



**JJN & another v KNK (Civil Appeal E133 of 2022)
[2024] KEHC 7440 (KLR) (21 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7440 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E133 OF 2022
PM MULWA, J
JUNE 21, 2024**

BETWEEN

JN 1ST APPELLANT

MNN 2ND APPELLANT

AND

KNK RESPONDENT

RULING

1. This is a ruling on an application dated 6th December 2022 filed by the 2nd appellant/applicant seeking the following orders: -
 1. Spent
 2. That pending the hearing and determination of the appeal herein, the 2nd appellant, JN be and is hereby granted the actual custody of child EN.
 3. That pending the hearing and determination of the appeal herein, the respondent be and is hereby granted access rights to child EN.
 4. That the costs of this application be in the cause.
2. This appeal was filed following a ruling delivered on 23rd May 2022 by Honourable J.A. Agonda in Ruiru Children’s Case No. E028 of 2021 where she ordered thus:

“...In the interest of justice, I do issue a warrant of arrest against the 2nd defendant and the actual custody of the minor will revert to the plaintiff upon the child being brought back to the court’s jurisdiction...”



3. Back to the instant application, the grounds on the face of it are that the 2nd appellant is the biological mother of the child EN while the respondent is the biological father and the 1st appellant is the grandfather; that the minor is currently residing with the 2nd appellant in Australia and is attending school and the respondent ordinarily resides in the United States of America. Further, it is in the interest of the minor that his actual custody be granted to his biological mother, the 2nd appellant.
4. The application is supported by the affidavit sworn by the applicant on 1st December 2022.
5. In response the respondent filed grounds of opposition dated 3rd February 2023 and a replying affidavit sworn on 31st January 2023. He averred that the application is frivolous, unmerited and an abuse of the court process in that the 2nd appellant is under a warrant of arrest for having removed the minor from the jurisdiction of the court when the minor was an Award of the court.
6. He further averred that actual custody of the minor is best with him as the 2nd appellant has demonstrated that she is dishonest, cannot comply with court directions and will frustrate any effort for the respondent to access the minor. That the instant application should not be entertained unless the minor is brought back to the jurisdiction of the court.
7. The 2nd appellant filed a supplementary affidavit sworn on 14th March 2023 and reiterated the contents of her supporting affidavit. She further contented that there were no orders stopping her from travelling with the minor to Australia and that the warrant of arrest was issued after she had already travelled out of Kenya.
8. The application was canvassed by way of written submissions. The parties filed their respective submissions, dated 2nd June 2023 for the appellants and dated 21st September 2023 for the respondent. The respondent filed further submissions dated 14th March 2024.

2nd Appellant/Applicant's Submissions

9. The applicant submitted that it was clear the respondent had never provided for the minor and unlike her, he had never lived with the minor. That she was currently living with the child in Australia where he had been enrolled in a good school. Counsel cited the case of *MA v ROO* (2013) eKLR to demonstrate how it would be against the best interest of the child to destabilize the environment where he was living.
10. The applicant submitted that the issue of the warrant of arrest was the subject of appeal and in any case the same was issued after the minor had left the country. That there were no orders barring the minor from travelling outside the country.
11. The applicant further submitted that the respondent should have access to the minor in recognition of his rights as a father and in compliance with the consent of parties filed in the lower court. She prayed that the application be allowed.

Respondent's Submissions

12. The respondent submitted that the applicant did not deserve the orders sought as she had deliberately disobeyed court orders and directions which then led to the ruling by the learned trial magistrate made on 23rd May 2022 and the issuance of a warrant of arrest.
13. The respondent cited several authorities to buttress his position among them *RK v AN* Family Appeal E028 (2022) where it was held that "...the applicant cannot come to court seeking review of orders which he has in any event disobeyed. It is trite that courts do not make orders in vain. A person to



whom a court order is directed is obliged to obey the said order however unpalatable it may be unless or until the same is reviewed and/or set aside.”

14. The respondent urged this Court to dismiss the application with costs.

Analysis and Determination

15. This Court has considered the material canvassed in respect of the motion and perused the parties’ respective pleadings and material on record.
16. I must state that most of the averments herein touch on what essentially transpired in the lower court culminating with the ruling by the learned trial magistrate rendered on 23rd May 2022. That ruling is actually the subject of appeal where the appellants have listed seven (7) grounds in the memorandum of appeal dated 20th June 2022.
17. The instant motion seeks actual custody of the child by the applicant pending the hearing and determination of the appeal and the respondent be given access rights to the child. The issue for determination therefore is whether or not the application is merited.
18. The court is alive to the often quoted and timeless principle that the best interest of a child is superior to rights and wishes of parents and should incorporate the welfare of the child in its widest sense.
19. The *Children Act* elaborates at Section 4(3) that: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”
20. In the submissions herein, parties tried to compete on who has done most for the child. This is despite the fact that a consent order had been issued in respect of shared/joint custody. It is not in doubt that the child is now outside the jurisdiction of this Court, living with the 2nd appellant and comfortably going to school.
21. To put things into perspective though, it is important that we understand the background of the impugned ruling by the learned trial magistrate made on 23rd May 2023. The trial court after having heard the respondent observed that 2nd appellant had lied that she had permanently relocated back to Kenya, and on that strength, she was granted custody of the child. However, two days later she filed an application seeking leave to travel with the child out of the country. And before that application could be heard, she had already left the country with the child.
22. While nothing restrained the appellant from travelling out of Kenya and taking with her the child, it is the manner in which she did it which was treacherous and hence dishonest. At the very least the same ought to have been done with the consent of the respondent (which was not to be unreasonably withheld as per the consent order) and the leave of the court.
23. Courts do not make orders in vain. In the Canadian Case of *Canadian Metal Company Ltd v Canadian Broadcasting Corporation* [1975] 48 DLR, it was held –

“To allow court orders to be disobeyed would be to tread the road towards anarchy. If orders of the Court can be treated with disrespect, the whole administration of justice is brought into scorn. If the remedies that the courts grant to correct wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of confidence in the courts will quickly result in the destruction of our society.” (own emphasis).



24. In the present situation, it is my considered view that the conduct of the 2nd appellant herein does not inspire or persuade me to grant the orders sought pending the hearing and determination of the appeal. A party cannot expect to benefit from acts of wilful disregard of court directions and/or legal processes.
25. Accordingly, I find the Notice of Motion dated 6th December 2022 lacking in merit and dismiss the same. Cost shall abide the outcome of the appeal.

RULING DELIVERED VIRTUALLY, SIGNED AND DATED AT NAIROBI THIS 21ST DAY OF JUNE 2024

P. M. MULWA

JUDGE

In the presence of:

Mr. Thuku. - for appellants/applicant

Ms. Ndungu h/b for Mr. Njuguna - for respondents

Carlos – court assistant

