



FCM (Suing as Next Friend of GCM, BCM and BKN (Minors)) v LMM (Family Appeal E006 of 2024) [2024] KEHC 10926 (KLR) (19 September 2024) (Ruling)

Neutral citation: [2024] KEHC 10926 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
FAMILY APPEAL E006 OF 2024
SM MOHOCHI, J
SEPTEMBER 19, 2024**

BETWEEN

FCM APPLICANT

SUING AS NEXT FRIEND OF GCM, BCM AND BKN (MINORS)

AND

LMM RESPONDENT

RULING

1. Before Court for determination is the Notice of Motion Application dated 22nd March, 2024 brought under Order 42 Rule 6 of the Civil Procedure Rules, and Sections 3, 3A and 68 of the [Civil Procedure Act](#) seeking the following prayers: -
 - a. Spent;
 - b. Spent;
 - c. That there be a stay of the Honourable Court's Ruling delivered on 21st March, 2024 and consequential orders therein pending the hearing and determination of the Appeal preferred therefrom to the High Court by the Applicant
 - d. That the Applicant be granted actual custody of the subjects pending the hearing and determination of the Appeal;
 - e. That an order does issue to stay the proceedings of Nakuru Children Case No. E058 of 2022 pending the hearing and determination of the Appeal;
 - f. That costs of this Application be provided for.
2. The Application was supported by the sworn affidavit of the Applicant of even date wherein she deponed that, she sought custody and maintenance of their three minors vide Nakuru MCCC No.



E058 of 2022 and on 31st March, 2022 the Court issued orders granting the Applicant custody of the minors and for the Respondent to pay school fees and school related expenses. That there was noncompliance on the part of the Respondent which resulted in the Ruling of 24th November, 2023 attaching the Respondent's salary. She added that the above orders were reviewed on 21st March 2024 on application by the Respondent, granting him custody of the minors and the orders of 24th November, 2024 were also set-aside.

3. It is the Applicant's case that the minors have always been in her custody and no reason was advanced to deny her custody. She argues that the eldest, a 14-year-old teenage girl, needs motherly guidance while the youngest a 3-year-old girl needs motherly care being of tender years. That eldest two confided in her that the Respondent abandons them at his sister's place in Kisii whenever they are in his custody. That the Respondent resides and works for gain in Lamu.
4. She further deponed that, the Respondent has never seen or had contact with the youngest one. That, the eldest two subjects are enrolled in boarding school while the youngest is in her custody. She also deponed that during mid-terms and school holidays the children have always been her custody. That she has tried to organize visits with their Respondent who has always turned them down. She also stated that, the Respondent has on occasion threatened her and the minors.
5. The Applicant states that, the Application for salary attachment was filed since the Respondent had completely abdicated his parental responsibilities and the money that was attached was used to cater for their education and maintenance. That it was crucial for her as a mother to have custody of the children as she always has.
6. The Respondent on the other hand opposed the Application vide Replying Affidavit sworn on 15th July, 2024 wherein he stated that, the Applicant has not annexed the orders she is seeking to be set-aside and therefore the Application is devoid of merit. That their union turn sour prompting the Applicant to file for divorce and that, after their divorce, the Applicant has been filing all manner of pleadings in Court.
7. He averred that, after the Orders of 21st March 2022, the Applicant transferred the minors from a school based in Kisii to one in Nakuru. That the Applicant misled the Court and obtained orders of 24th November, 2022 attaching his salary to the sum of Kshs. 13,000 which is paid directly to her account.
8. That on 7th May, 2023 without consulting the Respondent, the Applicant removed the children from school and sent them to his matrimonial home in Kisii where he then enrolled them in their former school and settled all their basic needs. It was his case that he upon the Applicant abandoning the minors in his custody, the Respondent applied for custody orders and setting-aside of orders attaching his salary as the interim orders had lapsed and she never sought an extension.
9. That the Applicant in order to gain advantage and in an attempt to mislead the Court, fetched the children from school for the 2023 August holidays and has been doing so despite the Court granting him custody vide Ruling delivered on 21st March, 2024. That the Applicant is in breach of those orders and should therefore not be granted audience by this Court. He stated further that the Applicant pleaded to abandoning the minors and if she was not happy with the orders of the Court she should have applied for review in the said Court.
10. He stated that, he had proposed that they share parental responsibilities equally as both of them are employed at the same rank with the National Police Service which the Applicant disagreed with.



11. He averred to providing for the minors including their medical needs. And despite working and residing in Lamu he has made a routine of taking his leave when schools are closed so as to spend time with the minors. That there are no valid reasons why his salary should be attached. He contended that the reasons for seeking stay of proceedings in the Lower Court have not been advanced therefore the Court should uphold the Ruling of the trial court.
12. On 4th July, 2024 when the matter came for directions the Respondent had not yet filed a response and the Court directed the Applicant to file of written submissions. The Respondent did enter appearance and file a response on 15th July, 2024. By the time the Court retired to write its Ruling, neither party's submissions were on record and shall therefore proceed to the determination of this application.

Analysis and Determination

13. On the basis of the material filed by the respective parties the following are the issues up for determination:
 - i. Whether the Applicant has placed material before Court to warrant stay pending appeal of the Ruling delivered on 21st March, 2024;
 - ii. Whether Court should grant actual custody of the minors to the applicant pending the hearing and determination of the Appeal; and
 - iii. Whether the Applicant has made a case to warrant the stay of proceedings in Nakuru Children Case No. E058 of 2022
14. Before anything else this being a matter concerning children, this Court is bound by *the Constitution* of Kenya under Article 53 (1) (e) and (2) and at Section 4(3) of the *Children Act*, to consider the best interests of the Children.
15. Article 53(2) of *the Constitution* provides that:
 1. "Every child has the right—
 - a.
 - b.
 - c.
 - d.
 - e. to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and “
 2. "A child's best interests are of paramount importance in every matter concerning the child.”
16. Section 8 (1) and (2) of the *Children Act* states that:
 8. Best interests of the child
 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 a primary consideration.”



- b. the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule
 2. All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to-
 - a. safeguard and promote the rights and welfare of the child:
 - b. conserve and promote the welfare of the child; and
 - c. secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest”
17. Now therefore regarding the first issue, Order 42 rule 6(2) of the Civil Procedure Rules, sets out the considerations for granting orders of stay pending appeal and which provides:
- “(2) No order for stay of execution shall be made under subrule (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.”
18. The first issue for consideration is whether Application was filed without considerable delay. The Ruling appealed against was delivered on 21st March, 2024. Both the Memorandum of Appeal and the Application herein were filed on 26th March, 2024. This Court is satisfied that the application has been made without unreasonable delay.
19. On to the second issue of substantial loss, this Court associates with the sentiments of L. Achode J. in the case of PNC v NMC [2021] eKLR wherein she stated that;
- “The case before Court involves the custody of a minor rather than a money decree. Reference to substantial loss must be quantified from the point of view of the affected child, who is subject of the subject of the orders being appealed against and is the one likely to suffer.”
20. After careful analysis of the pleadings and the orders issued by the Children Court, this Court finds that each party has accused the other of failing to obey Court orders. The Applicant has accused the Respondent of failing to provide for the children while in her custody yet he was ordered to. The Respondent has accused the Applicant of taking the children from school and being with them yet the court had granted him custody. What the Respondent has not however demonstrated are the steps he took to secure custody of the children or prevent abuse of Court orders.



21. The Applicant has argued that the children aged 14, 11 and 3 need their mother's guidance the eldest being a teenage girl and the youngest being a child of tender years. Section 32 (1) of the *Children Act* places parental responsibility on either parent equally and neither has superior rights or claim over the other. As regards substantial loss the Applicant has not placed material before Court to show that the Respondent is not capable of taking care of the minors, or that they are likely to suffer if in the custody of the Respondent.
22. As regards security, this being a case on custody and not a money decree the issue of security does not come about.
23. The second issue for determination is on custody, it is noteworthy that there is a child aged 3 years and as defined under Section 2 of the *Children Act* she is a child of tender years. This is a child deserving of parental love, care, social and emotional connection. The Order or Ruling being challenged has not been attached to accord the Court an opportunity to scrutinize it but the Applicant has stated she requested for it vide letter dated 22nd March, 2022. This poses a challenge to the prayers sought. The Respondent has however not denied the that as per the orders in question he was given actual custody of all the minors and salary attachment orders set aside.
24. It is not also denied that the Respondent lives and works in Lamu. The eldest two children are in boarding school and are not around during the school term. The Respondent has said he seeks time off during the school holidays and mid-term breaks. To spend time with the minors. As for the youngest, while the Respondent is at work in Lamu if she is not with the Applicant, it goes without saying that the she will be left in the custody of another person in his home in Kisii until the days he manages to secure time off.
25. This child that will be in the custody of neither parent when the Respondent is away at work. Notwithstanding that the Applicant did not adhere to Court orders and went ahead and maintained custody of the minors, denying this child parental care would surely not be in her best interests.
26. Finally, the Applicant has sought to have the lower court proceedings stayed. The general practice with regard to stay of proceedings is that it should not be imposed unless the proceedings beyond reasonable doubt should not be allowed to continue. In the Applicant's whole affidavit, she has not explained why she needs the proceedings stayed.
27. Article 159 (2) (b) of *the constitution* enjoins this Court to ensure justice is not delayed. Delay in determining the matter in the Children Court is likely to be prejudicial to the welfare of the children therefore this Court finds no cause beyond reasonable doubt to stay the proceedings in the Children Court and subsequently prayer No. 5 fails.
28. Considering the foregoing, this Court under Section 3A of the Civil Procedure Rules has inherent powers to make or issue such orders as may be necessary to meet the ends of justice and any decision made by this Court should be in the best interests of the minors. The Applicant averred that she has the actual custody of the minors and the Respondent has confirmed that the minors have been staying with the Applicant during school holidays although contrary to Court orders. As stated above, the rights of the parents are secondary to those of the minors and in this case to avoid confusion and destabilizing of the children by shifting them from one home to the other or the youngest child having to live away from either parent, this Court finds it prudent to maintain the prevailing status pending the determination of the intended appeal.
29. The upshot of the above is that the application partially succeeds and I make the following orders: -



- a. That the Ruling delivered on 21st March, 2024 and consequential orders therein is hereby stayed pending appeal in terms of custody of the minors;
- b. The Applicant shall have interim actual custody of the minors during the school term including the mid-term holidays pending the hearing and determination of the appeal or until the Children Court orders otherwise;
- c. The Applicant and the Respondent shall have alternate custody of minors during the school holidays;
- d. The Respondent shall continue to pay school fees and school related expenses of the minors pending the hearing and determination of the appeal or until the children Court orders otherwise;
- e. The Appellant shall cause the Record of Appeal to be filed within the next sixty (60) Days from the Date hereof;
- f. A Mention Date for directions to be assigned by the Court Assistant Court number 3 after sixty (60) Days from the Date hereof subject to the Court Diary
- g. Each party shall bear their own costs.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 19TH DAY OF SEPTEMBER, 2024

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MOHOCHI S.M

JUDGE

