



AWN (Minor Suing Through Their Father and Next Friend PNM) v MJS (Family Appeal E010 of 2024) [2024] KEHC 12798 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12798 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
FAMILY APPEAL E010 OF 2024
SM MOHOCHI, J
OCTOBER 17, 2024**

BETWEEN

AWN (MINOR SUING THROUGH THEIR FATHER AND NEXT FRIEND PNM) APPLICANT

AND

MJS RESPONDENT

RULING

1. In the Notice of Motion dated 11th July, 2024, the Appellant/Applicant herein prays for orders of stay of execution of the judgment and decree delivered on the 28th June, 2024 in Nakuru Children’s Case Number E224 of 2022 and all consequential orders pending the hearing and determination of the appeal. He also prayed for the said judgment, decree and all consequential orders be set aside.
2. The application is based on the grounds on its face and his affidavit of even date. He deposes that on 19th July, 2022 he filed Nakuru Children’s Case Number E224 of 2022 and on the same date he filed an application seeking interim orders for actual and legal custody of the minor which application was allowed. He deposed that following the hearing of the main suit, the Respondent was granted actual custody of the minor and he was granted access which he argued was against the best interest of the child and to his prejudice.
3. He further deposed that he filed an appeal which he believes to be arguable and will be rendered nugatory should the orders not issued and that the minor will suffer substantial loss. He stated that he has had actual custody of the minor since 29th September, 2022 which led to great improvement in her health and well being as she has a skin condition which was being taken care of at Nakuru Provincial General Hospital.
4. He contended that he has a stable home whereas the Respondent does not have a permanent home and the reason he was given actual custody was because he found the minor abandoned by the Respondent



at her sister's home in Baringo, he retrieved her from that place and enrolled her in Gladjos Nursery School. He argued that the minor has shown great improvement academically and the execution of the decree will negatively impact on her school progress and further cause emotional and psychological harm whereby she stands to suffer loss and injury.

5. In his Further Affidavit sworn on 18th September, 2024 he deponed that he sought to stay the decision in respect to having the minor's transfer orders the Court declined to issue. The minor was picked by the Respondent in 27th August, 2024 and transferred her to Newlight Nursery School in Eldama Ravine. That he received call from the school and the Respondent requesting the minor repeats PP2 and the school is constantly making demands for payments of monies which are exorbitant and the Applicant is unable to raise. That the Respondent has also denied him access causing him mental anguish and that he was willing to continue taking care of the maintenance of the minor.
6. The Application was unopposed since there was no response filed however the Respondent appeared in person at the hearing of the Application on 24th September, 2024 and orally indicated that as the mother she was best suited to have the actual custody of the minor subject who is a nine-year-old girl she prayed the Application be dismissed.

Applicant's Case

7. It was the Applicant's case that the Application was anchored on Order 42 Rule 6 of the Civil Procedure Rules and seeks stay of the Execution of judgment and decree of the Trial Court and in particular the orders granting custody of the minor to the Respondent.
8. He argued that regarding substantial loss, it ought to be considered in the context of Article 53(2) of *the Constitution* and Section 8 of the Children's Act taking into consideration the best interest of the child. It was submitted that in granting the impugned order, the Trial Court disregarded the fact that the Respondent had had actual custody of the minor since 29th September, 2022 and that the child was school going.
9. He argued further that, the minor has a respiratory condition and that the substantial loss the minor is likely to suffer was that, she was removed from school disrupting her academic calendar. That the new school insisted that she repeats her class. That there was no justification to transfer the child and it was done for the convenience of the Respondent. That the minor resided with the Respondent and is unable to attend to regular medical attention.
10. As regard delay, it was submitted that the application was filed timeously as the judgment was delivered on 28th June, 2024 and the Application was filed on 11th July, 2021. On security it was submitted that due to the nature of the matter there was no need for security. Counsel for the Applicant prayed that an order of stay be issued and the minor be reinstated to her school to avoid disruption.

Respondent's Case

11. She submitted that the Applicant was given custody on 20th October, 2022 and he took the child on that day. She was awaiting the outcome of the case. She argued that the child should be with the mother until age 18 years and opposed the Application as the child is only five years old. She confirmed that she had not put in a response but wants to remain with the custody of the minor.
12. She stated that she approved the child to repeat as she was behind in her studies and prays for the child to continue with her studies at Newlight Nursery School.



Analysis and Determination

13. This interlocutory motion is filed within an appeal that for all intents and purpose is a children's matter where the proceedings conducted are for and on behalf of the interest of AWN.
14. This Court is alive to the fact that the Applicant and the Respondent are estranged lovers and that their estrangement has dragged the child subject to the center of the proceedings caution should be taken not to allow parties to convert a Children's Court into an arena for settling adult grievances. It can never be in the child's best interest for adult parents to use their children as cannon fodder in their wars that the children have nothing to do with.
15. While the two adult parties go after each other with raw emotion, this Court shall maintain its focus on the interest of the minor.
16. The matter subject to Appeal was a child custody case that the Court determined in favor of the Respondent who shall have actual custody while the Appellant/Applicant retains the Joint legal custodian status.
17. I have given due consideration to the application and the submissions made in favor of and in opposition to, herein by learned counsel. Order 42 Rule 6 of the Civil Procedure Rules, pursuant to which the application has been brought, provides that:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order, but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the Appellate Court to have such order set aside...”

18. Thus, the conditions an applicant for stay of execution of decree or order needs to satisfy, as set out in Rule 6(2) of Order 42 aforementioned, are:
 - a. that substantial loss may result to the applicant unless the order is made;
 - b. that the application has been made without unreasonable delay.
 - c. that such security as the Court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
19. The rationale for the conditions aforementioned was aptly given in *Machira T/A Machira & Co. Advocates vs East African Standard (No. 2)* [2002] KLR 63, thus:

“The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court.”



20. It is now trite that, in applications for stay in respect of decrees or orders made in matters involving children, the welfare of the children in question be given utmost consideration. In *Bhutt vs. Bhutt*, Mombasa HCCC NO. 8 of 2014 (O.S.), this principle was expressed thus:

“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 the injunction of Article 53(2) of *the Constitution...*”

21. Hence, with regard to the best interest of the minors, there is no dispute that the subject child is a minor aged nine (9) years old. She is in a contested custody of the Respondent pursuant to the Judgment and it would be in the interest of the minor and the interest of justice to have the subject minor in the actual custody of the Respondent before hearing the parties on the appeal; particularly in the absence of concrete evidence that the Respondent is unsuitable to take care of her nine-year-old daughter.

22. It is trite law that parents have equal both responsibility towards the welfare of their children under Article 53 of *the Constitution* and the doctrine that, custody of children of tenders belongs to the mother, has to be considered together with the principle of the best interest of the child as was held in the case of *SMM v ANK* [2022] eKLR which I find persuasive in my determination of this case, the Court observed as follows;

“However, it is apparent that while the Tender Years Doctrine, is persuasive in considering custody of children, it can no longer be considered as an inflexible rule of law. This is not to say that the substance of the rule has dissipated completely; it is to say that its inflexibility has been eroded by the evolving standards of decency reflected in Article 53 of *the Constitution*. Differently put, the Tender Years Doctrine must now be explicitly subjected to the Best Interests of the Child Principle in determining custody cases. Differently put, the welfare of the children is the primary factor of consideration when deciding custody cases. The judicial rule that a child of tender years belongs with the mother is merely an application of the principle in appropriate cases. The modern rule begins with the principle that the mother and father of a child both have an equal right towards the custody of the child.

23. The subject child is a minor aged nine (9) years old and it is trite law that custody of children of tender years should go with the mother unless there are exceptional circumstances. In this instance no exceptional circumstance has been demonstrated to disqualify the Respondent in the interim.

24. Section 83 of the Children’s Act sets out the following principles guiding the Court in making a custody order. The Court must consider the following:

- i. The conduct and wishes of the parent or guardian of the child.
- ii. The ascertainable wishes of the relatives of the child.
- iii. The ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his/her home in the last 3 years before the application to the Court.
- iv. The ascertainable wishes of the child.
- v. Whether the child has suffered any harm, or is likely to suffer any harm if the order is not made.



- vi. The customs of the community to which the child belongs.
 - vii. The religious persuasions of the child.
 - viii. Whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether or not those orders remain in force.
 - ix. The circumstances of any sibling of the child concerned; and of any other children of the home, if any.
 - x. The best interest of the child.
25. This Court contends that there will be nothing to be rendered nugatory should this Court decline to stay the execution of judgment and in any case the child custody dispute has a judgment that is being appealed against which judgment remains valid until the Appeal either sets the judgment aside or upholds the same, thus the subject minor's actual custody status would vary as per the outcome, but the subject minor is the same and would only be moving between the parties.
26. The fact that the Applicant retains the joint legal custody of the subject minor cannot go without mention, the status shall and continues to guarantee him access to the minor and entitles him to full involvement in all decisions affecting the minor this being in relation to her education, where she goes to school, where she should repeat a class or not? and the subject minor's healthcare needs. Both the Applicant and the Respondent are expected to overlook their personal differences and emotion to objectively undertake the parenting of AWN having separated.
27. Accordingly, although, the application was filed without undue delay, I am far from convinced that any substantial loss will be visited on the Applicant or the Appeal shall be rendered nugatory unless the orders sought are given. Indeed, the best interest of the child dictates that, the Lower Court order be complied with in every aspect thereof by the Appellant, pending further orders of the Court upon the hearing of the appeal.
28. In the result, I find no merit in the Notice of Motion dated 11th July, 2024, the same is hereby dismissed with no order as to costs.
29. The Applicant is urged to cause his Appeal to be listed for admission, expedited hearing and determination.

It is so ordered

RULING SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 17TH DAY OF OCTOBER, 2024.

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MOHOCHI S.M

JUDGE

