



REPUBLIC OF KENYA



KENYA LAW
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**JIO v AJW (Family Appeal E148 of 2021)
[2023] KEHC 19584 (KLR) (Family) (4 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19584 (KLR)

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

FAMILY

FAMILY APPEAL E148 OF 2021

EKO OGOLA, J

JULY 4, 2023

BETWEEN

JIO APPELLANT

AND

AJW RESPONDENT

RULING

1. Before the court for determination is the Chamber Summons application dated February 28, 2022 brought vide Certificate of Urgency in which the Applicant/Respondent herein AJW seeks the following Orders:
 1. Spent
 2. That pending the hearing and determination of this application, this honorable court be pleased to grant the Respondent an Order for access of the subject minors on every weekend from Friday 5:00PM to Sunday 5:00PM
 3. That pending the hearing and determination of this application, this honorable court be pleased to set aside its order issued on December 21, 2021 and refer this matter back to the trial court for hearing and determination of the main suit
 4. That in the alternative to No 3 above this honorable court be pleased to grant the appellant interim custody of the subject children access to the Respondent on every weekend from Friday 5:00PM to Sunday 5:00PM pending the hearing and determination of Milimani children's case No. E1372 of 2021.
 5. That this Honorable court be pleased to make such further orders as it may deem fit and just to grant



6. That the costs of this application be borne by the Appellant
2. The application is premised upon Article 53(2) of the Constitution and Sections 101 of the Children's Act 2001. It is based on the grounds set out therein and supported by the Affidavit of even date sworn by the Applicant/Respondent.
3. The Applicant's case is that there is matter in the Milimani Children's Court, case number E1372 of 2021 where the Appellant/Respondent was on November 24, 2021 ordered to return custody of the minors involved to the Applicant/Respondent. The lower court also ordered that the Respondent would have access to the minors from Friday 4:00pm to Sunday 4:00pm pending the hearing and determination of an Application of Notice to Show Cause.
4. The Applicant deposes that the Respondent/Appellant was served with the said Order; that the Respondent/Appellant took the minors on November 26, 2021 and ran away with the children to Mombasa in an attempt to frustrate the implementation of the Order.
5. The Applicant then made an Application dated December 13, 2021 whereby the court made interim Orders that "pending the hearing and determination of the application and the Notice to show Cause, the minors be returned to the custody of the Applicant/Respondent. The Respondent/Appellant has not yet complied with the Orders.
6. According to the Applicant, the Appellant/Respondent then filed an Appeal through misrepresentation of facts and material non-disclosure seeking for orders for stay of execution of the orders of the trial court pending the hearing of the appeal and the substantive suit at the trial court.
7. The Applicant/Respondent deposes that the Respondent/Appellant has been brainwashing the minors and turning them against the Applicant and in the few times the Applicant has managed to speak with the children through phones, the minors confided in her that they had been facing problems with the Respondent. The Applicant further deposes that the children confided in her that they were under strict rules not to speak to the Applicant; that the Applicant was using court to take the children away from the respondent and sell them off; that the respondent does not take care of the children and punishes them when the children secretly contact the Applicant and that the respondent denies the children food.
8. The Respondent did not file a response. None of the parties filed submissions.

Determination

9. I have considered the application. The Applicant is seeking to set aside the Orders of December 21, 2021 which according to her granted Stay of Execution of the Orders of the Lower Court. The Order of December 21, 2021 arose from the Respondent's Application dated December 20, 2021 where the Respondent sought for Stay of Execution of the Orders of the Lower Court. The Orders of December 21, 2021 read as follows: -
 - a. "The Notice of Motion dated December 20, 2021 be and is hereby certified urgent
 - b. Let it be served upon the Respondent with seven days of this date
 - c. The Respondent shall have 21 days from the date of service to file and serve a response
 - d. Hon Deputy Registrar Family Division to expedite the typing of the lower court record and avail it before the hearing date
 - e. Inter-partes hearing shall be on February 3, 2022



f. Meanwhile prayer (2) in the Notice of Motion is granted on interim basis.

Prayer 2 of the motion was that this application is certified urgent and service thereof be dispensed with in the first instance.”

10. It is clear from the Order that no stay of execution was granted by the High Court. The Application for Stay is yet to be heard. The court did not even give interim Orders for Stay of execution. Therefore, the Prayer to set aside the Order of December 21, 2021 cannot be granted under such circumstances.
11. The Applicant also sought to be given access of the minor children every weekend. It is clear from the Orders of the lower court that the Respondent was to have access rights to the minors over the weekends while the Applicant was to have custody of the children pending the determination of the Lower Court case. The Respondent has however taken the children away and hidden them from the Applicant. The respondent was on DEcember 15, 2021 ordered to return the minors to the custody of the Applicant pending the hearing and determination of the Notice to show cause in the lower court. That was the reason why the Respondent sought stay of execution.
12. In consideration that the Order for Stay of execution has not been granted yet, nothing stops the Respondent from obeying the Orders of the Lower Court.
13. From the material provided in court, the respondent appears to be in a quest to disobey court orders as he has not complied with any orders of the lower court from returning custody of the children to the Applicant, to not changing the children’s school and finally to the second Order requiring the respondent to return the children to the Applicant.
14. The Applicant is the mother to the children in question and in that regard she is entitled to access her children. The first order of the lower court as issued by Hon C. Oluoch on November 24, 2021 was that “the Plaintiff/applicant shall have the access of the children every weekend from Friday 4:00pm to Sunday 4:00pm with effect from November 26, 2021 pending the hearing and determination of the application.” The second order of November 15, 2021 required the Respondent herein to return the minors to the custody of the Applicant pending the hearing of an Application and a Notice to Show Cause.
15. The Applicant stated that she is even willing to compromise and see the children over the weekend but the Respondent has completely denied the Applicant access to the children.
16. In *KMM vs. JIL* (2016) eKLR the Court had the following to say: -

“..... At the international level, the legal instruments on rights of the child, the International Convention on Rights of the Child (UNCRC) and the African Charter on Rights and Welfare of the Child (ACRWC) focus on child’s best interests, welfare and considerations as paramount. Secondly, both parents of the child shall contact, access and interact with the child irrespective of whether parents are married or not or if they reside in different states for purposes of the child’s upbringing and development. The member states are obligated to facilitate an expeditious process for the parent to contact access and interact with the child”
17. Access is a right granted to parents in the best interest of the minors. In this instant case, the Respondent has been denying the Applicant access to the minors without any reasons at all. The Respondent has not even responded to the current application.
18. This court shall embrace the principle of the best interest of the children and Order as follows: -



- i. The Respondent herein JIO is Ordered to comply with the Orders of the Lower Court and return the custody of the minor children to the Applicant AJW
- ii. The Respondent to have access of the minors over the weekend from Friday 4:00pm to Sunday 4:00pm as per the Orders of the lower court
- iii. These orders shall be extracted and served upon the Respondent and failure to comply shall constitute contempt of court, this being in the best interest of the children
- iv. Costs shall be in the Cause

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY 2023.

E.K. OGOLA

JUDGE

Mr. Noni for the Respondent

N/A for the Appellant

Ms. Gisiele Court Assistant

