



REPUBLIC OF KENYA



MCC v DMN (Civil Appeal E001 of 2023) [2023] KEHC 1273 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1273 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E001 OF 2023
AN ONGERI, J
FEBRUARY 16, 2023**

BETWEEN

MCC APPELLANT

AND

DMN RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated January 26, 2023 seeking the following orders:-
 - i. That the application be certified urgent and heard on priority basis and service of the same be dispensed with in the first instance.
 - ii. That this honourable court be pleased to issue stay of execution of judgment delivered by the Children's Court at Kericho in Children's Case No E201 of 2021 on December 23, 2022 specifically order 2 and all consequential orders pending the hearing and determination of this application.
 - iii. That this honourable court be pleased to issue a stay of execution of judgment delivered by the Children's Court at Kericho in Children's Case No E201 of 2021 on December 23, 2022 specifically order 2 and all consequential orders pending the hearing and determination of the appeal.
 - iv. That costs of this application be in the cause.
2. The application is based on the grounds on the face of it and supported by the affidavit of the applicant dated January 25, 2023.
3. The applicant avers that she was aggrieved by the decision of the court in Kericho Children's Case No E201 of 2021 delivered on the December 23, 2022 and has since lodged an appeal challenging the judgment and decree thereof.



4. The applicant avers that the trial court erred by granting the respondent unfettered and/ or unsupervised access to the minors against the recommendations of the children officer as to the exceptional circumstances that put the children's life, health and general welfare at risk while at the custody of the respondent to warrant the custody of the minors to be with the appellant.
5. The applicant avers that the trial court disregarded evidence that exposes the minors especially a girl aged four (4) years to harmful cultural practices of FGM, violence, unguaranteed safety and security while at the custody of the respondent against their best interest.
6. The applicant avers that the trial court disregarded evidence that the respondent being a military officer is often on transfer or deployment on missions and has no known permanent residence where the minors would reside while in his custody.
7. The applicant avers that the trial court failed to consider unguaranteed safety, provisions, care and unpredictable environment the minors would face while in the custody of the respondent owing to his frequent transfer and deployment.
8. The applicant avers that it is in the best interest of the minors herein that the instant application be allowed pending hearing and determination of the appeal
9. The respondent opposed the application and filed a replying affidavit dated February 8, 2023.
10. The respondent avers that he made an application for legal custody, care and control of the minors as the applicant had made it difficult for him to access the minors, he was therefore concerned about the welfare of the minors and wanted to provide for their basic needs.
11. The respondent avers that the appellant/applicant's conduct necessitated that she be granted supervised access of the minors as she had previously abandoned their matrimonial home and fled with the minors to an unknown location thereby making it difficult of him or his family members to locate them as she de-activated her number.
12. The respondent avers that any efforts to resolve their issues amicably have been futile.
13. The respondent avers that he is an officer of the law, and denied the allegations that he would expose the younger minor to harmful cultural practices in toto.
14. The respondent avers that since February 2022 he has been in the country and that he is permanently based here, which information he availed to the court and the applicant.
15. The respondent avers that he was not desirous of denying the minors access to their mother as the minors herein were still of tender age.
16. The parties filed written submissions in the application which I have considered.
17. The applicant in support of her application for stay of execution cited the case of *Bhutt v Bhutt Mombasa HCCC No 8 of 2014 (OS)* where the court stated that 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 overriding consideration of the best interest of the child in accordance to article 53 (2) of the *Constitution*.
18. The applicant submitted that the minors herein are of tender years and are aged 7 and 4 years respectively and therefore the interests of the minors ought to be a primary consideration as per section 4 (3) of the *Childrens' Act*.



19. The applicant contended that she had sufficiently demonstrated the substantial loss likely to be suffered by the two minors if the respondent is allowed to execute orders of unrestricted, unstructured, unsupervised access and removal of the minors to an unknown residence and/or outside the jurisdiction of the court.
20. The applicant contended that the orders granting the respondent unsupervised and/or unrestricted access to the minors was contrary to the comprehensive report and recommendations of the children officer and the orders were therefore inimical to the best interests of the minors herein.
21. The applicant contended that the application herein was made timeously and without unreasonable delay.
22. The respondent contended that the power of a court to grant or refuse an application for stay of execution is discretionary, which power must be exercised judiciously. The court in doing so, must balance two parallel propositions that a litigant, if successful should not be deprived of the fruits of a judgment without just cause and the proposition that execution would render the proposed appeal nugatory. The respondent cited the case of *Machira T/A Machira & Company Advocates v East Africa Standard (2002) 2 Kenya Law Report 63, 65-66*.
23. The respondent reiterated that the applicant was seeking to deny the respondent from enjoying the fruits of his judgment without showing reasonable cause.
24. The respondent contended that he would be prejudiced if the orders sought were allowed.
25. The respondent contended that the applicant had not demonstrated that she stood to suffer substantial loss if order for stay was not granted. The respondent cited the cases of *Kenya Shell Limited v Benjamin Karuga Kibiru & Anor [1986] eKLR*, *Pamela Akinyi Opundo v Barclays Bank of Kenya Ltd [2011] eKLR*.
26. The respondent contended that provisions of section order 42 rule 6 (2) (b) of the *Civil Procedure Rules* are couched in mandatory terms and therefore security is a condition for grant of an application for stay of execution.
27. The respondent reiterated that courts have held severally that, a successful litigant is entitled to the fruits of judgment and if he is kept away from these, there must be a guarantee of due performance of the decree or order.
28. The respondent conceded that this being a children matter no sufficient security would be given for time lost that would have been otherwise used bonding with the minors herein, the respondent therefore sought to have that the access orders be maintained pending hearing and determination of the appeal.
29. Finally it was submitted on behalf of the respondent, that the instant application was filed following unreasonable and inordinate delay, the application was merely an afterthought and did not meet the conditions set out under order 42 rule 6 (2) of the *Civil Procedure Rules*. The respondent therefore urged the court to dismiss the applicants application with costs to the respondent.
30. The issues for determination in this case are as follows;
 - i. Whether the trial court was right in granting the respondent unsupervised access to the minors.
 - ii. Whether the trial court disregarded hard evidence that exposes the minors especially a 4 year old to harmful cultural practice of Female Genital Mutilation (FGM), violence, unguaranteed safety and security in granting custody of the children to the respondent.



- iii. Whether the order of unfettered access and by extension removal of the minors to undisclosed and unknown jurisdiction for two weeks during the April holiday is in the best interest of the minors.
31. On the issue as to whether the trial court was right in granting the respondent unsupervised access to the minors, I find that it is not in dispute that the respondent is the biological father of the two minors the subject of this case. The respondent is therefore entitled to access to the minors.
32. On the issue as to whether the trial court disregarded hard evidence that the four-year-old is exposed to harmful cultural practices of FGM, violence and unguaranteed safety and security, I find that this court cannot make a determination on the same without the record of appeal and the judgment of the trial court.
33. On the issue of exposure of the minors herein to harmful cultural practices and violence alluded by the appellant, I find that she is under a duty to adduce evidence to assist the court to give an order that is in the best interest of the minors herein.
34. I find that it is not possible at this stage for the court to determine whether the orders given by the trial court are for the best interest of the child.
35. I find that the allegations made by the appellant are very serious. I grant stay of execution of order 2 of the trial court pending the full hearing of the appeal herein.
36. I direct that the appellant expedite the appeal.
37. The costs of this application to abide the appeal.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 16TH DAY OF FEBRUARY, 2023.

A N ONGERI

JUDGE

