)) in John Njenga Kamau versus Republic, Criminal Appeal No.63 of 2014 [2014] eKLR stated as follows: -

> "The Criminal Procedure Code does not envisage a situation where an accused or the prosecution may appeal to this court from an interlocutory ruling made by the trial court in the course of the trial. This court's considered view is that the reason why such appeals are not allowed is deliberate and is not a lacuna in the law. If parties to a criminal trial were allowed to appeal against any interlocutory ruling made during trial, there is a possibility that parties to such trials, especially accused persons, may use the appeal process to frustrate the hearing and conclusion of the criminal case."

30. In Maur Abdalla Bwanamaka v Director of Public Prosecutions & another, Petition no. 23 0f 2018 [2019] eKLR, Ogola, J noted as follows: -

> 21. The other factor for the Court to consider is that of reasonableness of the provision challenged. In the view of this Court, discouraging interlocutory appeals in criminal matters is a positive step towards ensuring strict compliance with the provision of Article 50 of *the constitution* of Kenya, 2010 which requires that criminal trials open and conclude without unreasonable delay.
>
> .....
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> 22. It is the view of this Court that the said Sections do not restrict or reduce access to the court to the point of rendering the right of appeal redundant. Allowing interlocutory Criminal Appeals would unnecessarily clog the system with the resultant effect of delays in conclusion of criminal trials. The petitioner is not without recourse since upon conclusion of the criminal matter he will have an automatic right of appeal to the High Court on matters of both Law and fact."

31. These decisions are persuasive, in my view, in respect of this application. They abhor applications that clog up the judicial system, thereby preventing expeditious disposal of cases. The best interest of children calls for expeditious resolution of disputes concerning them. That would not be possible if there were trials by instalments.

32. Regarding custody, this Court is of the opinion that the court below is best suited to make that determination. Although grave allegations have been made against H, which allegations are the basis of the criminal prosecution that he is facing before the Kwale Magistrate's Court, this is not the first time the issue has been made before this Court. I considered the same allegation in the ruling I delivered on 30th August 2023 in Mombasa High Court Family Misc. Cause No. E.028 of 2023; EAJ versus HS. In that ruling, I stated as follows: -

> 24. I have seen the 2 medical reports prepared by a clinical officer and a medical doctor. Both medical professionals made diametrically opposed findings. Equally baffling is the fact that HS appears to have accused each parent of abuse.
>
> 25. The minor was retrieved from the custody of the Applicant on 14th July 2023. A report was prepared by a Mr. Andrew Warui of the DCI Child Protection Unit, Mombasa. He reported that "the warrant of arrest was executed, and IK was arrested but with a lot of difficulties. He revealed where the minor was hidden but the defendant appeared intoxicated with abuse of cannabis sativa (bhang) as the house was smelly with strong stench of marijuana and stinking with a small bed with old mosquito nets and condoms/lying around where the minor was playing."
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> 26. The Court is inclined to believe what Dr. Mwangome wrote. He is a medical practitioner of good standing in Mombasa. His findings were consistent with the report of the Directorate of Criminal Investigations Children Protection Unit"

33. The trial court will be able to establish, after hearing the parties, which of the two rival accounts is correct, and thus who between E and H is in the best position to take care of the child in a manner most consistent with the child's best interest.

34. Whereas H is accused of a serious offence, this Court must presume him innocent until the trial Court finds otherwise. He has been the child's caregiver for some time.

35. Was the child's release to a couple whose suitability had not been assessed by the court proper? This is an issue of concern. However, without the order that the court below made, the child would have been without a caregiver once his father was arrested. Given the circumstances, it would appear to me that the decision of the children's court is justifiable.

36. I am not persuaded that mental examination, as ordered by the court, is objectionable. The order to that effect was made after an interpartes hearing of an application. In any event, such examination affords E an opportunity to disprove the allegation that she is mentally unstable that was made against her.

37. This Court disagrees with E counsel that the trial Court made permanent orders during ex-parte hearing. It was open for the Court during the interpartes hearing to vary the terms of custody on 31st January 2024, if circumstances warranted.

38. Regarding representation, this court notes that Lawrence Obonyo has represented H for a considerable period of time. Mr Obonyo submitted that an objection on the same ground was raised in the court below and that a determination was made, vide which he was permitted to continue representing H. The decision was not appealed against, nor was it reviewed. In the matter I have referred to, whose

ruling I have excerpted above, Mr. Obonyo represented H. No objection was raised by Ms Mwania, who then represented Ms EJ. In my view, the said objection cannot be rightly raised at this point.

39. Should stay of proceedings in respect of the children court be granted? I think not. In the case of Kenya Wildlife Service Vs James Mutembei (2019) eKLR, Gikonyo J held that:

> " Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent".

40. Gikonyo, J while quoting in part Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, stated that:

> " The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."
>
> This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases."
>
> It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case".

41. Staying proceedings in this matter would delay the prosecution of the matter before the Children's Court. No exceptional grounds have been given that would warrant the exercise of this rare remedy.

42. The upshot of the foregoing is that this Court finds no merit in the application dated 26th January 2024. The same is dismissed. Each party shall, however, bear his or her own costs. The orders that have been subsisting in this matter pursuant to my orders of 30th January 2024 are hereby discharged.

43. It is clear to this Court that the hearing in the Court below must be concluded as soon as possible in the interest of justice. This Court, in the exercise of its supervisory jurisdiction under Article 165(6) and (7) of *the Constitution* of Kenya, 2010, hereby directs the Children's Court to conclude the case before it within 90 days of the date of this ruling.

44. The children's cause shall be mentioned on 14th February 2024 before Hon. Nelly Chepchirchir, PM, for purposes of fixing a suitable hearing date.

Orders accordingly.

DATED AND SIGNED THIS 7TH FEBRUARY 2024 AT MOMBASA

GREGORY MUTAI

JUDGE

In the presence of: -

Ms. Kageni for the Appellant/Applicant;

Mr. Obonyo for the Respondent; and

Arthur – Court Assistant.