



**In re AN (Minor) (Civil Appeal E119 of 2022)
[2023] KEHC 18398 (KLR) (Family) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18398 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

CIVIL APPEAL E119 OF 2022

MA ODERO, J

MAY 19, 2023

IN THE MATTER OF AN (MINOR)

BETWEEN

MKM APPELLANT

AND

GGM RESPONDENT

*(Being an Appeal from the Judgement and Decree of the Chief Magistrate's Court at Milimani
(Hon. Terer, RM) delivered on 18th November 2021 in CASE NO:MCCHCC/E373/2022)*

RULING

1. Before this court for determination is the Notice of Motion application dated November 22, 2023 by which the Applicant MKM seeks the following orders:-

- “1. Spent.
2. That this Honourable Court be pleased to order stay of execution and enforcement of the Judgment and Decree of the Children's Court made in Milimani Children's Court in Children Case No MCCHCC/E373/2022 on the 18th of November 2022 pending the hearing and determination of the Appeal herein.
3. That this Honourable Court be pleased to issue an order restraining the Respondent, her agents, representatives and/or persons working under her instructions from taking the minor therein, AN, from the territory of the



Republic of Kenya (jurisdiction of this Honourable Court) pending the hearing and determination of the intended appeal.

4. That the Cabinet Secretary, Ministry of Interior and National Administration, and the Director of Immigration Services, be directed to assist in the enforcement of the orders of this Honourable Court.
 5. That this Honourable Court be pleased to issue any other/further orders taking in regard the best interests of the minor.
 6. That the costs of this application be provided for.”
2. The Application was premised upon Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Order 42 Rule 6 of the *Civil Procedure Rules*, 2010, Articles 53(1) (e) & 2 of the *Constitution* of Kenya, Sections 8, 31, 32 102, 103 & 107 of the *Children Act* & Laws of Kenya and all other enabling laws, and was supported by the Affidavit of even date sworn by the Applicant.
 3. The Respondent GGM opposed the application through the Replying Affidavit dated November 30, 2022. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated January 22, 2023, whilst the Respondent relied upon her written submissions dated February 9, 2023.

Background

4. The applicants herein are the biological parents of the minor AN who is aged seven (7) years old. This application arises from the ruling delivered on November 18, 2022 by Hon Terer Senior Resident Magistrate in Nairobi Children’s Case No 6373 of 2022. In said Judgement the trial court made the following orders:-
 - “ 1. That the Plaintiff is granted the Legal, Actual custody, care and control of the minor AN.
 2. That the Plaintiff is granted leave to travel with the minor to Australia or any other Jurisdiction as circumstances may require.
 3. That the Defendant to be granted access to minor during the minor’s summer holidays. Parties to mutually agree on the place and modalities of this mode of access.
 4. That the Plaintiff to facilitate the Defendant’s access to the minor in Australia whenever he desires by supplying requisite visa application documents.
 5. That the Defendant to avail the requisite gadgets and or equipments to facilitate his virtual access to the minor.
 6. That parties to agree on the Defendant’s telephone and virtual access to the minor taking into account the different time zone differences.
 7. That the Plaintiff to fully assume parental responsibility to the minor whilst in Australia and the Defendant is at liberty to assist the depending on his financial abilities.
 8. That each to bear own cost.”



5. Being aggrieved by the decision of the Children’s Court the Applicant filed the Memorandum of Appeal dated November 22, 2022. Contemporaneously with that Appeal the Applicant filed this present application seeking a stay of the decision of the Magistrate’s Court pending the hearing and determination of his appeal.
6. The Respondent opposed the application for stay submitting that the same has been overtaken by events as upon receiving the authority of the court she has already relocated to Australia with the minor.

Analysis and Determination

7. I have considered the application before this court, the reply filed thereto as well as the written submissions filed by both parties. The only issue for determination is whether the application for stay of execution ought to be granted.
8. Order 42 Rule 6 (2) of the *Civil Procedures Rules* provides for guiding principles that one must satisfy before the court can grant a stay of execution, as follows:-

“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 orders as may ultimately be binding on him has been given by the applicant.”
9. The impugned orders were made on November 18, 2022. This application for stay was filed on November 22, 2022 barely a week after the judgement was delivered. I am satisfied that the application for stay was filed in a timely manner.
10. The impugned orders were made in relation to the custody and maintenance of a minor. It is trite law that in matters concerning the welfare of children courts are required to give priority to the best interest of the child.
11. The *Constitution* of Kenya 2010 provides at Article 53 (2) that:-
 - (2) 2) A child’s best interest are of paramount importance in every matter concerning the child.”
12. Likewise the *Children Act* 2022 at Section 8(1) provides as follows:-

“(8)(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 the primary consideration; [own emphasis]
13. In the case of *Bhutt Vs Bhutt* – Mombasa Hccc No 8 of 2014, the court held as follows:-

“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 with “Article 53 (2) of the *Constitution*.” [own emphasis]



14. The court is mindful of the fact that it is not required at this point to determine the merits or otherwise of the intended appeal. I have perused the judgement of the lower court. I note that legal custody of the minors was vested in the mother of the child. The Applicant (Father) was awarded custody during the summer holidays as well as rights of access to the minor whilst she is in Australia.
15. The Applicant argued that he stood to suffer substantial loss if the orders of stay of execution were not granted as if the minor is taken out of the country then he may never see her again.
16. I am not persuaded by this argument because as indicated earlier the trial court did make orders of granting the Applicant access to the child during school holidays and even made orders for virtual access by way of mobile phone or facetime when the child was in Australia. The Respondent indicated that she was willing to abide fully with the orders made by the Children's Court. Thus the argument that the Applicant may never see the child again does not hold water.
17. The Respondent who is the child's mother and custodial parent averred that she has secured employment in Australia. She annexed to her Affidavit a copy of the letter of Employment as well as the Employment Agreement dated July 19, 2022 (Annexure 'GGM-2').
18. The Respondent stated that she has already relocated with the minor to Australia on November 30, 2022 to enable her take up her employment and in keeping with the orders made by the Children's Court granting her leave to travel with the minor to Australia or to any other jurisdiction as circumstances may require.
19. In the circumstances therefore I find that this application for stay has been overtaken by events as the child has already left the county. To now grant an order of stay would be superfluous.
20. Finally, I find no merit in this application. The same is dismissed in its entirety. The Applicant to bear the costs for this Application.

DATED IN NAIROBI THIS 19TH DAY OF MAY, 2023.

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MAUREEN A. ODERO

JUDGE

