



JAA v LWN (Civil Appeal E003 of 2024) [2024] KEHC 741 (KLR) (2 February 2024) (Ruling)

Neutral citation: [2024] KEHC 741 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E003 OF 2024
WM MUSYOKA, J
FEBRUARY 2, 2024**

BETWEEN

JAA APPELLANT

AND

LWN RESPONDENT

(An appeal arising from the orders/directions by Hon. EC Serem, Resident Magistrate, RM, made on 24th January 2024, in Busia CMC Children's C No. E028 of 2023)

RULING

1. The application that I am called upon to determine is dated January 24, 2024. It seeks stay of temporary orders that were made by the trial court on 24th January 2024, divesting the appellant the custody of the minor, the subject of the proceedings in Busia CMC Children's C No. E028 of 2023, pending the inter partes hearing of the application and the hearing of the appeal. It also seeks conservatory orders pending hearing and determination of the appeal.
2. The grounds are that the impugned order was unwritten, and was prejudicial to the welfare of the child, who has been under the custody of the appellant since October 2023; no reasons were assigned for the orders; the minor was school-going; the appellant has preferred to appeal rather than challenge the orders at the trial court; that the main suit is due for hearing on 7th February 2024; that the appellant has been meeting the daily subsistence of the minor, and is ready and willing to continue doing so; among others.
3. In the supporting affidavit, sworn on 24th January 2024, the appellant avers that the status quo be preserved pending the hearing and determination of the appeal and or of the main suit. He says that he is the one whose been taking care of the needs of the minor and is ready to continue doing so. He denies chasing the respondent away from the home, adding that she left of her own volition, fearing arrest by the police. He states that the best interests of the child favoured status quo being maintained. He avers that he is ready to abide by any orders on stay.



4. The response is in the replying affidavit of the respondent, sworn on 30th January 2024. She avers that the parties had been cohabiting since 2019, until October 2023, when the appellant chased her out of the home. The appellant changed locks at the home, and instructed the gateman to keep her away, with the result that she was separated from their child of 4 years. She went to the police, but was referred to the courts. She avers that she has been kept away from the minor since October 2023. She avers that she was granted custody of the child, in a ruling delivered on 24th January 2024. She states that before the appellant chased her away, he had been a seasonal figure in the life of the child, as he would appear and disappear, adding that he has only begun to pay fees after he assumed custody of the child.
5. The matter was placed before me on 25th January 2024, under certificate of urgency. I gave directions on its service, and allocated 31st January 2024, as the date for inter partes hearing. The application was argued inter partes, on that date, by Mr. Okutta for the appellant, and Ms. Muzungu for the respondent. Both breathed life to their respect filings.
6. The matter is active before the trial court. I can see that the trial court is making an effort to dispose of it expeditiously, given that it relates to a minor of tender years, and it is a family matter, where tensions and emotions are high. It has a date for hearing on 7th February 2024.
7. The infant, the subject of these proceedings, is aged 4 years. That makes him a child of very tender years. The court, in *SCM vs. JKM* [2021] eKLR (Kimaru, J), said with regard to that:

“There is also another principle which this court is required to adhere to and that is where the custody of a child of tender years is in issue, such custody should be with the mother of the child unless there are extenuating circumstances.”
8. Similar sentiments were expressed in *KMM vs. JLL* [2016] eKLR (Muigai, J), where it was said:

“...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. Case law lends credence to the proposition that in cases of a child of tender years of less than 10 years ... custody is granted to the mother.”
9. It is a notorious legal principle that a child of tender years belongs with the mother, unless there exist circumstances that demonstrate lack of suitability of the mother to have custody. The appellant has not alleged any such unsuitability, and, if he has, has not demonstrated it. The welfare and best interests of a child of 4 would be most secure with the mother, the respondent in this case.
10. There can be no doubt in my mind that that was what influenced the trial court in making the orders of January 24, 2024. I see no reason to stay them, as I find no reason to depart from the principle stated in the 2 decisions that I have cited above. Consequently, I hereby dismiss the application, dated January 24, 2024. The costs shall abide the outcome of the appeal. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 2ND DAY OF FEBRUARY 2024

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Okutta, instructed by Ouma Okutta & Company, Advocates for the Appellant.



Ms. Muzungu, instructed by Muzungu & Company, Advocates for the Respondent.

