



RA v JNO (Suing as the next of friend and mother to the minors IO and MM) (Children's Appeal Case E001 of 2024) [2024] KEHC 1278 (KLR) (14 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1278 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CHILDREN'S APPEAL CASE E001 OF 2024**

TA ODERA, J

FEBRUARY 14, 2024

BETWEEN

RA APPELLANT

AND

JNO (SUING AS THE NEXT OF FRIEND AND MOTHER TO THE MINORS IO AND MM) RESPONDENT

JUDGMENT

1. Before this court is a Notice of Motion application dated 11th January 2024 filed by the Applicant/Appellant who has approached this court seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That, this court be pleased to issue an order granting actual custody of IO to the applicant/appellant so as to enable him facilitate his continued education at HILL SCHOOL, pending the hearing and determination of the appeal.
 - d. That pending the hearing and determination of the Appeal, being High Court at Nyamira children Appeal No. E001 of 2024, the Court be pleased to issue an order for stay of execution from judgment and orders issued by the Nyamira Chief Magistrate Court Children Case No. E008 of 2023 on 14th December, 2023 and 4th January, 2024 respectively.
 - e. Costs of and incidental to this suit be provided for.
2. The Application was premised upon section 4, 23, 24, 25, 93, 97 and 101 of the *children Act*; sections 3, 3A Order 51 Rule 1 of The *Civil Procedure Act* and rules and all enabling provisions of the law and was supported by the Affidavit of even date Sworn by the Applicant/Appellant on 11th January 2024.



3. The Respondent opposed the Application through a Replying Affidavit dated 19th January 2024.
4. The Application was canvassed by way of written submission. The respondent filed the written submissions dated 19th January 2023 whilst the Applicant relied upon his grounds on the face of the Application and his supporting Affidavit.

Background

5. The facts of this case are that the Appellant and the Respondent residing and working for gain in the Republic of Kenya got married to each other in the year 2015. Their union was blessed with two children; a son and daughter (MM and IO) who are the subject of these proceedings) who are now aged about seven (7) year and nine (9) years respectively. The marriage between the parties fell into problems and the couple separated in May 2021 wherein the Appellant moved to the Eldoret where he currently works as a high school teacher while the Respondent remained in Nyamira where she works as Nutritionist.
6. The Appellant and the Respondent later approached the Children's office at Nyamira where they agreed that the son would stay with the father in Eldoret while the daughter would stay with the mother in Nyamira. They also agreed in their said arrangement they would share 50% custody during the school holidays. However, after sometime the daughter informed the mother that she was not comfortable staying away with his brother. Pushed by the interests of the daughter to stay with his brother, the Respondent approached the trial court by filing suit against the Defendant (the Appellant herein) vide a plaint dated 1st March 2023 seeking the following orders: -
 - a. Legal custody, care and control of both the minors.
 - b. The Defendant produces IO (the son) before the court.
 - c. Costs of the suit.
7. The matter was heard and the trial court delivered its Judgment on 14th December 2023 making the following orders: -
 - a. That both the plaintiff and the defendants shall have Joint Custody of the minors IO and MM.
 - b. That the joint custody shall be implemented in the following terms; Actual Custody of the minors IO and MM is granted to the plaintiff;
 - c. That during school holidays the plaintiff shall have Custody of the minors IO and MM for the first half of all school holidays.
 - d. That the defendant is granted the CUSTODY of the minors during the last half of all school holidays;
 - e. That the maintenance of minors with respect to food, shelter clothing and education shall be shared equally between the Plaintiff and the Defendant. No party shall be overburdened by the said shared parental responsibility in maintaining the minors IO and MM.
 - f. That both the plaintiff and the defendant shall have unlimited access and visitation rights of the minors IO and MM during the subsistence of the Shared Joint Custody upon making prior arrangements with each other.
 - g. That the order of Shared Joint Custody shall remain in force until the children are old enough to decide which parent wish to have Sole Custody of them.



- h. That this being a children's matter parties shall bear their own costs.
8. Being aggrieved by the decision of the trial court the Appellant filed the Memorandum of Appeal dated 3rd January, 2024 challenging the entire judgment. The Appellant set out the following as the grounds of Appeal;
- a. That the honorable trial magistrate erred both in law and in fact by misapprehending and disregarding and/or ignoring to take into consideration the ascertainable wishes of IO who emphatically stated that he wished to be in custody the appellant and/or further that IO is a pupil at(Particulars withheld) , with a special identification number and that he has continuously been in the actual custody of the Appellant for more than three (3) years on an account of the minor's election.
 - b. That , the honorable trial magistrate erred both in law and in fact by not considering the import of the Respondent's carelessness, recklessness and/or negligence of unilaterally and maliciously changing the name of the of MM to AKT
 - c. That , the honorable trial magistrate erred both in law and in fact by not analyzing and evaluating the evidence on record properly and by making a Judgment and decree that evidently and clearly biased the Appellant without reckoning the best interest of the subject minors.
 - d. That , the honorable trial magistrate erred both in law and in fact by misapprehending and failing to uphold the best interest of the subject minors as the paramount consideration when making the decree and Judgement.
 - e. That , the honorable trial magistrate erred both in law and in fact by ordering that the actual custody of IO substantially be in the Respondent's hands without reckoning that MK was a pupil in a boarding school wherein her name was shown as AKT and therefore the two subject minors will not live together as assumed by the honorable trial court.
 - f. That , the honorable trial magistrate erred both in law and in fact by not taking into consideration of all circumstances of the matter before him, the rights of each of the parties herein and also the rights of the subject minors.
 - g. That , the honorable trial magistrate erred both in law and in fact by failing to grant the actual custody of both minors in favor of the Appellant considering the ascertainable wishes of IO and in violation of the right to a name unilaterally and maliciously changed to ARK under the circumstances that are clearly criminal and which she needed to be sanctioned on.
9. Based on the above grounds of appeal the appellant sought for orders that;
- a. This court be pleased to allow the Appeal
 - b. This court be pleased to set aside the decree and judgment of the trial court
 - c. This court be pleased to grant an orders as it may deem feet and just in the interest of justice upholding the best interest of the subject minors as the paramount consideration.
10. Contemporaneously with the Memorandum of Appeal, the Applicant filed the present application on 11th January, 2024 seeking to stay execution of the judgment of the Children's Court and also seeking to be allowed Actual Custody Of IO to enable him resume studies at(Particulars withheld) pending the hearing and determination of the Appeal.



11. As stated earlier the application was opposed by the Respondent.

Issues For Determination

12. I have carefully considered this application, the Affidavits on record as well as the written submissions filed by both parties. The issue for determination by this court is whether this court can stay the execution of the Judgment and decree of the trial court and in the meantime grant actual custody of IO to the Appellant to enable him resume studies at (Particulars withheld) pending the hearing and determination of the Appeal.

Analysis And Determination

13. As was observed in Muriithi J in the case *Bhutt v. Bhutt Mombasa HCCC NO. 8 of 2014 (O.S.)*, 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 interest of the child in accordance with Article 53 (2) of the *Constitution*.

14. Even before establishing whether this application meets the conditions set out under order 42 rule 6 (2) as read together with Article 53(2) of the *constitution* this court must be careful not to determine substantive issues that will eventually be determined during the hearing and determination of the Appeal at the interim stage because such will be akin to disposing of the Appeal without hearing the parties. In the case *JMM v PM* [2018] eKLR C. Meoli J while dealing with an application of this nature observed as follows;

“The court must be careful in dealing with the application so as to uphold the best interest of the minors, but also to avoid determining the merits of the appeal at this stage.”

15. Muriithi J the case of *K W M v R N* [2015] eKLR equally observed as follows;

“The question of fact as to whether the respondent is a fit person to be granted the custody of the minor child the subject of the appeal herein is a matter for determination upon either the full trial of the suit in the trial court or upon final judgment of this court in the appeal. It is a matter which ought not to be finally determined on the basis of disputed facts set out in affidavits filed the parties at the interim stage....”

16. In my analysis of the Application, the response thereto and the grounds of Appeal attached to the Application it is outright that the issue of granting the actual custody of IO to the Applicant which is the fulcrum of this Application is a substantive issue in the Appeal that cannot be determined at this stage. Hence therefore, the question as to whether the Appellant/applicant can be granted the custody of the IO is a matter of fact that can only resolved upon determination of the appeal.

17. Moreover, the Respondent in her response to the Application disclosed that she had prior to the filing of this Application regained custody of IO in accordance with the orders of the trial court and enrolled him in another school called NYAMIRA DOWN FOREST. She disclosed that she informed the Applicant of the said move through WhatsApp on 9th January, 2024 before this Application was filed in this court on 11th January, 2024. She contended further IO had adopted to the environment in the school and thus moving him to (Particulars withheld) would not be in his best interest. From the record before me, such disclosure by the respondent was not challenged by the Applicant through a further affidavit.



18. Based on the above analysis it would be in the best interest of IO that he continues with his studies at Nyamira Down Forest School and be under the custody of the Respondent pending the hearing and determination of the Appeal.

Conclusion.

19. Accordingly, for the reasons set out above, I decline the request for stay of execution of the orders of the NYAMIRA Chief Magistrate's Court Children's Case No. E001 of 2023 made on 14th January, 2023. I equally decline to grant custody of the minor IO the Applicant at this stage.
20. In accordance with the general principle for expeditious disposal of children matters under Section 76 (2) of the *Children Act*, I direct that the Appeal be heard expeditiously.
21. Appellant /applicant to file and serve record of appeal within 7 days from today.
22. Directions be taken before this court on 22. 2.24 for directions on hearing of the main appeal.
23. This being a family matter I make no orders as to costs.

T. A ODERA

JUDGE

14.2.24

In the Presence of;

Job Obure advocate for the Appellant /applicant

Respondent-Present

T. A ODERA

JUDGE

14.2.24

Obure: There is a child namely Harriet who was introduced by respondent. She is a stranger to this court. Should our client pay fees for the said stranger.

Order: Appellant to pay fees for the child he sired respondent i.e M.M as per the birth certificate produced in the lower court and the children officer's report and parental responsibility agreement entered into by the parties before moving to lower court.

T. A ODERA

JUDGE

14.2.24

