JKP v KSC (Civil Appeal E059 of 2022)
[2023] KEHC 22108 (KLR) (Family) (18 April 2023) (Ruling)

Neutral citation: [2023] KEHC 22108 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL E059 OF 2022

EKO OGOLA, J

APRIL 18, 2023

BETWEEN

JKP ..... APPELLANT

AND

KSC ..... RESPONDENT

RULING

1. The Appellant filed two applications. The first is a chamber summons application dated 7th September 2022, and the second is a Notice of Motion Application dated 28th September 2022.
2. In the first Application, the appellant prays for the following orders:
    a. Spent;
    b. Due to urgency, the Appellant's Appeal be admitted for hearing and/or directions be issued for its disposal during the current court vacation or at the earliest opportunity;
    c. Cost to be in the cause.
3. In the second Application, the Appellant prays for the following:-
    a. Spent;
    b. The Honorable court be pleased to admit the Appellant's UK Residency permit and communication from her employer confirming she has a job waiting for her annexed to this application as evidence to form part of the Record of Appeal.
    c. The cost of this Application be borne by the Respondent.
    d. This honorable court be pleased to grant orders it deems just and expedient.

4. The Appellant deposed that in the judgment of the Children's Court, the learned magistrate dismissed her prayer to relocate the children to the United Kingdom (UK) despite the fact that the respondent and the children are all UK citizens and none of the parties are Kenyan citizens. She added that after she instituted divorce proceedings in the UK, there were no provisions for her maintenance, therefore, she stands a risk of conflicting with the citizenship laws in Kenya that would cause her to lose physical custody of the children. The appellant is a qualified lawyer in Australia and UK however, she avers that she is rendered destitute while in Kenya with no prospects of contributing to the raising of the children. It is for this reason that she prays for the Appeal to be heard on a priority basis.

5. On the prayer of admission of new evidence, she deposed that during the pendency of the Children's court case, she had received communication from UK immigration that she had been granted a Skilled Worker Visa. However, it was until 5th April 2022 that she was able to travel and collect the residency permit but at this time parties had already closed their cases. She deposed that her job offer in the UK still stands. The appellant insists that this evidence is material for the court in the just and fair hearing and determination of the appeal as it is the true and factual position.

6. In response to the Applications, the respondent deposed that the Appellant's application to introduce new evidence is fatally defective as she will be introducing new evidence that was not presented in the Children's Court. The respondent further stated that the correspondence between the appellant and the UK immigration was before the judgment was delivered and hence, she should have been vigilant and brought it to the attention of the Children's Court before the judgment was read.

7. On the issue of hearing the appeal on a priority basis, the respondent stated that there is consent recorded in HCFOS E010 of 2020. This was on the matters relating to the terms under which the appellant would return the children to Kenya. The consent was for the respondent to inter alia continue to provide and maintain for the appellant and the children.

8. Further to this, he added that the Divorce proceedings filed in Kenya which he has not taken steps to prosecute do not affect the immigration status of the appellant as the letter from the Kenyan Immigration department states that, "in the event, the principal has ceased to maintain the dependent, the Kenya dependent pass will be invalidated..." Therefore, it is the failure to maintain that leads to invalidation and not the divorce. He deposed that the appellant is still living in the matrimonial home where he pays the rent, utilities, and upkeep for both the appellant and the children.

9. The respondent further stated that the Children's Court dismissed the appellant's application on the ground that she is an Australian citizen and not a UK citizen and as such if she was to lose her job, she would be deported, and no one will be able to take care of the minors in the UK. He deposed that the children have lived in Kenya since 2016, and their last child was born in Kenya. Therefore, the children know Kenya as their home. It is the respondent's case that the cost of living in UK is higher than in Kenya therefore, it would be challenging to maintain them if they were in the UK. He deposed that the Children's Court did not dismiss the Appellant's prayer for relocation on the basis that the Appellant had a job offer in the UK.

10. The respondent further deposed that the appellant was offered a job in the UK on 12th January 2020, and she has been postponing the starting date. The respondent is curious about what job offer can be open for more than two years. He avers that the job offer annexed in the appellant's application is dated 5th September 2022 two days before filing this instant application.

Determination

11. The application was canvassed by way of written submissions. I have read and considered all the rival arguments posed by counsel. I have also considered the application, the affidavits and annextures.

First Application

12. The first issue for determination is whether the appeal should be heard on a priority basis. Disposal of cases expeditiously is undoubtedly an overriding principle in the administration of justice. It is the core of the maxim that delay defeats equity. Also, Article 159(2)(b) of the *Constitution* provides that:

    (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

        (a) ...;

        (b) justice shall not be delayed;

13. The appellant has the Constitutional backing to seek orders for her Appeal to be heard expeditiously. However, the reality on the ground is that the single most drawback in the administration of justice in this jurisdiction is case backlog which causes the delay in the determination of cases. That being said, has the appellant provided enough reasons to have her Appeal heard on a priority basis? The appellant's reason is that her immigration status is at risk taking into consideration that the respondent filed for divorce. Also, she is heavily indebted to friends and family. I will analyse each of her reasons.

14. The appellant and the two children are in Kenya under the Dependent Visa where the respondent is the principal. The *Kenya Citizenship and Immigration Act*, 2011 defines a dependent as a person who by reason of age, disability or any status of incapacity is unable to maintain himself or herself adequately and relies on another person. Regulation 27 of The *Kenya Citizenship And Immigration Regulations*, 2012, (The Regulations) provides that any person being either a Kenyan citizen, a permanent resident in Kenya, an accredited diplomatic/foreign envoy to Kenya or a person to whom a valid work permit has been issued may apply for a dependent pass for his spouse, children or any other person who depends on them for their livelihood.

15. Under Paragraph 28(1) of the *Regulations*, a dependent pass may be invalidated where:-

    a. the dependent has ceased to depend on the applicant;

    b. the person who applied for the dependant's pass has failed or is unable to maintain the dependant;

    c. the person who applied for the dependants pass has left Kenya in circumstances which raise a reasonable presumption that his or her absence will not be temporary;

    d. the dependant engages in employment or other income generating activity;

    e. the permanent residence status of the applicant ceases;

    f. the applicant dies; or

    g. the dependant was a child, the dependant attains the age of twenty-one years, the dependant's pass shall be deemed to have expired and shall be invalid."

16. In this case, the respondent still maintains and cares for the Appellant and his children. The Consent dated 23rd September 2020 in HCC (OS) E010 of 2020 stated that the respondent will inter alia pay

the rent for the family home where the appellant and children live; pay the salaries of the household staff; provide for the appellant a car and a driver; pay the utility bills; pay the medical, school fees of the children; and to pay the appellant USD 2000 per month to support herself and the children. The Appellant has not alluded in any way that the respondent has breached this consent agreement. Therefore, according to Regulation 28(1) (a) and (b), the immigration status of the Appellant is intact. I hereby dismiss the Application dated 7th September 2022 for lack of merit.

Second Application

17. The second Application was for admission of the Appellant's UK Residency permit and communication from her employer confirming she has a job waiting for her as evidence to form part of the Record of Appeal.

18. The applicable law as regards to the admission of additional evidence by an appellate court is Section 78 of the *Civil Procedure Act* which stipulates as follows: -

> "(1) Subject to such condition and limitations as may be prescribed, an appellate court shall have power –
>
> (a) to determine a case finally;
>
> (b) to remand a case;
>
> (c) to frame issues and refer them for trial;
>
> (d) to take additional evidence or to require the evidence to be taken;
>
> (e) to order a new trial.

19. The procedural Rules that are hand maidens to Section 78 of the *Civil Procedure* above provide under Order 42 rule 27 of the *Civil Procedure Rules* that:-

> "(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if –
>
> (a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
>
> (b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced or witness to be examined.
>
> (2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reasons for its admission."

20. In the case of *Fibre Link Limited vs. Star Television Production Limited* [2015] eKLR (CA 172 of 2012),the court held as follows on admission of evidence at appeal stage;

> " Appellate courts have been very reluctant to allow parties to adduce additional evidence on appeal except where there are exceptional circumstances. The principles for adduction of new evidence on appeal were set out in Tarmohamed & Another vs. Lakhani & Co (1958)

EA 567 where the Court of Appeal in adopting the Judgment of Lord Denning in Ladd vs. Marshall (1954)1 WLR, 1489, the Court of Appeal for Eastern Africa stated that:

"to justify reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that , if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

20. In *Wanjie & others v Sakwa & others*(1984) KLR 275 the Court of Appeal considered at length the rationale for the obvious restriction of reception of additional evidence in Rule 29 of the *Court of Appeal Rules*. Chesoni JA observed at page 280:

> " this rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence."
>
> Hancox JA (as he then was) in the same case stated that the requirement for reasonable diligence is meant to discourage litigants from leaving until the appeal stage all sorts of material which should properly have been considered by the trial court."

21. The taking of additional evidence lies at the discretion of the Court and is intended to aid in the attainment of the ends of justice. In summary of the abovementioned case law, this court should consider the following:-

    i. Whether the evidence could not have been obtained with reasonable diligence for use at the trial.

    ii. Whether the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive.

    iii. Whether the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

    iv. Whether the evidence is for the purpose of removing lacunae, filling in gaps in the party's case; or making out a fresh case in the appeal.

    v. Whether the evidence is needful.

22. The Appellant is aggrieved with the entire judgment of the Children's Court. So, is the UK Residency permit and proof of a job needful for this Appeal? In the Judgment, the learned Hon. F. Terer, Principal Magistrates, decided on three issues: Whether the appellant and the respondent should share physical custody and control of the minors; whether the appellant should be allowed to relocate with the minors to the United Kingdom; and what other orders are available in the circumstances. The issue of the

Appellant's UK immigration status and whether she had a job in the UK arose in the second issue. The court held as follows:-

> " From the mail communication from CLP, it is trite that if she did not take up the job by 16th September, 2021 her chance would be forfeited. The net effect is that she would not manage to secure the 5 year period skilled worker to remain in the UK.
>
> The defendant's legality to set foot in the UK was and/or is dependent of the said job offer. From the material before court, there is nothing to show if CLP rescinded its communication on 1st September, 2021. On this basis alone, the court is incapacitated to consider the merits or otherwise of her quest to relocate with the minors.
>
> That notwithstanding, if it were true that the defendant had secured a job offer and a skilled worker visa of 5 years, would it be in the best interest for her to relocate with the minors? My answer is in the negative. Firstly, the defendant is not a citizen of the UK. She is an Australian Citizen. If, therefore, in the same vein she contends the plaintiff would lose status if he were to lose his job in Kenya, she loses her job with CLP, then she would be rendered a fugitive ripe for deportation. What will become of the minors who are citizens of the UK? Who will be there to take care of them?"

23. Without going to the crux and determining the Appeal, it must be noted that the trial court in its determination took into consideration the event where the Appellant actually had a skilled workers visa and a job in the UK. If she had both, the trial court still found it fit to have the minors return to Kenya. Because the skilled worker visa was dependent on a job, if the Appellant was left jobless, the minors would be left destitute. According to the trial court, a skilled worker visa was not a strong enough visa to uproot the children from the place they call home. The trial court was of the view that it is not in the best interest of the children to relocate to the United Kingdom on the strength of a skilled worker visa.

24. The Appellant received her skilled worker visa after the close of pleadings in the trial court. There was no opportunity to bring it to the attention of the court and for the respondent to cross-examine it. It was however noted that the visa was still in process and that is why the trial magistrate in his determination created a conjecture and stated that a skilled worker visa of five years was not enough to relocate the children to the UK.

25. Will the evidence have an important influence on the result of the case? Without deciding on the Appeal, the question of the minors relocating to the UK is dependent on whether the Appellant has a job and a visa to work in the UK. Therefore, this is important and needful evidence that can influence the case since the trial magistrate only determined this issue on assumption.

26. It must be noted that the job offer has been on the table for many years. The respondent argues that it is a false job offer for that reason. For one to obtain a skilled worker visa, one must inter alia work for a UK employer that has been approved by the UK Home Office and have a 'certificate of sponsorship' from your employer with information about the role offered in the UK. If UK Immigration saw it fit to grant the Appellant a skilled worker visa then indeed the job offered to the Appellant must be legit. Hence, this new evidence is credible and incontrovertible.

27. This being a matter involving children, all information important and useful to determine the best interest of the children should be presented in court.

28. The upshot is that the second Application dated 28th September 2022 is allowed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF APRIL 2023

E.K. OGOLA

JUDGE

In the presence of:

Mr. Makonyo for the Appellant

Ms. Kamau for the Respondent

Gisiele Muthoni Court Assistant.