



**SD v CTTE (Civil Appeal E009 of 2022)
[2024] KEHC 12367 (KLR) (Family) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12367 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E009 OF 2022
HK CHEMITEI, J
OCTOBER 17, 2024**

BETWEEN

SD APPLICANT

AND

CTTE RESPONDENT

RULING

1. In her Notice of Motion dated 18th February 2022 the Applicant prays for the following orders:-
 - (a) Spent
 - (b) That pending the hearing and determination of the appeal this court be pleased to stay part of the order made on the 19th December 2021 by Hon H M Mbatia (SRM) to the extent that both parties shall have joint legal custody of the child when they are in Kenya and the child is in Kenya.
 - (c) That pending the hearing and the determination of the appeal this court stays the trial courts orders made on 28th February 2022.
 - (d) That pending the hearing and the determination of this appeal the proceedings at the trial court be stayed, namely Children’s Case no 1553 of 2021.
 - (e) That this court does find that the trial court has no jurisdiction to determine the case before it.
 - (f) That the status quo ante be restore immediately prior to the grant of the order issued on the 9th December 2021 and on 28th January 2022 by the trial court.
2. The application is based on the grounds thereof and the Applicant’s sworn affidavit dated the same date.



3. The application has been opposed by the Respondent vide his replying affidavit dated 22nd March 2022 and the grounds of opposition dated the same date.
4. The parties have also filed written submissions pursuant to the directives from this court.
5. The court has perused the same as well as the cited numerous authorities.
6. The issues before this court are clear and straight forward as can be discerned from the pleadings. The parties are the biological parents to a minor ADE. The Applicant is an American citizen and the Respondent has British, New Zealand as well as a South African passport.
7. Both the minor and the Applicant stayed in Kenya and it would appear that they stayed here courtesy of a working permit.
8. The said permit expired on 23rd December 2021 and she has returned to America together with the minor.
9. Prior to this they moved to the trial court which gave” joint legal custody of the minor when they are in Kenya and the minor is in Kenya. Actual custody shall remain with the minor defendant/mother.”
10. The Applicant was aggrieved by the said orders hence this appeal and the application.
11. It is also worthy to note that the parties have another suit over the said minor in America namely Cause No 2111-FC01069 at St Charles County State of Missouri USA. The same was instituted by the Applicant.
12. It was therefore her case that the Respondent was using the case in Kenya to extract further information and documentation so as to strengthen the case in America.
13. In his grounds of opposition, the Respondent argued that the Applicant was wrong in invoking the jurisdiction of this court while on the other hand denying it.
14. That they both have joint legal custody of the child under the Kenyan as well as International law and that the existence of another suit outside Kenya did not preclude this suit.
15. In his lengthy replying affidavit, the Respondent has concentrated his efforts on the history of his relationship with the Applicant and the minor, the efforts he has undertaken to secure the minor under his custody and the financial implication he has gone through.
16. The court has perused the same and in my quick view the said voluminous affidavit and especially the annexures will be relevant in the main cause.
17. Suffice to state that for now I think the issue revolves around the provisions of Order 42 rule 4 of the Civil procedure rules and all the enabling provisions of the law. In a nutshell, will the pending appeal be rendered nugatory should the orders not be granted? Shall any of the parties suffer prejudice should the stay orders not grante?
18. I think in view of the fact that the Applicant’s work permit to work in Kenya expired and there was no evidence of its renewal and or any future plans to travel to Kenya, I do not see any urgency or need to grant the stay orders.
19. The above reasoning is based on the fact that this Court cannot issue orders in vain. She is outside this Court’s jurisdiction and the same applies to the Respondent. They have not denied that they have another case as mentioned above in Missouri, USA. It concerns the two of them as well as the minor.



Probably and since they both access the said Court and the child is an American citizen, for now let them litigate there.

20. Nothing at any rate precludes the trial Court from proceeding with the matter pending the determination of the appeal.
21. There is nothing to show that either of the parties shall suffer any prejudice and specifically the minor if the application is not allowed.
22. Consequently, the application is declined. The issue of jurisdiction raised by the Respondent can well be taken at the trial court. For now, this court is satisfied that the grounds provided under Order 42 of the Civil Procedure rules of issuing stay orders pending appeal have not been met by the Applicant.
23. The application is disallowed with no order as to costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 17TH DAY OF OCTOBER 2024.

H K CHEMITEI

JUDGE

