



**SWN v CGM (Miscellaneous Civil Application E034 of 2024)  
[2024] KEHC 10079 (KLR) (11 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 10079 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
MISCELLANEOUS CIVIL APPLICATION E034 OF 2024  
SN MUTUKU, J  
JUNE 11, 2024**

**BETWEEN**

**SWN ..... APPLICANT**

**AND**

**CGM ..... RESPONDENT**

**RULING**

**The Application**

1. By a Notice of Motion dated May 21, 2024 and brought under the provisions of the Constitution, the Children’s Act and the Civil Procedure Act and the Rules made thereunder as shown on the face of that application, SWN, the Applicant, has moved this court seeking the following reliefs:
  - i. Spent.
  - ii. That the Honourable Court be pleased to issue an order to arrest any further proceedings in Children’s Case No. E016 of 2024 at the Chief Magistrate’s Court at Ngong Law Courts pending the hearing and determination of this Application and the Intended Appeal herein.
  - iii. That the Honourable Court be pleased to order for status quo to be maintained in the matter i.e the Applicant to continue having physical and actual custody of the minors CBG and MOM pending the hearing and determination of this application inter partes.
  - iv. That the Honourable Court be pleased to order for status quo to be maintained in the matter i.e the Applicant to continue having physical and actual custody of the minors CBG and MOM pending the hearing and determination of the intended appeal.
  - v. That the Honourable Court be pleased to issue an order restraining the Respondent, her agents, representatives, and/or person working under her instructions from taking the minors



from the jurisdiction of this Honourable Court pending the hearing and determination of this application inter partes and the intended appeal.

- vi. That this Honourable Court be pleased to issue any other/further orders taking into account the best interests of the minors CBG and MOM.
  - vii. That costs of this application be provided for.
2. The grounds in support of this application are contained on the face of the application and in the Supporting Affidavit sworn by the Applicant on May 21, 2024. I have read and understood the grounds in support and need not replicate them here but briefly, the Applicant is basing her case on the facts that both parents of the minors are deceased. She is the maternal grandmother of the minors. Her daughter and the mother of the minors left the minors under her care when she went to hospital for surgery but passed on after the said surgery.
  3. The Applicant claims that following an Application in Ngong Chief Magistrate's Children's Case No. Eo16 of 2023 filed by the Respondent, who is the paternal grandmother of the minors, the trial court, in a ruling delivered on May 15, 2024, granted actual and physical custody of the minors to the Respondent pending the hearing and determination to the main suit. This, according to the Applicant is against the best interests of the minors. She intends to appeal that decision.
  4. The Applicant is apprehensive that the Respondent may execute the orders of the court. She claims to have bonded with the children because she has been taking care of them for about one year. The Applicant claims that she stands to suffer substantial loss and harm if the orders she is seeking are not granted by this court.

### **Replying Affidavit**

5. The application is opposed by the Respondent through a lengthy Replying Affidavit sworn on May 24, 2024. I have read the Replying Affidavit. In brief, the Respondent confirms that she is the paternal grandmother of the minors and the Applicant is the maternal grandmother; that the Applicant's daughter was married to the Respondent's son and that both are deceased. She has stated that both the parents of the minors were Kikuyus by tribe and under Kikuyu customs, the children belong to the paternal family.
6. The Respondent has stated that the Applicant is taking advantage of the circumstances surrounding the death of the mother of the minors in that she left the minors with the Applicant when proceeding to hospital due to the proximity of the Applicant's home to Nairobi where the mother of the minors was proceeding to hospital as compared to Nakuru where the Respondent resides. That it is not disputed that both the parents of the minors were Kikuyus and therefore the applicable customs and culture as to who should take care of the minors is the paternal grandparents of the minors. That the Applicant enrolled CBG, aged 4 ½ years in Masai Schools to defeat justice.
7. The Respondent further asserts that the Applicant has severed all communications with the Respondent's family. She states that she is the right person to take care of the minors and that she is willing to allow the Applicant access to the minors. That both parents of the minors were married and there is no evidence that they separated.

### **Applicant's Submissions**

8. This Application was canvassed through written submissions. The Applicant's Submissions are dated May 27, 2024. I have read the submissions and understood them. In brief, the Applicant has submitted that she has filed this application because one of the minors, CBG, is in school and changing school



and the environment for the minor during the school period is likely to destabilize and disorient the minor. She has submitted that the minors have never lived with the Respondent at her place and the change of environment is likely to destabilize them; that the minors have been living with the Applicant comfortably before their mother died and that it is in the best interests of the minors that they continue under the custody of the Applicant and CBG continue to attend school at Masai Schools where her school fees for this term has already been paid.

### **Respondent's Submissions**

9. I have read and understood the Respondent's submissions dated May 5, 2024. She has submitted on whether the Applicant's application is merited. It is submitted that this application is frivolous and vexatious; that the application was filed with the intention of frustrating the Respondent from enjoying the fruits of the Ruling delivered by the trial court in her favour. The Respondent has urged this court to strike out the Application for being scandalous, frivolous and vexatious.
10. It is submitted that the Applicant is hiding under the best interests of the child cloak but has failed to obey the orders of the trial court; that the status quo lies in having the minors under the custody of the Respondent as ordered by the court. It is submitted that culture plays an important role in giving a child an identity and that under Kikuyu culture, identity is patriarchal. The Respondent reiterates that she is ready and willing to allow the Applicant unlimited access to the minors.

### **Determination**

11. I have considered the issues arising from this application. I have also noted that there is an intended appeal. The Applicant has filed a Memorandum of Appeal in this matter challenging the orders of the trial court. I am also aware that this is an interlocutory appeal. The matter before the lower court is yet to be determined in finality.
12. The grounds of appeal question the discretion of the trial court in making the orders appealed against. The same orders are also subject of the application under determination. I will, therefore, constrain myself in this ruling to avoid comments that may jeopardize the appeal or the trial in the lower court or even prejudice the parties.
13. This is an interesting but sad case in that both parties are grandparents to the minors. None of them is a parent of the minors. The Respondent has orders in her favour while the Applicant has none. She is trying to maintain the hold onto the minors. Interestingly, both parties are citing the best interests of the two minors to explain the positions each has taken.
14. The Respondent is backing her stand through Kikuyu culture and customary law to claim that the parents of the minors were both Kikuyus and were married. That both are deceased and are buried at the same place, in Nakuru where the Respondents resides. Her case is that this is the home where the minors belong because they are both Kikuyu and customs demand so.
15. It is clear to me that these issues can only be fully canvassed through the full hearing of the Appeal. The Appeal is not ripe for hearing and the lower court matter is still proceeding. It is a delicate situation I find myself in. CBG has started school and this court has been told that the fees for this term have been paid. The trial court is yet to grant final orders in the matter before it and this court is yet to determine the appeal.
16. For the above reasons, I will and do hereby grant the following orders:
  - i. Prayer 2 of the application is declined.



- ii. Prayers 3, 4, and 5, are declined in the manner they are worded. Instead, and only for the purposes of allowing this court to fully determine the issues being raised by the parties in the appeal, I allow the minors to remain with the Applicant pending the hearing and determination of the Appeal.
- iii. The Applicant is directed, through her counsel, to file record of appeal on or before June 25, 2024 when this matter shall be mentioned to give directions on the hearing of the Appeal.

17. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 11<sup>TH</sup> DAY OF JUNE 2024.**

**S. N. MUTUKU**

**JUDGE**

In the presence of:

1. Mr. Bizimana for the Applicant
2. Mr. Kiroko Ndegwa for the Respondent

