



PCL (Suing as Father and Next Friend of HCL, ICL, ZSL & NAL All Minors) v JCA (Family Appeal E007 of 2024) [2024] KEHC 14457 (KLR) (19 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14457 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
FAMILY APPEAL E007 OF 2024
HI ONG'UDI, J
NOVEMBER 19, 2024**

BETWEEN

PCL (SUING AS FATHER AND NEXT FRIEND OF HCL, ICL, ZSL & NAL ALL MINORS) APPLICANT

AND

JCA RESPONDENT

RULING

1. This ruling is in respect of the preliminary objection dated 17th May 2024. However, this court shall also determine the chamber summons dated 3rd April, 2024 considering this is a children’s matter and unnecessary delays are uncalled for.
2. In the chamber summons dated 3rd April, 2024 the appellant /applicant pray for the following orders;
 - i.
 - ii Spent.
 - iii. Pending the hearing and determination of this application, this honourable Court be pleased to allow custody and maintenance of the minors herein to be carried out in terms of the orders dated 31st October, 2022 issued in Nakuru Children’s Case No. E077 of 2022 Jemima Chepchumba Aremule -
 - iv. That this Court be pleased to stay execution of the Orders dated 21st March, 2024 pending hearing and determination of High Court Family Appeal No. E007 of 2024.
 - v. That costs of this application be provided for.
3. The said application is based on the grounds thereof and the affidavit of the appellant/applicant sworn on even date. He deposed that on 20th February 2022 the respondent filed Nakuru Children



Case No. E077 of 2022 Jemima Chepchumba Aremule v Paul Cheptai Lomeri where she sought for maintenance. That the appellant/applicant equally filed a counterclaim for legal and actual custody. The said suit was finalized on 31st October, 2022 in the appellant's favour and he took up his roles under the decree.

4. He further deponed that on 3rd April 2023 the respondent filed an application for setting aside the judgment of 31st October 2022 and reopening of the case for hearing. That on 21st March, 2024, the trial Magistrate issued a ruling setting aside the said judgment and the appellant being aggrieved by the said ruling filed this appeal. He stated that the appeal was arguable with a high probability of success and unless stay of execution orders were issued the appeal would be rendered nugatory.
5. The respondent in response filed a replying affidavit sworn on 17th April 2023. She averred that the appellant/applicant's application for stay of execution was an abuse of the court process. Further, that the same was meant to derail the course of justice and infringe on the minor's welfare and best interests. She added that in the application that led to the ruling being appealed, she had sought for the court to hear her and arrive at a just determination in the best interests of the minors.
6. The appellant filed a further affidavit on 23rd July 2024 in which he deponed that the replying affidavit by the respondent was full of false statements, unsubstantiated and malicious allegations meant to disparage him, his family, the school attended by the minors and his legal team.
7. The respondent filed a supplementary affidavit on 7th May 2024 in response to the appellant's further affidavit. She reiterated the contents of her replying affidavit.
8. In the Preliminary Objection the appellant/applicant prays for orders that;
 - i. That the said affidavit particularly at paragraphs 12, 18 and 24 thereof violate the protections afforded under Articles 28, 31, 36 and 47 of *the Constitution* of Kenya, 2010 and Sections 26, 29, 30, 31, 34, 36, 39, 40, 44, 45, of the Data Protection *Act, No. 24 of 2019*.
 - ii. That the annexures to the affidavit particularly JA 3B, JA 3C1, JA 3C2, JA 3C3, JA 3C4, JA 3C5, JA 3C6, JA 3C7 and JA 3A violate the protections afforded under Provisions of Articles 28, 31, 36 and 47 of *the Constitution* of Kenya, 2010 and Sections 26, 29, 30, 31, 34, 36, 39, 40, 44, 45, of the Data Protection *Act, No. 24 of 2019*.
 - iii. That the data breach is actionable under provisions of Section 56 of the Data Protection act which allows the Appellant to lodge a complaint with the Data Commissioner for reparations.
 - iv. That the documents marked and attached to the Application offend provisions of Rule 9 of the Oaths and Statutory Declarations Rules which requires annexures to be sealed and stamped. The said rule stipulates as follows: "All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and Shall be marked with the serial letters of identification."
9. The preliminary objection was canvassed by way of written submissions.

Appellant/applicant's submissions

10. These were filed by Sabaya & Associates Company Advocates on 1st August, 2024. Counsel identified five issues for determination.
11. On whether the objection is a true preliminary objection, counsel cited the celebrated case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Lts [1969] EA 696 and submitted that there was no evidence that consent of the concerned parties was sought before processing of their data. Further, that no accompanying certificate of electronic evidence as required in law and the



exhibits annexed in the respondent's supplementary affidavit had not been sealed under the seal of a commissioner for oaths.

12. To buttress the said position counsel placed reliance on several decisions among them being *Racheal Njoki Kabara v Gideon Migiro Nyambati Kisii Civil Case No. 12 of 2017* where the court held as follows;

“20. It is clear that the screenshots were taken by some other person other than the plaintiff and later sent to the plaintiff whereupon she downloaded and saved the image. Through her device she was able to download, save the contents of the WhatsApp message on her computer and print out the document. It was thus necessary to file a certificate pertaining to the person who took the screenshot of the WhatsApp messages describing the particulars of any device involved in the production of the image. “22. In the end therefore and for the reasons stated, the plaintiff has not complied with the provisions of section 65(a) as read with section 106B of the *Evidence Act*. The objection to the production of the print out of WhatsApp messages as evidence in these proceedings is upheld”

13. The second issue is whether the documents offend constitution and statutory provisions. Counsel submitted in the affirmative and cited Articles 28, 31, 36 and 47 and sections 26, 29, 30, 31, 34 and 36 of the Data Protection *Act No. 24 of 2019* and the decisions in Nairobi Constitutional and Human Rights Division Petition No. E406 of 2020 RC v KKR [2021] eKLR.
14. The third issue is whether illegally obtained evidence is admissible. Counsel while relying on the case of RC v KKR [2021] eKLR submitted that admission of illegally obtained evidence would taint the proceedings and amount to a violation of the applicant's right to a fair trial, especially as the content of the messages are unknown.
15. On whether the offending documents ought to be expunged from record, counsel submitted that admission of the documents referred to herein would be detrimental to the administration of justice since private individuals would have been condemned unheard. She placed reliance on the decision in Nairobi CHR Petition No. E406 of 2020 (supra).
16. Lastly on costs, she urged the court to order that each party bear its own costs.

Respondent's submissions

17. These are dated 28th August 2024 where the respondent submitted that the annexures sought to be struck out herein were necessary for her defence in the claims made against her by the appellant/ applicant. Further, that the applicant in his submissions had not demonstrated the damage he would suffer from the annexures since the same had not been broadcast to other parties other than being filed in court.
18. She further submitted that this court, being an appeal court on a children's matter lacked the jurisdiction to determine a constitutional matter touching on breaches of the bill of rights raised on a preliminary objection. That the preliminary objection herein was not a petition as envisaged under part II of the Mutunga rules.
19. It was also her submission that failure to mark and seal the annexures in her supplementary affidavit was a technical oversight on her part and she should not be penalized. She placed reliance on Article



159 of *the constitution* and the decision in *Anchor Lid v Sport Kenya* [2017] eKLR Ngugi J (as he then was), held as follows;

“procedural technicalities” as follows; “Combining the meaning of these words “procedural technicalities” may be described as those that are more concerned with modes of proceedings rather than substantive rights under the law. This may not be an all encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules that hinder the achievement of substantial justice”

20. In conclusion, she urged the court to dismiss the preliminary objection and proceed to determine the appeal on its merit in the best interest of the minors.

Analysis and determination

21. I have considered the application, the preliminary objection herein and the submissions by both parties. I will first deal with the preliminary objection since it raises the issue of admissibility of the documents attached to the respondent’s supplementary affidavit dated 7th May 2024. The issue for determination here is whether the Notice of Preliminary Objection dated 17th May 2024 is merited.

22. It is trite law that for a preliminary objection to be valid; firstly, it must raise a pure point of law. Secondly, the objection is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. Lastly, an objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696, Law JA stated as follows:

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

23. The Court also takes into account that a preliminary objection must stem from the pleadings and raise a pure point of law, and should not deal with disputed facts nor derive its foundation from factual information. See the case of *Oraro v Mbaja* [2005] 1KLR 141, where it was held that: -

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

24. In the instant preliminary objection grounds 1,2,3 relate to the nature of documents annexed in the respondent’s supplementary affidavit and how the same violates the applicant’s rights. The respondent has argued that such claims ought to be brought in a petition and not a preliminary objection.

25. This court shares the same sentiments as those in the case of *Oraro vs. Mbaja* (supra). That is, a preliminary objection cannot be raised on disputed facts and the same should only be raised on pure points of law. It is my view that the said grounds do not raise pure points of law and moreover what has been raised therein as rightly put by the respondent, cannot form part of a preliminary objection.

26. On the other hand, ground 4 states that the documents marked and attached to the application offend provisions of Rule 9 of the Oaths and Statutory Declarations Rules. In applying the principles laid out



in *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (Supra)*, it is my view that the said ground raises points of law.

27. I have perused the annexures being challenged and I opine that the same have no connection to what is being sought in the Appeal. For the said reasons, I uphold the Preliminary Objection raised and order that the offending annexures discussed above be expunged from the supplementary affidavit sworn by respondent on 7th February, 2024. Further, the respondent is warned from filing such documents in future without leave of the court.
28. I now move to the chamber summons seeking stay of execution of the orders dated 21st March 2024 pending hearing and determination of the appeal. The principles guiding the grant of a stay of execution pending appeal are set out under Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:
- No order for stay of execution shall be made under sub rule (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 ultimately be binding on him has been given by the applicant.
29. In *RWW vs. EKW [2019] eKLR*, the purpose of a stay of execution order pending appeal was explained as follows:
- “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”
30. Further, in the case of *Regional Institute of Business Management v Lucas Ondong' Otieno [2020] eKLR* the court observed as follows;
- “20. Weighing the Applicants' right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of *the Constitution* of Kenya and the equally important Respondent's fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of *the Constitution* of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Applicants if they were denied an opportunity to ventilate their Appeal on merit in the event an order for stay of execution was not granted”.
31. The grant of stay of execution is discretionary and the court will exercise this discretion on a case by case basis depending on the circumstances of each case. It is this court's view that it must balance these rights to ensure that justice is served. Further, this being a children's matter the same ought to be heard



and determined in the shortest time possible. In addition, the concerned children are of tender age and cannot continue to be moved from one parent's custody to the other. This is necessary for their own well being and it is in their best interest.

32. Article 53(2) of *the Constitution* requires this court to treat the best interest of the child as of paramount importance in every matter concerning the child. Additionally, Section 4(3) of the *Children Act* requires all judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any power conferred by this Act to treat the interest of the child as of first and paramount consideration to the extent that it is consistent with adopting a course of action calculated to safeguard, conserve and promote the rights and welfare of the child, and further secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.
33. The above being the position I allow the chamber summons dated 3rd April, 2024 on the following terms and conditions:
- i. The children shall remain in the custody of the appellant/applicant until this court orders otherwise.
 - ii. The appellant/applicant prepares, files and serves the Record of Appeal within 30 days from the date of today's ruling to enable fast tracking of the Appeal.
 - iii. The children are now on school holiday. The appellant/applicant to organize and avail all the four (4) children to meet with their mother here in Nakuru on two different days before the schools open. The dates shall be 14th December, 2024 and 4th January, 2025. Non-compliance shall attract serious consequences. Both parties must put their differences aside for the sake of these young ones.
 - iv. The preliminary objection is allowed.
 - v. Each party to bear its own costs.
 - vi. Mention on 21st January, 2025 for directions on the hearing of the Appeal.

DELIVERED VIRTUALLY AND IN OPEN COURT, DATED AND SIGNED THIS 19TH NOVEMBER, 2024 IN OPEN COURT.

H. I. ONG'UDI
JUDGE

