AKK v AKR (Minor Suing Through Mother and Next Friend JC) (Civil Appeal 58 of 2023) [2024] KEHC 4962 (KLR) (15 May 2024) (Ruling)

Neutral citation: [2024] KEHC 4962 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 58 OF 2023

JRA WANANDA, J

MAY 15, 2024

BETWEEN

AKK ..... APPLICANT

AND

AKR (MINOR SUING THROUGH MOTHER AND NEXT FRIEND JC) ..... RESPONDENT

RULING

1. This Appeal arises from the Judgment delivered on 29/07/2022 in Eldoret Chief Magistrate's Court Children's Civil Cause No. E188 of 2021.

2. The Application now before Court for determination is the Notice of Motion dated 16/05/2023 filed by the Appellant through Messrs Morgan Omusundi Law Firm Advocates. The same seeks the following orders:

    i. ..... [spent]

    ii. ..... [spent]

    iii. that this Honourable Court be pleased to restore custody status of the minor to the Appellant/ Applicant as it was prior to the Judgment of the trial Court pending the hearing and determination of this Appeal.

    iv. That this Honourable Court restores status of the Ruling prior to the Ruling issued by the trial Court on 4th November 2022.

    v. That costs of this Application be provided for.

3. The Application is expressed to be brought pursuant to Order 42 Rule 5(6), Order 22(2) of the *Civil Procedure Rules* and Section 1A & 3A of the *Civil Procedure Act*. The grounds of the Application are as set out on the face thereof and it is supported by the Affidavit sworn by the Appellant.

4. In the Affidavit, the Appellant deponed that the Respondent filed a suit for custody and maintenance of the minor and the trial Court entered Judgment on 29/07/2022 against the Appellant, that aggrieved by the Judgment, the Appellant filed this Appeal challenging the issues of custody and the minor's best interest which have been compromised, and it would be prudent for the status quo prior to Judgment to be maintained, that he (Appellant) has been in sole custody of the minor since he was young before being kidnapped by the Respondent tactfully and conveniently to hoodwink the trial Court to grant orders in her favour, that the minor's best interest is at stake since he is now under custody of a stranger, i.e., a maternal grandmother who was neither a party in the suit nor has the order of priority in respect to the minor, that he (Appellant) no longer has access nor visitation rights to the minor due to frustration instigated by the Respondent, that the best interest of the minor can only be well taken care of by custody being restored to the Appellant since he has been living and maintaining/supporting the minor since birth and the Respondent is an absentee mother, irresponsible and resides in Sweden pursuing her studies and greener pastures and that the minor's welfare and best interest has been compromised by his being put under custody of his grandmother who is not fit nor sensitive to the minor's needs.

Response

5. The Respondent, through Messrs Isiaho Sawe & Co. Advocates opposed the Application by swearing the Replying Affidavit filed on 30/11/2023. She deponed that the child has been in the actual custody of the Respondent's mother since December 2021, long before Judgment was delivered by the trial Court on 29/07/2022, that the child was enrolled in a school in which he is still so enrolled, that the child had bonded well with the Respondent's mother, that the Respondent moved the trial Court on 17/12/2021 seeking actual custody of the minor and was granted interim custody ex parte pending hearing and determination of the Application inter partes, that although the Appellant moved the child outside the jurisdiction of the Court, the child was subsequently released to the Respondent with the intervention of CID Officers who tracked down the Appellant.

6. She deponed further that the case was subsequently heard on merit and the trial Court deemed it fit to grant the Respondent's mother custody of the child pending completion of the Respondent's studies abroad, that aggrieved by the Judgment, the Appellant moved the trial Court seeking stay of execution thereof vide the Application dated 22/08/2022 as per the copy exhibited and which Application was dismissed, and that the Appellant was granted unlimited access to the child. She stated further that no reason has been furnished for the delay in bringing the instant Application, that it is untrue for the Appellant to allege that he had custody of the child prior to custody orders being issued, the allegations that the Respondent "kidnapped" her own child are made in bad taste since the Respondent only took the child after she was granted custody, and that the Appellant has not furnished any evidence to corroborate his allegation that the child's best interest is at stake.

7. She further deponed that she and her mother had actual custody of the child before Judgment was delivered, that the Respondent has never been an irresponsible mother as alluded, the allegations that the Appellant has been denied access to the child are not only untrue but aimed at arm-twisting this Court into giving orders in favour of the Appellant, that the Appellant has never raised the allegation of non-compliance on access before the trial Court and has also Appellant has not demonstrated and/or substantiated the substantial loss he stands to suffer should the orders he seeks not be issued, that the issue of the Respondent residing and pursuing education abroad was considered by the trial Court

before pronouncing its Judgment and the custody granted to the Respondent's mother is purely on temporary basis pending her return to Kenya on completion of her studies, that the child has been in the custody of the Respondent's mother since November 2021 and is since attending school there, and that the child has since been enrolled into a school in Kericho therefore issuing any orders to compromise the said position will not serve the child's best interest.

Hearing of the Application

8. It was then agreed, and I directed, that the Application be canvassed by way of written Submissions. Pursuant thereto, the Appellant filed his Submissions on 4/12/2023. As regards the Respondent, up to the time when I concluded this Ruling, I had not come across any Submissions filed by or on her behalf

Appellant's Submissions

9. The Appellant submitted that when dealing with matters concerning a child, recourse is to be sought in Article 53 of the *Constitution* and that Section 83(1) of the *Children Act*, 2001 outlines the guiding principles when making a determination related to the custody of a minor. He submitted that one factor to be taken into account is the "best interest of the child". He referred to the case of *J.O. v S.A.O.* [2016] eKLR and submitted further that under the *Children Act*, custody of a child may be granted to a parent and the Appellant is such parent, that what the Court is to establish is whether there exist exceptional circumstances that would displace these prima facie rule evolved in favour of the mother. He also cited the *Convention on the Rights of a Child* and the *African Charter on the Rights and Welfare of the Child* and submitted that they, too, affirm that the "best interest" of a child is what is of paramount consideration.

10. Counsel argued that no sufficient evidence was adduced to convince the Court that the Appellant was not fit to stay with the minor, that the Court based its Judgment on the ground that the Appellant did not intend to live with the minor and that he wanted to take her to his parents adding that she is in Sweden pursuing her education and the minor has been left with the maternal grandmother, that grandparents have no right to assume parental responsibility over a child when the child's parent is still alive and has the means and is willing to take up parental responsibility, that a child has a right to parental care and denying a child such right cannot be in his best interest, that the *Children Act* provides that even where the father and mother were not married, the father shall acquire parental responsibility and there is no provision in the *Act* which provides that custody for the child be granted to grandparents, that the law leans towards a child being raised by a parent, and that children are unique and adapt to their surroundings very fast.

11. He urged further that it is not in the best interest of the child to deny him the comfort and fatherly love and for the father be reduced to being a mere provider with only visitation rights, the Appellant should have the right to decide on how the minor should be brought up, that the trial Court failed to properly address the issues by indicating that taking away the minor from her current home would affect him despite acknowledging that the Appellant was married to the minor's mother, that the Court failed to consider that the child was forcefully taken away from the Appellant whom he was staying with, the Appellant demonstrated that he has been living and maintaining the minor since birth and that the Respondent is an absentee mother. In conclusion, Counsel cited Article 19 of the *African Charter on the Rights and Welfare of the Child* to the effect that a child shall

> " wherever possible reside with his or her parents".

Determination

12. The issue for determination herein is

> " whether an order of stay of execution pending appeal should issue against the Judgment of the Magistrate's Court awarding custody of the child to the Respondent's mother (child's grandmother), rather than to the Appellant (the child's father)".

13. In determining matters involving children, including an Application for stay of execution as herein, the "best interest" of the child is what is paramount. This is expressly provided under Article 53(2) of the *Constitution* and also in Section 8(1)(a) of the *Children Act* as follows:

> Article 53(2) of the *Constitution*
>
> > A child's best interests are of paramount importance in every matter concerning the child.
>
> Section 8(1)(a) of the *Children Act*
>
> 8(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;

14. The principles applicable in handling Applications for grant of stay of execution in children's matters was well set out in the case of *Bhutt v. Bhutt*, Mombasa HCCC No. 8 of 2014 (O.S.) where the Court stated as follows:

> " 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 overriding consideration of the best interest of the child in accordance with Article 53 (2) of the *Constitution*."

15. Generally, the principles guiding grant of stay of execution pending Appeal are well settled. In this respect, Order 42 Rule 6(2) of the *Civil Procedure Rules* provides as follows:

> " 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 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."

16. From the foregoing, it is clear that an applicant for stay of execution pending appeal must satisfy the above conditions, namely,

(a) that he will suffer substantial loss unless the order is granted,

(b) the Application has been made without unreasonable delay, and

(c) willingness to deposit security for the due performance of any orders so stayed.

17. The first condition that I wish to consider is whether the application has been made without unreasonable delay. In determining this limb, I note that the Ruling appealed against herein was delivered by the Magistrate's Court on 29/07/2022. According to the Respondent, the Appellant, on 24/08/2022, filed an Application before the same Court seeking stay pending Appeal of the Ruling but that the same was dismissed on 4/11/2022. The Appellant has not denied these facts. The Appellant then filed the present Application on 19/05/2023.

18. From the above chronology, it is clear that the period between the date that the Magistrate's Court dismissed the Appellant's earlier Application for stay pending Appeal on 4/11/2022 and the date when the Appellant filed this instant Application (19/05/2023) is more than 5 months apart. Insofar as no explanation has been offered by the Appellant for this delay, I find the same to be inordinate. The Appellant therefore fails at this first condition since he has failed to demonstrate that the Application has been made without unreasonable delay

19. The second condition is on whether there shall be any "substantial loss" should the order not be granted. As to what encompasses "substantial loss", Hon. Justice F. Gikonyo, in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, stated as follows:

> " ..... The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

20. The Appellant has correctly argued that grandparents have no right to assume parental responsibility over a child when the child's parent is still alive and has the means and is willing to take up parental responsibility. He also correctly contends that a child has a right to parental care and denying a child such right cannot be in his best interest.

21. However, it is important to always recall that in children's matters, the interests of the child supersede those of the parents. The "substantial loss" that prevails over and above that of the Applicant-parent is therefore that of the child. The Court must therefore look beyond the possible "loss" to be suffered by the Appellant and consider the "loss" that may be suffered by the child. In regard thereto, in the case of *LDT v PAO* [2021] eKLR, Hon. Lady Justice R. Ngetich stated as follows:

> " 18. While considering stay of execution in respect to children matters, beside the above, the Court has to consider the best interest of the child. The applicant is expected to demonstrate that the minors will suffer if a stay is not granted. I however note that the applicant averred that he will suffer great prejudice as he will be condemned to pay school fees twice if an order of stay is not granted.
>
> .....
>
> 20. The best interest of a child is superior to rights and wishes of parents; they should incorporate the welfare of the child in its widest sense. The respondent submitted that she has the actual custody of the minors and the minors are attending [Particulars withheld] and if the orders of stay are granted, it will not be in the best interest of the minors since it will mean the custody reverts to the applicant and the minors attend [Particulars withheld] Academy thereby interfering with education of the children."

22. In this case, apart from the order granting custody to the minor's maternal grandmother, the trial Magistrate also issued orders giving the Appellant access to the minor - as the father, and also ordered the Appellant to cater for the minor's school fees, medical, food and clothing expenses. I however understand the Appellant to be only aggrieved with the order on custody of the minor. That order by the Magistrate was couched in the following terms:

> " That custody of the minor is granted to the maternal grandmother who shall have actual physical care and control of the minor until the guardian *ad litem* clears her studies next year (2023)."

23. There are two important observations that I make from the above. The first is that the Magistrate appreciated the reality that it is the Respondent (the minor's mother) who at all times remains the Guardian ad litem. The submission that the Magistrate dispossessed the parents of their natural God-given right of parental responsibility and bestowed the same upon the grandmother is not therefore entirely correct. At no point did the Magistrate appoint or declare the grandmother to be the Guardian. I observe that the Appellant's Counsel appreciates that when it came to the question of deciding custody of children of tender years, it is the law that in the absence of any exceptional circumstances, the custody of such child should be awarded to the mother. It should not be lost that it is not the grandmother who filed the Application for custody but it is the Respondent (the minor's mother) who did and specifically prayed that custody be granted to the grandmother.

24. Secondly, and more important, although what was delivered was a final Judgment, the custody granted to the grandmother was simply an interim measure which was to remain in force pending completion of studies by the Respondent (the real Guardian *ad litem*) in Sweden in the year 2023 (now past). The grandmother was to therefore only assume temporary custody on behalf of the Respondent (the mother).

25. What I therefore expected the Appellant to have done was to return to the Magistrate's Court for fresh orders or review, as soon as the Respondent completed her studies or as soon as the year 2023 came to an end. On her part, the Respondent could also return to the Magistrate's Court to seek extension of the interim orders. This is because the interim order of custody was time-bound, at least this is my understanding of the essence of the Magistrate's orders. The year 2023 having also come and gone, interfering with the order sounds like an effort in futility as it may very well have been overtaken by events. The Appellant's recourse therefore lies before the trial Court.

26. In the circumstances, I do not fathom any "loss" leave alone "substantial loss" that has arisen or may arise. As aforesaid, in children's matters, the "substantial loss" that prevails over and above that of the Applicant-parent is that of the child. It should therefore at all times be remembered that it is not therefore "loss" to the complaining parent, but "loss" to be suffered by the minor, that is paramount.

27. It has been submitted by the Respondent that the minor is enrolled in a school chosen by the Respondent as the mother. Should stay be granted, then it means that the minor shall be handed over to the Appellant who shall most likely relocate the minor to a different school in a different town. Should the Appeal eventually fail, again, the Respondent will reclaim the minor and perhaps return him to the original locality and re-enrol him back to the original school. Granting the stay is therefore a recipe for destabilizing the minor as he may keep on being tossed from "left to right". This will not be in his "best interest". To avoid such disruptions in the child's life, it is my view that it will in the "best interest" of the child that the prevailing status quo be allowed to subsist and the minor be left to remain in the grandmother's custody pending the hearing and determination of this Appeal or upon the trial Court making any further orders in the intervening period as contemplated in the Judgment.

28. The Appellant has prayed that this Court restores custody status of the minor to the Appellant as it was prior to the Judgment of the trial Court pending the hearing and determination of this Appeal. However, the parties are not even in unison as to who had actual custody of the child before the Court's intervention. Each party claims to have had such custody. In the circumstances, the Court is not in a position, at this stage, to make a determination thereon.

29. Regarding the Appellant's contention that he no longer has access or visitation rights to the minor due to frustration instigated by the Respondent. As aforesaid, the trial Magistrate did grant the Appellant such orders of access to the minor. The procedure is therefore for the Appellant to return to the same Court and raise his complaints there. There is no room for him to use such protests as a ground for seeking stay pending Appeal in this Court.

30. The Appellant has also not shown how the Respondent is an absentee mother or irresponsible simply because she is pursuing studies in Sweden. Similarly, it has not been demonstrated that the minor's welfare or best interest has been compromised by his being put under custody of the grandmother and neither has it been demonstrated that the grandmother is unfit.

31. In the circumstances, my finding is that, apart from the inordinate delay to file the instant Application, the Appellant has also failed to demonstrate any "substantial loss" that may be suffered. It has also not been shown that the Appeal will be rendered nugatory if the stay is not granted. Allowing the Application will, in my view, inflict greater hardship and damage to the minor, and by extension, the parties, than it would benefit the minor and the parties.

32. The third condition, the one relating to depositing of security, does not necessarily arise in this matter since the issue in contention is on who should have the custody of the child pending determination of the Appeal. No monetary decree or any other order of such nature is in contention and the Appellant is not challenging the order that he caters for the minor's school fees and upkeep. I will not therefore belabour this issue of security.

33. For the foregoing reasons, I believe that I have said enough to indicate that the instant Application has no merit and cannot succeed.

Final Orders

34. The upshot of my findings above is as follows:

    i. The Notice of Motion dated 16/05/2023 is hereby dismissed

    ii. This being a family matter, I make no order on costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 15TH DAY OF MAY 2024

WANANDA J.R. ANURO

JUDGE