



REPUBLIC OF KENYA



STC v GSK (Civil Appeal E009 of 2023) [2023] KEHC 19224 (KLR) (16 May 2023) (Ruling)

Neutral citation: [2023] KEHC 19224 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E009 OF 2023**

G MUTAI, J

MAY 16, 2023

BETWEEN

STC APPELLANT

AND

GSK RESPONDENT

RULING

Introduction

1. The application before the court is dated May 8, 2023. The same is expressed to be brought under sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 Rule 6(1) of the *Civil Procedure Rules*, section 4(2) and 8(3) of the *Children Act, 2022*, Article 53(2) of the *Constitution of Kenya, 2010* and all other enabling provisions of the law.
2. The Appellant/Applicant seeks the following orders: -
 1. Spent
 2. Spent
 3. That the honourable judge be pleased to grant stay of execution of the judgment delivered on the 3rd day of May, 2023 in Tononoka MCCHCC/E344 of 2022 pending the hearing of the appeal filed herein;
 4. That the honourable judge be pleased to issue any order he deems just and fit in the circumstances; and
 5. That costs of the application be provided for.
3. The said application is based on 7 grounds to wit that: -



1. The Appellant's claim for physical custody of the child was dismissed with the Respondent being granted such custody;
 2. The actual physical custody of the child by the Respondent was to begin on 8th May, 2023 at Tononoka Law Courts, notwithstanding the fact that schools were reopening on the said date;
 3. The Court failed to take into account the best interest of the child while making the said decision and thus contravened the law;
 4. If the orders sought aren't granted the child would be forced out of his current school and be enrolled in another school mid-year which action shall psychologically and emotionally affect the child;
 5. No adverse evidence was adduced against the Appellant as would justify the decision to take away physical custody from him;
 6. The appeal has overwhelming chances as the Respondent is unfit to have custody of the child and if the order sought vide the instant application are not granted the appeal shall be rendered nugatory if it is successful; and
 7. It would be in the interest of justice and equality to grant the orders sought.
4. The motion was supported by the affidavit of the Appellant sworn on 8th May, 2023. The Supporting Affidavit restates the contents of the grounds, which contents I need not rehash here, save that he disclosed that he is in college furthering his studies at [Particulars Withheld] College.
 5. The Appellant/Applicant annexed to his Supporting Affidavit a copy of the judgment and a court order vide which he was asked to produce the child in Tononoka Law Courts on 8th May, 2023.
 6. The application is opposed by the Respondent. Vide Replying Affidavit sworn on 11th May, 2023 she opposed the application. She stated that despite the court ordering the Appellant to restore custody of the child to her the Appellant had not done so as at the time she swore the affidavit.
 7. She deposed that the Appellant/Applicant made grave allegations against her as he was bitter that she had left him. She stated she had been in a brief relationship with the Appellant/Applicant when she worked in Nakuru. The said relationship was not a marriage and that it ended as the Appellant/Applicant is ill-tempered, physically abusive, and offers very little financial towards the subject minor. She deposed that the support she received from the Appellant/Applicant did not exceed Kes.4000.00 per month.
 8. The Respondent deposed that the Appellant/Applicant is a very busy man, working as a medical officer with the [Particulars Withheld] Forces and has no time for the child the subject of the proceedings now before this court. The Respondent was fearful that the child would be left with caregivers despite the child being of tender age.
 9. The matter came before me on 8th May, 2023. On the said date I certified the matter urgent and directed that the same be served for inter parties hearing on 12th May, 2023.
 10. On 12th May, 2023 the parties' advocates appeared virtually before me for the hearing of the substantive motion. The Appellant/Applicant was represented by Mr. Ajigo while the Respondent was represented by Ms. Mulago. As both parties were ready to proceed I heard the matter. Parties made oral submissions.



Submissions Of The Parties

11. Mr. Ajido, for the Appellant/Applicant submitted that he seeks a stay of the judgment of the subordinate court vide which he was asked to surrender actual physical custody of the child to the Respondent. He submitted that the subject child is presently enrolled in a school in Mombasa and that compliance with the orders of the learned Magistrate would be unduly disruptive. I was urged to allow the application. It was submitted that the Appellant/Applicant would comply with whichever orders this court ultimately makes after hearing the appeal on merits. Mr. Ajigo urged that the court below had sought the opinion of the child and that she had expressed a desire to stay with the father.
12. Ms. Mulago for the Respondent opposed the application. She submitted that the Appellant/Applicant took the child away from the Respondent without her consent. The child had not been with the mother since December 2022 as the Appellant/Applicant had done everything possible to deny her access. It was submitted that the Appellant/Applicant is a military officer, working with the [Particulars Withheld] and is thus unreachable. It was further submitted that he has 8 other children from different relationships while the subject child was the only child of the Respondent. Reference was made to the age of the child. The subject child is 6 years old. It was therefore urged that given her age and barring exceptional circumstances a child of tender years should be in the custody of the mother. The Respondent denied that there were exceptional circumstances warranting the custody of the child being given to the Appellant/Applicant, especially in light of his busy work schedule, the training he was presently undergoing and the number of children under his care.
13. Mr. Ajigo in his response asked me to look at the judgment of the court below. The lower court judgment, it was submitted, had analysed the rival submissions well. He contended that the child wasn't forcefully taken away from the Respondent, but that she freely surrender the subject child to him as she was unable or unwilling to take care of her. He argued that allowing the application would be in the best interest of the child. In closing, I was asked not to interrupt the child's schooling by restoring custody to the mother.

The Law

14. The order sought herein is a stay of execution of the judgment of the lower court pending appeal to this court. Order 42 Rules 6(2) of the [Civil Procedure Rules, 2010](#) provides that
 - “(2) 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 order as may be ultimately be binding on him has been given by the Applicant.”
15. This is a matter concerning a child. Article 53 (2) of the [Constitution of Kenya, 2010](#) provides that
“a child's best interests are of paramount importance in every matter concerning the child”.
16. The constitutional dictate is given effect by section 8 of the [Children Act, 2022](#) (Act No 29 of 2022) which provides as follows: -



- (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;
 - (b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule. 19 No. 29 of 2022 Children
 - (2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—
 - (a) safeguard and promote the rights and welfare of the child;
 - (b) conserve and promote the welfare of the child; and
 - (c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.
 - (3) In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child’s age and degree of maturity.
17. As a court hearing an appeal arising at a decision of the Children Court it is my opinion that “substantial loss” on order 42 Rule 6(2) must be modified such that the court hearing a stay application should consider if substantial loss will be suffered by the Child the subject of the proceedings unless the stay application is granted. I say so as the best interest test is applicable to the child only, not to the parent seeking custody.
18. In making the finding above I am persuaded by the decision of the court in [*MNN versus MOK & Another*](#) [2017] eKLR where the court stated that: -
- “... in determining an application for stay of execution in cases involving children the general principle for the grant of stay of execution under 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 Article 53(2) of the [*Constitution of Kenya*](#)”.
19. Maureen Odero, J cited the above holding with approval in [*In re ABE \(Minor\)*](#) [2021] eKLR when she held that: -
- “therefore in order to merit stay of being sought the Applicant must satisfy the court that the said stay is in the best interest of the minor, not herself or the Respondent”. (emphasis added).
20. Where then does the best interest of the child lie in this cause? I have read the judgment of the court below. I have also considered the rival affidavits which were filed in this court. It would appear to me that the Appellant and the Respondent were in some sort of a relationship. The child the subject of this appeal was born of the said relationship. The relationship between the two collapsed. For most of her life the child lived with the mother. She attended a school in Narok until sometime in 2022 when the Appellant gained custody of her in very unclear circumstances. I am unable to tell at this point whether the Respondent surrendered custody (as alleged by the Appellant/Applicant) or custody was



obtained unlawful (as averred by the Respondent). The child presently resides with the Appellant/Applicant and goes to school in Mombasa.

21. The court below upon evaluating the evidence gave custody to the Respondent. The child, it bears repeating, is 6 years old. The court of Appeal In *J.O versus SAO* [2016] eKLR stated as follows in paragraph 13: -

“There is plethora of decisions by this court as well as the High Court that in determining matters of the custody of the children, especially of tender age, except where exceptional circumstance exist, the custody of such children should be awarded to the mother, because mothers are best suited to exercise 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 disgraceful or immoral. See *Sospeter Ojuamong versus Lynnette Amondo Otieno Civil Appeal No. 175 of 2006*; *Karanu versus Karanu* [1975] EA 18 and *Githunguri versus Githunguri* [1979]eKLR”.

22. Did the Appellant/Applicant provide evidence in the court below sufficient to displace the presumption that custody of children of tender years should be with the matter? I am afraid not. I say so for the reasons I shall refer to below.
23. The Appellant/Applicant is a very busy man. He is a medical doctor with the [Particulars Withheld] It was submitted that he has either 5 or 8 children. He is presently undergoing training in Nairobi. No mention was made of his domestic arrangement. Is he married? Do the 5 or 8, apart from the subject child, children have the same mother? I am unable to tell who, given his busy schedule takes care of his children whenever he is absent. Given the said situation would it be in the best interest of the child to have custody retained by the Appellant/Applicant? I do not think so.
24. The Respondent on the other has no other child other than the subject of these proceedings. She has a business which, it would appear gives her sufficient income to honour her moral constitutional and legal obligations to the child. In the present circumstances, I find and hold that the best interest of the child would be served by restoring custody of the subject to the Respondent. I further find and hold that permitting the Appellant/Applicant to retain custody of the child would expose the child to a very clear and present risk of suffering a substantial loss. The Appellant/Applicant is in all likelihood an absentee father. He is currently undergoing training in Nairobi. A 6 year old girl will, if the application is allowed, left to the mercies of a caregiver whose suitability has not been assessed by the court. The Respondent on the other hand would be available to take care of the child. Being the only child under her care she will be able to shower her with undivided love and affection.
25. I must express my disquiet with the conduct of the Appellant/Applicant. Although he has been aware of the court orders issued by the court below he has done everything possible to disobey those orders. When this matter came before me on 12th May, 2023. I asked the counsel for the Appellant/Applicant if his client had complied with the court orders. Counsel informed me that the child had been taken ill. No evidence of the alleged ailment was provided.
26. In those circumstances I am persuaded that the Appellant/Applicant contrived an excuse, the alleged ill health, believing that this court would rule in his favour and thus sanitize his conduct.
27. I am afraid that this is a continuation of a pattern of conduct on the part of the Appellant/Applicant that I find incredibly disturbing. In the court below for example, he produced communication he alleged was between the Respondent and her lovers, that he could only have accessed by way of the



unlawful and illegal invasion of the privacy of the Respondent. The right to privacy is protected by Article 31 of the [Constitution of Kenya, 2010](#) which states that:-

“ Every person has the right to privacy which includes the right not to have

- (c) information relating to their family or private affair unnecessarily required or revealed; or
- (d) the privacy of their communication infringed”.

Disposition

- 28. The upshot of the foregoing is that I find and hold that the application for a stay of execution of the orders of the trial court is completely bereft of merit and must fail. I, therefore, dismiss the same.
- 29. This court has the duty under section 5(1) of the [Judicature Act](#) to uphold the dignity of the subordinate courts. The court below has already ordered the Appellant/Applicant to grant the Respondent custody of the child. I therefore order that the Appellant/Applicant grants actual custody of the child to the Respondent on Thursday the 18th day of May, 2023 at 9. am at Tononoka Children Court.
- 30. I further order that this matter be mentioned before me on Friday the May 19, 2023 to confirm compliance with the above order and also for further directions.
- 31. I make no orders as to costs.
- 32. Orders accordingly.

DELIVERED, DATED, AND SIGNED THIS 16TH DAY OF MAY, 2023 AT MOMBASA VIA MICROSOFT TEAMS

.....

GREGORY MUTAI

JUDGE

In the presence: -

.....for the Appellant/Applicant

.....for the Respondent

Winnie Migot – Court Assistant

