



REPUBLIC OF KENYA



**KENYA LAW**  
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**JKP v KSC (Civil Appeal E059 of 2022)  
[2023] KEHC 22100 (KLR) (Family) (5 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 22100 (KLR)

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

**FAMILY**

**CIVIL APPEAL E059 OF 2022**

**EKO OGOLA, J**

**JULY 5, 2023**

**BETWEEN**

**JKP ..... APPELLANT**

**AND**

**KSC ..... RESPONDENT**

**RULING**

1. What is before this Court are four Applications, filed on several dates by the Respondent.
2. The first Application is dated May 2, 2023 (hereinafter, 'first application'). The respondent prays for the following: -
  - a. This honorable Court be pleased to grant the Respondent leave to appeal to the Court of Appeal against the ruling of Honorable Mr Justice Eric Ogola delivered on April 18, 2023, allowing the Appellant's application dated September 28, 2022 seeking to introduce new and fresh evidence in Civil Appeal No E059 of 2022-JKP vs Kabir SC.
  - b. The cost and incidental to this application be provided for.
3. The second Application is dated May 5, 2023 (hereinafter, 'second application'). The Respondent prays for the following:-
  - a. Spent;
  - b. This honorable Court be pleased to order a stay of proceedings in this appeal pending the hearing and determination of the Respondent's intended appeal from the ruling and order delivered by this court on April 18, 2023;



- c. The cost of and incidental to this Application be provided for.
4. The third Application is dated June 4, 2023 (hereinafter, 'third application'). The Respondent prays for the following:-
  - a. Spent;
  - b. An order be issued to JKP and KSC the parents of RSSC to produce RSSC before this Honorable Court on a date that will be issued by this court for purposes of this Court ascertaining the feelings and wishes of the minor RSSC in respect of his current and future custody arrangements.
  - c. The costs of and incidental to this Application be provided for.
5. The fourth Application is dated June 4, 2023 (hereinafter, 'fourth Application'). The Respondent prays for the following:-
  - a. Spent;
  - b. This Honorable Court be pleased to issue an order allowing the Respondent KSC to travel with the minors RSSC and PSKC to Canada on July 14, 2023 and return to Kenya on August 6, 2023.
  - c. This Honorable Court be pleased to order the Appellant JKP to release to KSC, the Respondent, the following passports belonging to RSSC and PSKC:
    - i. RSSC British Passport No 1206XXXX
    - ii. RSSC Australian Passport No PA49XXXXXX
    - iii. PSKC British Passport No 5563XXXXXX
    - iv. PSKC Australian Passport No PA694XXXX
  - d. The Court be pleased to issue an order that on the minors' return from Canada, the Respondent deposits the Minor's passports with the Deputy Registrar of this honorable Court.
  - e. The cost of and incidental to this Application be provided for.
6. All the Applications were based on the grounds set forth therein, the respondent's Supporting Affidavit and Supplementary Affidavit dated June 28, 2023.
7. On the first application to grant leave to appeal the Ruling of this court dated April 18, 2023, the respondent averred that he is aggrieved with part of the said Ruling that allowed the Appellant to adduce additional evidence that was not produced during trial. He further stated that no prejudice will be occasioned on the Appellant if leave sought is granted and further to this, the leave sought will ensure the respondent's constitutional right to access justice.
8. On the second Application for stay of proceedings pending the determination of the Appeal, the respondent averred that he has lodged a Notice of Appeal dated April 28, 2023 and he has already commenced the process of preparing the Record of Appeal. He stated that unless stay is granted, he shall suffer substantial loss, and his appeal shall be rendered nugatory if this court proceeds to hear the appeal based on the additional evidence that is already in the court's record. According to the respondent, the Appellant has, notwithstanding directions has not been given on this appeal, filled her



written submissions and introduced the additional evidence in a supplementary record of appeal dated April 24, 2023 and unless proceedings are stayed, the respondent's appeal will be rendered nugatory. The application has been without unreasonable delay.

9. The third Application to produce the minor RSSC before this court, the respondent stated that by a judgment delivered on June 10, 2022, the Children's Court made orders on the custody of the minors RSSC and PSKC. The Orders stated that the minors would spend one week during every month of the school term in the custody of the respondent as well as alternate weekends during the school term. According to the respondent, RSSC has expressed his displeasure and distress at the custody arrangements. His displeasure has recently resulted in standoffs when the respondent arrives to drop them to the Appellant's residence. The respondent deposed that RSSC's recent behavior, outbursts, and obstinate refusal to be dropped off at the Appellant's residence is what has necessitated this Application.
10. In the fourth Application for travel orders, the respondent avers that he is desirous to travelling with the minors during their school summer holidays. The reason for the travel is to visit the minors' paternal aunt, the respondent's sister, PKV who is ailing from cancer. According to the respondent, the Appellant is not opposed to the respondent travelling with the minors to Canada. However, the Appellant has made her formal consent conditional on the respondent conceding to her appeal and allowing the minor children to forever leave the jurisdiction of this court thereby severing the close bond between a father and his children.
11. The Appellant opposed the four Applications vide a Replying Affidavit dated June 15, 2023. On the Application for Leave to Appeal, the Appellant deposed that Appealing on an interlocutory matter will occasion a delay in hearing the substantive appeal. She deposed that this would not be in the interest of the children.
12. On the Application for stay of proceeding pending the determination of the Appeal, she averred that it is in the Court's discretion to issue the said order. However, one must demonstrate that substantial loss may result and, in this case, the best interest of the children must be taken into consideration. She stated that it is ironic that whilst the respondent wishes to stay the proceedings, he also prays for orders to travel with the minor. His actions militate against the grant of the orders sought.
13. On the Application to produce the minor RSSC to court, the Appellant contended that the respondent has been on a spree to influence the minor on the custody arrangement. Further that the minor is of tender years; and has been brainwashed by the respondent.
14. On the Application for the respondent to travel with the minors, the Appellant deposed that the PKSC's British Passport expires on 14<sup>th</sup> August 2023 and her Australian passport expired on May 17, 2023. Hence, by August 13, 2023 the minor will not have a valid travel document.
15. On record and in support of the Appellant's Affidavit opposing the respondent's Applications, is a Further Affidavit sworn on June 15, 2023 by one KSB, the Appellant's neighbor in Nairobi. She deposed that in most occasions she hears the children laughing as they play and she has never heard the Appellant raise her voice in an angry manner towards the children. She deposed that in her opinion, the appellant is an amazing mother to the minors.
16. She deposed that on several occasions when the respondent returns the minors back to the Appellant's residents, he would leave them at the stairs. These acts have caused the minors to have outbursts. They cry and say that they would want more visitation rights with the respondent. The respondent has been recording these outbursts. However, Ms B deposed that after these outbursts, and when the children,



get in the house, they become calm and fine. According to Ms. Barnes, it is up to the parties to avoid causing distress to the children.

17. The parties canvassed these Applications by way of written submissions which were highlighted in court. I have read and considered them.

### **Determination**

18. I have considered the Applications, the Affidavits and annexures therein, and the submissions by counsel and the authorities attached.

### **The first and second application**

19. The first Application is premised on Section 75(1) of the *Civil Procedure Act* and Order 43 Rule 1(2) of the *Civil Procedure Rules*. The respondent is aggrieved with part of this Court's Ruling dated April 18, 2023 that allowed the Appellant to adduce new evidence on appeal.

20. It must be noted that this Appeal was instituted by a memorandum of Appeal dated June 24, 2022. It has been well over one year and no steps have been taken to prosecute this Appeal. The parties have been filing one interlocutory application after another.

21. The respondent in the first and second Applications prays for leave to Appeal and stay of these proceedings pending an Appeal in the Court of Appeal. Counsel for the Appellant referred the Court to the case of *SAM v SOA* (Family Appeal 12 of 2022) [2022] KEHC 3019 (KLR) (20 May 2022) (Ruling) where the Court held as follows:-

“However, in matters concerning children, it is always advisable for parties to pursue a substantive hearing of the main appeal to avoid wasting time on interlocutory appeals. It is during the appeal or substantial hearing before the trial court that the appellant/applicant will prove that he has not failed in his parental responsibility to the baby.”

22. In this case, the Court in its Ruling allowed the Appellant to produce her UK Skilled worker Visa and a job offer. The UK Visa had not yet been processed by the time the trial was concluded. What is being Appealed is whether the Appellant should relocate to the UK with the minors. This is an issue that can be ventilated during the hearing of the substantive appeal and depending on the judgment of the Court on the Appeal, the parties will be at liberty to lodge an Appeal to the Court of Appeal.

23. This Court cannot and will not ignore the fact that this is a matter which concerns the welfare of minors. Article 53(2) of the *Constitution* provides that the best interest of the children is of paramount importance in every matter concerning the child. Hence, the best interest of the minors is for the substantive Appeal to be expeditiously determined as stipulated in Section 95(3) of the *Children's Act, 2022*.

“In any proceedings in which an issue arises as to the upbringing of a child, the Court shall have regard to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child.”

24. Granting leave to appeal an interlocutory application and further stay these proceedings will be delaying and impeding justice. The Appellant and the Respondent might not be prejudiced but the delay will cause substantial loss to the minors.

25. From the foregoing, I dismiss the Applications dated May 2, 2023 and May 5, 2023 with no orders as to costs.



### Third Application

26. The third application was for the production of the minor in court so he could vent his concerns about the custody arrangement. The custody arrangement as per the judgment of the trial Court dated June 10, 2022 is that the parties will both have legal custody of the minors; actual custody of the minors will vest with the Appellant; the respondent is granted access on alternative weekends and the last week of the month during the school term; the parties will have 50:50 actual custody of the minors during the school's mid-terms and during school holidays; actual custody on alternative basis during public holidays and special days like birthdays.
27. Grounds 1 and 2 of the Memorandum of Appeal is on the custody order issued by the trial court in its judgment. Section 95(2)(a) of the Children's Act provides that:-
- “Where the Court is considering whether or not to make an order under subsection (1), it shall have particular regard to
- (a) the ascertainable feelings and wishes of the child concerned having regard to the child's age and understanding;”
28. RSSC was born on August 4, 2015. He is 8 years old. At this age, he is capable of articulating and expressing his feelings about the custody arrangements. Therefore, the minor RSSC is to be produced in Court during the hearing of the Appeal to express himself solely on the issue of custody.
29. I hereby allow the Application dated June 4, 2023 with no orders as to costs.

### Fourth Application

30. The fourth Application is for orders to allow the respondent to travel with the children to Canada. The custody arrangement as per the judgment of the trial Court is that the parties have 50:50 actual custody of the minors during the school's mid-terms and during school holidays.
31. The respondent states that the children are to travel on July 14, 2023 and return to Kenya on August 6, 2023. This will be during the school holidays and they would return before the holidays end. The Appellant's contention is that the minor, PSKC's British passport expires on August 14, 2023 while her Australian passport expired on 17<sup>th</sup> May of 2023. The British passports will still be valid by the time the minors return to Kenya.
32. Travelling is a fact of modern living and it will not be in the best interest of the children herein to be denied this right to travel with their parents because the parents cannot agree on anything. Moreover, it is in the best interest of the minors to visit and interact with their extended family.
33. On prayer (d) the respondent prayed that the minors' passport be deposited with the Deputy Registrar of this Court. I have not been persuaded to issue this order. If either of the parents would like to travel with the minors, they are at liberty to do so with the consent of the other parent. If the parties are unable to agree, they can always approach the court.
34. The upshot is that I grant prayer (b) and (c) of the Application dated 4<sup>th</sup> June 2023 as follows:-
- a. That the respondent is hereby allowed to travel with the minors, RSSC and PSKC to Canada on July 14, 2023 to August 6, 2023.
- b. That the Appellant is hereby ordered to release the minors' passports to the respondent.



- c. That the respondent shall facilitate the registration of these orders in the Family Court in Ontario, Canada.
- d. That the registration shall include the date of travel, being July 14, 2023, the date of arrival in Canada, and the date of departure from Ontario, Canada, being on or before August 6, 2023.
- e. That the said order shall be enforceable against the respondent in the event that the minors are not returned back to Kenya on or before August 6, 2023.
- f. No orders as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF JULY 2023.**

**E.K. OGOLA**

**JUDGE**

**In the presence of:**

Mr. Muite, Mr. Wandabwa, Mr. Malenya for the Appellant

Mr. Abbas, Ms. Amayo for the Respondent

Gisiele Muthoni Court Assistant

