



AIB v YNM (Suing as the mother and the next friend of NHM (Minor) (Family Appeal E022 of 2024) [2024] KEHC 12321 (KLR) (7 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12321 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E022 OF 2024**

G MUTAI, J

OCTOBER 7, 2024

BETWEEN

AIB APPELLANT

AND

YNM (SUING AS THE MOTHER AND THE NEXT FRIEND OF NHM (MINOR) RESPONDENT

JUDGMENT

Introduction

1. The appellant and the respondent are the biological parents of NHM (hereafter ‘the minor’). Vide a Complaint dated 28th March 2024, filed at the Tononoka Children’s Court, the Respondent sought certain custody and maintenance orders against the appellant. Upon hearing the parties, the trial court entered judgment as follows:-

1. It issued a declaration that the appellant and the respondent had equal parental responsibility over NHM;
2. It granted both parties legal custody. The actual physical custody of NHM was granted to the respondent, with the appellant having unlimited access whenever he was in Mombasa and access for half the school holidays;
3. It ordered that Kes.10,000.00 per month be paid by the appellant to the respondent on or before the 5th day of each month;
4. The respondent to pay for shelter, utility bills, and the house help’s salary;
5. Payment of the education expenses remained with the appellant;
6. It orders both parties or caters for the clothing needs of NHM;



7. It ordered the appellant to issue NHM with a medical insurance card and a gate pass to the respondent so that she could access the military hospital whenever NHM needed care; and
 8. It made no orders as to costs.
2. It would appear to this court that both parties were satisfied with the court's decision, as no appeal was preferred against it.
 3. Towards the end of 2023, the respondent got a job offer from a firm in Cyprus. The start date for the said job was March 2024. The respondent wrote to the appellant seeking his consent to relocate the minor. In the penultimate paragraph of the email she sent on 4th December 2023, the respondent wrote in part, "... my sincere hope is that we can recognize the immense opportunity this presents for our son and avoid any unpleasant legal proceedings."
 4. The appellant responded to the same via an email he sent on 6th December 2023 at 0001 am in which he stated, curtly, that "my son is not going out of the Country; I can cater for his needs and education in Kenya. My lawyer will contact you soon."
 5. The respondent filed a Miscellaneous Cause in Nairobi Children's Court, to wit, Nairobi Children Miscellaneous Cause No E007 of 2024; Yvonne Njeri Mungai vs Ali Ibrahim Boru, seeking to be allowed to take NHM to Cyprus. The Appellant raised an objection to the application on the ground that it was *re judicata* as the issues in dispute had been heard and determined by the Children's Court at Mombasa.
 6. The objection was upheld by the Hon Andrew Githinji Munene, PM, in his decision delivered on 28th February 2023.
 7. The next day, on 29th February 2024, a similar application was filed at the Tononoka Children's Court. The main prayer of the latter application was that "this honourable Court be pleased to grant an order allowing the minor to travel with the applicant out of the Country."
 8. The appellant, just as he had done regarding the Nairobi Cause, filed a Preliminary Objection. The trial Court, upon hearing the submissions of the parties, ruled in paragraph 29 as follows:-

"Bound by the above-cited authorities, noting the conduct of the Respondent as regards compliance with the orders of the Court and noting the unlimited opportunities that the minor will have both for his education and other aspects of life, I find that it is in the best interest of the minor to travel with the applicant. The application is allowed with costs".

The Appeal

9. The appellant was aggrieved by the said decision and filed the instant appeal. The appeal seeks to have the ruling that the Court below delivered on 25th March 2024 set aside or quashed and for costs of the appeal to be awarded to the appellant. The Court was also invited to give such further or other orders as it may deem fit and just to grant.
10. It is necessary that I set out the grounds of appeal. These are:-
 1. That the learned magistrate erred in fact and in law by misapprehending the preliminary objection dated 29th February 2024, the law in support and evidence on record;
 2. That the learned magistrate erred in law by failing to evaluate, reconsider and assess the suit, the evidence tendered and the proceedings before the trial court in order to reach its own conclusion;



3. That the learned magistrate erred in law by failing to appreciate that the application dated 29th February 2024 offends Order 42 and Order 60 of the Civil Procured Rules;
 4. That the learned trial magistrate erred in fact and in law by failing to appreciate that the minor is immigrating out of the jurisdiction of this court;
 5. That the learned magistrate erred in fact and in law by failing to appreciate that the appellant has been awarded custody of the minor;
 6. That the learned magistrate erred in fact and in law by failing to appreciate that the appellant cannot exercise parental responsibility outside the jurisdiction of this honorable court;
 7. That the learned magistrate erred in fact and in law by failing to appreciate that the best interest of the minor is served within the jurisdiction of this court;
 8. That the learned magistrate erred law and fact in failing to appreciate that the issue of custody of the minor had already been heard, determined, and judgment delivered;
 9. That the learned magistrate erred in law and fact in failing to consider the rights of the appellant while arriving at his decision;
 10. That the learned magistrate erred in law and fact in failing to consider that the application dated 29th February 2024 was barred by the principle of res-judicate.
11. The appellant applied for a stay of execution of the ruling of the Court below. In the ruling that this court delivered on 28th June 2024, I dismissed the application dated 5th April 2024 with no orders as to costs. With the dismissal of the application, the interim orders I had issued on the 6th day of April 2024 lapsed.

Court Directions on the Hearing of the Appeal

12. On 16th July 2024, I gave my directions on the hearing of the appeal upon admitting it under section 79B of the [Civil Procedure Act](#). In compliance with the Court orders, both parties filed written submissions.

Submissions of the Appellant

13. The appellant's counsel condensed his submissions into two thematic areas which I shall set out below.
14. Grounds 1, 2, 3, 5, 8, 9 & 10 of the Grounds of Appeal were argued together. It was urged by the learned counsel for the appellant that the decision of the trial Court permitting the respondent to travel with the minor outside Kenya limits the parental responsibilities of both parents. Counsel submitted that such limitation curtailed the rights of the minor. Counsel relied on Article 53(2) of [the Constitution](#) of Kenya 2010 and sections 8 and 24(1) of the [Children Act](#) 2022. He urged that allowing the child to relocate with the minor would deny the father his right to access the child when both parents are supposed to be equal. In his view, the trial Court failed to note that the appellant's role as the child's father would be curtailed if relocation was allowed and the effect such curtailment would have on the minor. In support of this proposition, the appellant relied on the case of PNN vs BMK [2021]eKLR, where the court stated that:-

“Further, it is trite that the paramount consideration in this type of case is the welfare of the children. To deprive a parent of access to his children is to deprive such a child or children of an important contribution to his emotional and material growth in the long run. This



court has a duty under section 4 to treat the interests of the child as the first and paramount consideration to the extent that is consistent with adopting a course of action calculated to, amongst others, safeguard and promote the rights and welfare of the child and to conserve and promote the welfare of child.”

15. It was urged that the respondent welcomes the monetary contribution by the appellant but is not concerned with the appellant’s involvement and presence in the minor’s life”.
16. Counsel for the appellant submitted that if the child relocated to Cyprus, the minor would suffer long-term emotional and psychological problems. He relied on the case of MAK vs SNMM & Another [2019]eKLR.
17. I was also referred to the Supreme Court decision in MAK vs RMAA & 4 others 2023] KESC 21 (KLR), where the Court held that:-

“We cannot help but find that the child’s constitutional rights to nationality, parental care, and responsibility which includes equal responsibility of the mother and father to provide for the child whether they are married to each other or not have been infringed. This finding is also in light of the English Court’s orders that the 1st respondent had care and control of the child. This court also ordered that the mother was to have no direct contact with the child. This in effect meant that the father could determine every aspect of the child’s life: where he went to school, lived, or holidayed.”
18. The appellant’s counsel argued grounds 4, 6 and 7 together. He contended that if the orders are not granted, then the orders made by Hon Viola Yator in her judgment of 11th August 2023 would not be actualized. It was urged that Hon. Viola Yator’s orders were accepted by both parties in the child’s best interest.
19. The Appellant argued that if the child was taken outside Kenya, there would be no way for the Court to ensure compliance with its orders. In support of the said contestation, this Court was referred to the English decision Hadkinson vs Hadkinson [1952]ALL ER Vol 2 at page 56, where Romer LJ observed that:-

“...the court cannot exercise its quasi parental powers in relation to a child unless effect can be given to its orders and it cannot enforce its orders if the child is taken abroad. Once a child is removed from the jurisdiction, no satisfactory means have ever been devised of ensuring or enforcing its return. It is because of this that applications for leave to take an infant, even temporarily out of the country, are jealously scrutinized and are only granted subject to every guarantee that is reasonable being exacted for the return of the child at the end of the authorised period. There is always the danger that a parent will be able, by wrongfully taking a child abroad, or by keeping there, after the sanctioned period has expired, to present the court with fait accompli and argue that the child having become firmly established outside the jurisdiction, it would be against his interest to bring him back within it.”
20. It was thus urged that the child’s best interest would be reserved if he remained in Kenya “as his interests and the decisions by the Court will be enforced better for his benefit”. Counsel submitted that if he moves to Cyprus, “all orders made for his benefit cannot be enforced and the judicial process in the lower Court file Mombasa Children’s cause No E128 of 2022 will be deemed an academic exercise.”
21. Counsel thus urged that I quash the decision of the lower Court and award him costs.



Submissions of the Respondent

22. The appeal is opposed. The respondent's counsel filed written submissions vide which she argued that what the appellant was trying to do, in essence was "to flog a dead horse." The respondent identified issues coming up for determined as being
 1. Whether the ruling delivered in Tononoka Children's cause No E128 of 2022 by the Hon Green Odero ought to be set aside and or quashed;
 2. Whether the appeal ought to be allowed.
23. Regarding the first issue, it was submitted that the trial Court delivered a well-reasoned decision in which the submissions of the parties were evaluated and considered. It was urged that the respondent produced evidence touching on the conduct of the appellant, his non compliance with the orders of the trial court and his lack of response to the communication from the respondent. In light of that, it was urged that the learned magistrate was right in his decision and also that he considered what effect migrating to Cyprus would have when he held that the minor would have unlimited opportunities in Cyprus, advanced medical care and quality education.
24. It was urged that the appellant was absent from the minor's life, never attended his birthdays nor called, and that the situation did not change even after the respondent relocated to Nairobi, where the appellant lives. Further, it was submitted that the appellant did not pay school fees on time. The appellant did not also provide medical cover or clothing as ordered by the trial Court forcing the respondent to take up the said responsibility.
25. Learned counsel for the respondent denied that the application before the lower Court was res judicata since the issue up for determination was whether the respondent could take NHM out of Kenya, something that the trial court had not previously considered.
26. Counsel submitted that the doctrine of res judicata was inapplicable to children matters. Reliance was placed on the decision of the High Court in ANM vs DMN (Civil case No 14 of 2015) (2016)KEHC (EKLR) (Family) (5 September 2016) (ruling).
27. It was submitted that the Court made the correct decision in allowing the child to travel out of County. Counsel urged that the appellant had been absent from the child's life and failed to honour his obligations as ordered by the Court.
28. The respondent urged that the child was of tender age. In such circumstances, custody of the child should remain with the mother unless exceptional circumstances are shown. In support of this contention, counsel relied on Githunguri vs Githunguri (1981)KLR, and Re S (in infant) (1958) 1 All ER.
29. It was urged that the relocation of the minor could be allowed in certain circumstances where it would be in the best interest of the child and where a refusal would detrimentally affect the welfare of the dependant children. Reliance was placed on the pursuance authority of the English case Payne vs Payne [2001] EWCA CIV 166.
30. Counsel for the respondent submitted that the primary concern of the appellant was his interest rather than that of the minor. She submitted that the appellant had, while opposing the proposal to relocate the child, not given a reason for his decision. Counsel stated that the respondent was relocating to Cyprus for better opportunities so as to give the minor the best in life.
31. It was, therefore, urged that I dismiss the appeal.



Analysis

32. I have considered the Record of Appeal, the Memorandum of Appeal, and the written and oral submissions of the parties. Having done so, I have distilled four issues which, in my view, call for determination. These are:-
1. Whether the application before the trial Court was res judicata?
 2. Whether the relocation of the Respondent and the minor would be in the minor's best interest?
 3. Whether the appellant would have custody of the minor if the appeal was allowed?
 4. What orders ought to be issued?
33. I will look at each of those issues below. Before doing so, I must warn myself about the duty of the 1st appellate Court when hearing appeals against orders made by the trial courts in respect of interlocutory applications.
34. The duty of a first appellate court was succinctly stated by Wendoh J, in *JWN v MN* [2019] eKLR as being
- “It is settled law that the duty of the first appellate court is to re-evaluate the evidence tendered in the subordinate court, both on points of law and facts and come up with its findings and conclusions.”

Was the application dated 29th February 2024 res judicata?

35. Section 7 of the [Civil Procedure Act](#) states that:-
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court...”
36. I agree with the trial Court's application of the decision of the Court of Appeal in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR when considering whether the matter was res judicata. In my view, the learned Magistrate correctly applied the law and made the right finding that the application was not res judicata.
37. The Court of Appeal in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR held that:-
- “Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;
- (a) The suit or issue was directly and substantially in issue in the former suit.
 - (b) That former suit was between the same parties or parties under whom they or any of them claim.
 - (c) Those parties were litigating under the same title.



- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

In the case before the trial court the subject matter of the application was not determined in the judgment. It wasn't an issue that was contemplated by any of the parties. It cannot therefore be said that the application was res judicata in any way.

38. Even if the matter was res judicata in the ordinary sense, I do not think that the said doctrine would be applicable in this case. The matter before the trial Court is for custody and maintenance of a child. I agree with the decision on M Muigai J in ANM vs PMN [2016]eKLR that res judicata is inapplicable in children matters. The learned judge held that: _

“Res judicata is not applicable to children matters as it is not expressly provided for in Children's Act 2001. Practically, it behoves, parents, family community and society to support the child in growth and development up to the stage the child or young adult has ability to fend for himself/herself. Therefore, naturally there will be upcoming issues with regard to the child to safeguard the child's interest.”

Would the relocation of the minor would be in his best interest?

39. It is true that children of both sexes need the presence of both parents for proper development. That is in fact the essence of section 32(1) of the Children Act, 2022 which provides as follows:-

“Subject to the provisions of this Act, the parents of a child shall have parental responsibility over the child on an equal basis, and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility whether or not the child is born within or outside wedlock.”

40. The Court is, however, faced with a fairly complicated situation where the father and the mother do not live together and haven't done so far a while. Thus, while I am alive to the need for the father to be present, I must also note that even when he had the opportunity, the appellant was absent from the minor's life. It cannot be the case that he has just realized how important his presence is at the moment when the respondent got a good job in Cyprus and is about to relocate.
41. I note the emails the respondent wrote to him that he didn't respond to, the grudging manner in which he met his obligations as a father and his absence from the child's life.
42. Although relocating the child from Kenya to Cyprus would take him outside the jurisdiction of the Children's Court, I agree with the persuasive English decision in *Payne vs Payne* (supra) that permissions may be given in certain circumstances.
43. This court, in the case of Benjamin Harun Mwandoe Mwawasi vs Beverley Mukula Anyika; Mombasa HCFA No. E024 of 2022 allowed a mother to emigrate to the USA with the children based on similar reasoning. In paragraph 16 of my judgment, I held that:-

“Upon consideration of the grounds of appeal, the proceedings and rulings of the trial court it is my view that the appeal is not in the best interest of the children. I agree with the Court below that the United States of America has better opportunities than those available in Kenya. As a first-world country, America has leading universities and colleges and better



infrastructure. The children will, in all likelihood, find it easier to get good jobs and to thrive.”

44. If the minor goes to Cyprus, a European Union member, he will get free education, free healthcare, and better opportunities than those available to him in Kenya. Therefore, it is in his interest to be allowed to relocate with his mother.
45. I note that if the appeal is allowed, the Court will have forced the respondent to make a fairly perverse choice of either foregoing a job and career development for herself and better life choices for her son on the one hand so that she can take care of son in Kenya with a reluctant, grudging contribution of the appellant or going to Cyprus and leaving the child in the hands of a father who has been hitherto absent, distant and unconcerned. This leads me to the issue of the suitability of the Appellant to have custody.
46. It is now fairly well settled that the custody of a minor of tender years remains with the mother unless the mother is unsettled. The Court of Appeal in *J.O. vs. S.A.O (2016) eKLR* held as follows:-

“There is a plethora of decisions by this court as well as the High Court that in determining matters of custody of children and especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother because mothers are best suitable to exercise care and control of the children. Exceptional circumstances include: the mother being unsettled; where the mother has taken a new husband; where she is living in quarters that are in deplorable state; or where her conduct is disgraceful and/or immoral.”
47. I have not seen anything that would convince me that the respondent is unsettled or otherwise unsuitable.
48. It is necessary to consider the suitability of the appellant, for if the appeal is allowed the respondent may nevertheless go to Cyprus leaving the child with the appellant. In essence, allowing the appeal would lead to a review of the judgment of the Court below.

Would allowing the minor to relocate frustrate the father’s access rights?

49. I note that in her email of 4th December 2023, the respondent proposed a meeting with the appellant so that they could agree on the way forward. It is evident from the correspondence exchanged by the parties that the respondent is a reasonable person. There is no indication that she is permanently relocating and won’t return to Kenya or that she does not intend to honour her access obligations. Therefore, I cannot agree with the Appellant that he would be unable to access his son and be available to him.

Final Determination

50. It is clear that I am not convinced that the appeal has merit. It is evident to me that the appellant is driven by his own needs and motives, other than the child’s best interest. In the circumstances, I find and hold that the appeal is one for dismissal.
51. This is an appeal against the decision the trial court made regarding the child. The Family Court does not normally make orders as to costs unless there are exceptional circumstances, such as a situation where the court process is being misused. I see no reason in this case to depart from the norm. The award of costs will make a bad situation worse and won’t bring about the kind of reconciliation that will enable the child to have the care and affection he so clearly needs from his father and mother.



52. The appeal is dismissed with no orders as to costs.

Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 7TH DAY OF OCTOBER 2024. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr Kariuki, for the Appellant;

Ms Kathambi, for the Respondent; and

Arthur - Court Assistant.

