



**In re ANN – (Minor) (Civil Appeal E120 of 2022)
[2023] KEHC 19744 (KLR) (Family) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19744 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E120 OF 2022
MA ODERO, J
JUNE 19, 2023**

BETWEEN

ANN APPLICANT

AND

NST RESPONDENT

RULING

1. Before this Court are two applications for determination. The first is the Notice of Motion dated 22nd November 2022 filed by the Appellant NST whilst the other application for determination is the Notice of Motion dated 30th November 2022 filed by the Respondent ANN.
2. The court directed that the two (2) applications be heard together and be canvassed by way of written submissions. The Appellant filed the written submissions dated 27th January 2023 whilst the Respondent relied upon his written submissions dated 2nd February 2023.

Background

3. The Applicant and the Respondent are the biological parents of the minor ANN who was born on 15th April 2017. The Respondent (Father) is a Kenyan National whilst the Appellant (Mother) is a national of Eritrea.
4. Vide a ruling delivered on 11th October 2019 Hon. Lady Justice Ongeri awarded custody of the minor to the Appellant (Mother) pending the hearing and determination of the suit filed in the Children’s Court. The High Court further ordered that the Appellant and the minor be allowed to remain in the [Particulars Withheld] Apartment pending determination of the suit filed in the Children Court.



5. The genesis of this Appeal is the Judgment delivered by Hon. C.C Oluoch – Chief Magistrate in Nairobi Children Case No. 112 of 2019. In the judgement which was delivered on 17th November 2022, the Children’s Court made the following orders:-

- “ 1. Both parties shall have joint legal custody of the minor.
2. The Defendant shall have actual custody, care and control of the minor during school terms.
3. The parties shall have shared actual custody of the minor during school holidays. The Plaintiff shall have the first half of school holidays and the Defendant the second half.
4. The Plaintiff shall have access to the minor the last weekend of every month from Friday 5.00p.m. to Sunday 4.00 p.m. He shall also have access to the minor during mid-term breaks. The parties shall agree on picking up and dropping off points through their advocates on record.
5. The Plaintiff shall pay school fees and cater for all school related expenses for the minor at the current school or any other to be mutually agreed on by the parties.
6. The plaintiff shall cater for the medical needs of the minor through a medical cover.
7. Each party shall provide shelter, food, clothing when the minor is in their custody.
8. The minor shall not be taken out of the Republic of Kenya without the consent of the other party or leave of the court.
9. Each party shall bear its own costs.

6. Being aggrieved by the decision of the trial court the Appellant filed a memorandum of Appeal dated 22nd November 2022. Contemporaneously with said appeal the Appellant filed the Notice of Motion dated 22nd November 2022.

7. On 28th November 2022 this court made interim orders directing that the child and the Appellant should continue residing at Apartment No. Dx [Particulars Withhed] Gardens situated on LR No. xxxx/xxxx pending the hearing and determination of the Appeal.

8. However Counsel for the Respondent appeared in court and indicated that the [Particulars Withhed] Apartment was not infact occupied by the Appellant and the minor as had been misrepresented to the court. That infact the minor and Appellant actually resided at [Particulars Withhed] Apartment in Riverside since the year 2020.

9. The court then on 2nd December 2022 set aside the interim orders issued on 30th November 2022.

Analysis and Determination

10. The Appellant filed the application dated 22nd November 2022 seeking the following orders:-

- “ 1. Spent.



2. Pending the hearing and determination of this Appeal, this Honourable Court be pleased to make an interim order directing that the Appellant and the minor continue residing at Apartment No. Dx [Particulars Withhed] Gardens situated on LR No. xxxx/xxxx .
 3. Pending the hearing and determination of this Application, this Honourable court be pleased to make an interim order directing the Respondent herein to make reasonable contribution as may be determined by this Honourable Court towards the maintenance of the minor.
 4. Pending the hearing and determination of this Appeal, this Honourable Court be pleased to make an interim order directing that the Appellant and the minor continue residing at Apartment No. Dx [Particulars Withhed] Gardens situated on LR No. xxxx/xxxx.
 5. Pending the hearing and determination of this Appeal, this Honourable Court be pleased to make an interim order directing the Respondent herein to make reasonable contribution as may be determined by this Honourable Court towards maintenance of the minor.
 6. The cost of this Application be provided for.”
11. The application which was premised upon Section 8, 91, 117 and 118 of the *Children Act* and Article 53 of *the Constitution* of Kenya 2010 was supported by the Affidavit of even date sworn by the Appellant.
 12. The Respondent opposed that application through the Replying Affidavit dated 30th November 2022.
 13. In her application dated 22nd November 2022 the Appellant seeks orders to allow herself and the minor to continue residing in the [Particulars Withhed] Apartment pending the hearing and determination of the Appeal. The Appellant also seeks for interim orders to compel the Respondent to make reasonable contribution towards the maintenance of the minor.
 14. In her supporting Affidavit the Appellant averred that the suit was heard in the Children Court and judgement was delivered on 17th November 2022. That the trial Magistrate however declined to make any order directing the Respondent to make a financial contribution towards the maintenance of the minor. The trial court equally declined to order that the Appellant and the minor continue to reside in the [Particulars Withheld] Apartment despite the same having been the home of the minor since her birth.
 15. The Appellant further averred that she is an Eritrean National holding a dependent pass thus is not able to engage in formal employment in Kenya. That she has been forced to seek accommodation from well-wishers prejudicing the minor who needs to a stable home.
 16. In opposing the application the Respondent stated that the child and Appellant do not reside at [Particulars Withhed] Gardens but reside at [Particulars Withhed] in Riverside. He states that the Appellant employs lies and deceit to mislead the court into making interim orders in her favour. He stated that he owns the [Particulars Withhed] Apartment jointly with his mother and that the same is currently rented out to a tenant. That the interim court orders made on 30th November 2022 effectively amounted to an order to evict the tenant.
 17. According to the Respondent the trial court found that the Appellant was capable of providing for the minor.



18. The Respondent stated that he has now relocated to Nakuru County where he lives with his new partner and two (2) children. That if the Appellant is unable to accommodate the minor then he is willing to accommodate the child in Nakuru where he currently lives with his mother, wife and children.
19. The Respondent stated that by her application the Appellant was seeking to have issues which ought to be raised in the main appeal resolved. He urged the courts to dismiss the application in its entirety.
20. The Respondent on his part filed the Notice of Motion dated 30th November 2022 seeking the following orders:-
 - “ 1. Spent.
 2. THAT the interim orders issued on the 30th of November 2022 by Hon. Lady Justice Maureen Odero be set aside and/or vacated pending hearing and determination of this application.
 3. THAT the Appellant/Respondent be restrained from interfering, trespassing, evicting and harassing the tenants residing in Apartment No. Dx [Particulars Withhed] Gardens situated on LR No. xxxx/xxxx pending hearing and determination of this application.
 4. THAT the Appellant/Respondent be restrained from interfering, trespassing, evicting and harassing tenants residing in Apartment No. Dx [Particulars Withhed]e Gardens situated on LR No. xxxx/xxxx pending hearing and determination of the Appeal.
 5. THAT costs be provided in favour of the Applicant.”
21. The application which was premised upon Sections 1A, 1B, 3, 3A of the *Civil Procedure Act*, Sections 8, 91, 118 and Article 53 of *the Constitution* of Kenya 2010 and all other enabling provisions of laws was supported by the Affidavit of even date sworn by the Respondent.
22. The Appellant opposed the application through her Replying affidavit dated 9th December 2022.
23. In his supporting Affidavit the Respondent asserted that the Appellant and the minor are not and have never been resident in the [Particulars Withhed] Apartment. That the Appellant and the minor have all along resided at [Particulars Withhed] Apartment located in Riverside. That this issue was canvassed and determined in the Children’s Court.
24. The Respondent went on to state that sometime in August 2022 the Appellant and the minor were evicted from the [Particulars Withhed] partment and the Appellant then went into hiding with the minor. He states that the trial court directed that the Appellant cater for her own accommodation.
25. That the Appellants application dated 22nd November 2022 was intended to coerce the Respondent to bend to the will of the Appellant. He stated that the Appellant deliberately failed to disclose to the court material facts and the application amounts to an abuse of court process.
26. The Respondent opposed the application dated 30th November 2022. She states that vide a ruling delivered on 11th October 2019 Hon. Lady Justice Ongeri directed that the Appellant and the minor move back into the [Particulars Withhed] Apartment pending hearing and determination of the suit in the Children’s Court.



27. That the Respondent instead secured alternative accommodation for them at the [Particulars Withhed] Court Apartment. However the Respondent later defaulted in the payment of rent leading to the eviction of the Appellant and the minor. The Appellant insists that there is no tenant in the [Particulars Withhed] Apartment and maintains that the lease Agreement produced by the Respondent is a forgery. She urges the court to dismiss in its entirety the application dated 30th November 2022.
28. I have carefully considered the two (2) applications, the affidavit on record as well as written submissions by both parties. In determining the two (2) applications this court is mindful that it should not delve into matters issues which ought to be determined during the hearing of the main appeal. All the court is required to determine at this stage is the merit or otherwise of the two (2) applications.
29. The issues that fall for determination from the two (2) applications are:-
- (i) Whether the minor and the Applicant should continue residing at Apartment No. Dx [Particulars Withhed] Gardens situated on LR No. xxxx/xxxx pending hearing and determination of the appeal.
 - (ii) Whether the Respondent should provide reasonable maintenance pending hearing and determination of appeal
 - (iii) Whether the interim orders issued on 30th November 2022 should be set aside and or vacated.
 - (iv) Whether an injunction should issue against the Applicant from interfering, trespassing, evicting and harassing the tenants residing in Apartment No. Dx [Particulars Withhed] Gardens situated on LR No. xxxx/xxxx.

Whether the Appellant and the minor should reside at Apartment No. Dx [Particulars Withhed] Gardens situated on LR No. xxxx/xxxx

30. The Appellant contends that [Particulars Withhed] Apartment was the matrimonial home and averred that she and the minor were in fact living in the said apartment. She prayed that they be allowed to be continue residing there pending the determination of the main appeal.
31. On his part the Respondent categorically denied that the Appellant and the minor reside at [Particulars Withhed] Apartment. He states that they infact reside at [Particulars Withhed] Apartment in Riverside.
32. The Respondent insists that the [Particulars Withhed] Apartment is owned jointly by himself and his mother and that the same has been rented out to a tenant which claims the Appellant denies.
33. The question of who owns and/or occupies the [Particulars Withhed] Apartment cannot be determined at this interlocutory stage on the basis of Affidavit evidence.
34. I note that vide a ruling delivered on 11th October 2019 Hon. Lady Justice Ongeri directed that the Appellant and the minor remain in the suit property (being the [Particulars Withhed] Apartment). However it is important to note that the orders of 11th October 2019 were Interim Orders which were only to remain in force pending hearing and determination of Nairobi Children’s Case No. 112 of 2019.
35. That Children Case was fully heard and judgement was delivered on 17th November 2022. In the said judgement the learned Chief Magistrate directed that each party was to cater for shelter, food and clothing when the minor was in their custody. The Interim Orders made on 11th October



2019 therefore lapsed and were set aside by the judgement of 17th November 2022. Thus the Appellant cannot claim under the authority of a court order, the right to remain in the [Particulars Withheld] Apartment. Annexed to the Respondents supporting Affidavit dated 30th November 2022 is a copy of a Tenancy Agreement (Annexure 'ANN2') showing that the Appellant and the minor have resided at [Particulars Withheld] Court since 28th February 2020.

36. Additionally, I find that the Appellant was not entirely truthful in the averments made in her supporting Affidavit dated 22nd November 2022 in which she stated that she was in occupation of the [Particulars Withheld] Apartment. In her Replying Affidavit dated 9th December 2022 at Clause 10 and 11 the Appellant admitted that sometime in March 2022 she was evicted from the [Particulars Withheld] Apartment and was provided with alternative accommodation at [Particulars Withheld] Court Apartment. Annexed to the Respondents supporting Affidavit dated 30th November 2022 is a copy of a Tenancy Agreement (Annexure 'ANN2') showing that the Appellant and the minor have resided at [Particulars Withheld] Court since 28th February 2020.
37. Therefore, the Appellant prayer to be allowed to remain in occupation of the [Particulars Withheld] Apartment was deliberately misleading as in November 2022 when the application was made the Appellant and minor were not in fact residing in that apartment.
38. The Appellant cannot seek orders to remain in occupation of an Apartment which she does not in fact occupy. The Appellant is clearly using this court process as a ploy to force her way back into the [Particulars Withheld] Apartment. The Appellant appears mistakenly to believe that she can use the current proceedings to stake her claim to what she alleges is matrimonial process. This is a Children's Case not a Matrimonial Cause. The proper procedure would be for the Appellant to file a separate suit for division of matrimonial property.
39. The Children's Court directed that each party cater for their own accommodation. This order has not been reviewed and /or set aside I believe it will be one of the issues to be determined during the main appeal. I therefore decline to grant orders allowing the Appellant and minor to occupy the [Particulars Withheld] Apartment pending hearing and determination of the appeal.
40. Further it is my view that the tenant in occupation of said Apartment is entitled to peaceful possession and occupation. I therefore issue an injunction restraining the Appellant her agents and/or assigns from interfering in any way with the tenant residing in the said [Particulars Withheld] Apartment.

Whether the Respondent should provide reasonable maintenance for the child.

41. The Appellant is aggrieved by the failure of the trial Magistrate to make orders directing the Respondent to pay a specific sum as maintenance. The orders of the Children's Court were very clear regarding what each parent was to provide for the child. The Respondent was required to meet the cost for school fees and all school related expenses for the minor at her current school or any other school mutually agreed upon by the parties.
42. On the question of maintenance I see no reason to make interim orders on maintenance. The question of whether or not the trial court erred in failing to direct the Respondent to make a financial contribution towards the Child's maintenance is an issue to be canvassed during the main appeal.
43. On the question of school fees the Respondent has suggested that the child be taken to live with him and his new family in Nakuru and states that he is ready to enroll the minor at [Particulars Withheld] School in Nakuru.



44. The court cannot lose sight of the fact that this is a matter which concerns the welfare of a minor. In that regard the court is obliged to give priority to the “best interests” of the child.
45. *The Constitution* of Kenya 2010 provides at Article 53 (2) as follows:-
- “ (2) A child’s best interest are of paramount importance in every matter concerning the child.” [own emphasis]
46. Likewise Section 8(1) of the Children’s Act of 2022 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]
47. The child is currently schooling at [Particulars Withhed]School. The trial court directed the Respondent to cater for her fees and all school related expenses at her current school. That order has not been set aside or reviewed. It remains valid and enforceable.
48. The subject child in this matter is a human being. She has thoughts feelings and desires. A child is not a sack of potatoes to be moved around at the whims of her parents. It is not in the best interest of the child to remove her from her current school where she has settled and has made friends to another school in a different county. In any event actual custody of the child was award to the Appellant who reside in Nairobi not in Nakuru. It is not in the best interest of the child to have her relocate to Nakuru away from the custodial parent.

Conclusion

49. Based on the foregoing this court now makes the following orders:-
- (i) The Notice of Motion dated 22nd November 2022 is hereby dismissed in its entirety.
- (ii) The Notice of Motion dated 30th November 2022 is allowed in the following terms:-
- a. The interim orders issued by this court on 30th November 2022 are hereby set aside.
- b. The Appellant is hereby restrained from interfering, trespassing, evicting and/or harassing the tenants residing in the Apartment No. Dx [Particulars Withhed] Gardens situated on LR No. xxxxx/xxx pending hearing and determination of the main appeal.
- (iii) This being a family matter each side will bear its own costs.

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

MAUREEN A. ODERO

JUDGE

