



**LMM v GJM (Children's Appeal Case E137 of 2024)
[2024] KEHC 15829 (KLR) (Children's) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15829 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CHILDREN'S
CHILDREN'S APPEAL CASE E137 OF 2024
HK CHEMITEI, J
DECEMBER 17, 2024**

BETWEEN

LMM APPLICANT

AND

GLM RESPONDENT

*(Being an Appeal Against the Entire Ruling, Order and Directions
of the Honourable Andrew Githinji Munene (PM) Delivered on 4th
October, 2024 Arising from Children's Case No. MCCHCC/E692 of 2023)*

JUDGMENT

1. In his Notice of Motion dated 18th October 2024 the Applicant prays for orders that:-
 - (a) Pending the hearing and determination of this appeal this court be pleased to review, set aside and or stay the orders issued by Hon Andrew Githinji Munene (PM) on 4th October in MCCHCC No E 692 of 2023.
 - (b) Costs be provided for.
2. The application is premised on the grounds thereof and the Applicant's sworn affidavit dated even date.
3. The gist of the application is a long running issue between the Applicant and the Respondent over the legal custody of their six-year-old child. The trial court on 4th October 2024 made several orders on how the two will have and manage the custody of the minor. The Applicant was granted among others supervised access to the child on alternate Saturdays between 10 am and 3 pm and Sundays between 10 am and 3pm.
4. The said access would be in the presence of a caregiver and would be done in public.



5. The other issue was that since the Applicant was to travel to Serbia for holiday with the child the court gave a structured manner in which if followed the Applicant was to grant his consent to have the child travel.
6. The Applicant was dissatisfied with the said orders hence this appeal and the prayers to stay the same. It was his case as per the grounds of appeal that the court failed to consider his further affidavit, the court erred in the manner it gave the supervised visits and by extension all the orders it gave.
7. It was further his case that the orders given ran contrary to the provisions of Article 53 of the Constitution and that there was every likelihood that the child will be taken out of this court's jurisdiction and she will not be returned.
8. On her part the Respondent through her replying affidavit sworn on 19th November 2024 opposed the application among others on the grounds that the same was ill advised as it seeks to review the orders of the trial court which were unlawful and unprocedural.
9. That allowing the same was tantamount to hearing the appeal in full as it seeks far reaching orders.
10. That there was no evidence of how the Applicant would suffer prejudice as a result of the supervised visits and or access to the minor after the allegations of sexual assault upon the minor. The said sexual assault was reported at Kilimani police station and that the Applicant remained defensive.
11. As regards her travel to Serbia with the minor she deponed that she was an employee of the United Nations and that she has an apartment at Hatheru road within Nairobi which is mortgaged and further that she had already enrolled the minor at Kianda school for grade one in the year 2025.
12. She said that she was willing to offer any security or surety so as to show that she intended to come back with the minor after the holiday in Serbia.
13. The Applicant filed a further affidavit sworn on 27th November 2024 in response to the Respondent's replying affidavit. He denied the averments therein that his application was for review but instead it was for stay pending appeal.
14. On access to the minor the Applicant blamed the Respondent for denying him reasonable access to the minor by misrepresenting the orders granted by the court.
15. He also denied the issue of sexual assault against the child and that he only learned of it when he was called at Muthangari police station.
16. He accused the trial court of not taking into consideration his further affidavit in which the Respondent had deponed that the same was filed without the leave of the court and thus the court was right in not taking it into consideration.
17. The court directed the parties to file written submissions. At the time of writing this ruling it was only the Respondents' submissions that were on record.
18. It was her case that this court cannot review the orders by the trial court as it ran contrary to Section 80 of the Civil Procedure Act and rule 45 (1), (2) of the Civil Procedure Rules.
19. That the prayers sought by the Applicant are akin to determining the appeal before the same is set down for hearing and thus the Applicant is inviting the court to summarily hear the appeal.
20. It was therefore the Respondent's submissions that the prayers sought effectively determined the appeal and that the same does not reflect any suffering or prejudice the Applicant stands to suffer. That the only variation to the access is that the same is under supervision as opposed to the earlier mode.



21. In any case, she went on, what was important is the interest of the minor as provided under Section 8 of the *Children's Act* which ought to be of primary importance.

Analysis and determination.

22. The court has perused the application together with the rival affidavits onboard. The matter before me squarely falls within the purview of Order 42 rule 6 of the *Civil Procedure Rules*. The same must however be tampered with a consideration of the overriding interest of the child in accordance with Article 53 of the *Constitution*. In other words, it's not enough to consider the three elements provided under the above rule.
23. In this matter I think the issues are still active at the trial court and the five orders granted are structured in nature.
24. Orders number (a) to (c) are not difficult to appreciate and can easily be dealt with save for the question of the time and place. It appears to me that the orders were amended after the sexual assault allegations were made and the court sought to intervene.
25. That issue was still active and I think the trial court rightfully asked for a report from the Children's Department. Should the report I suppose be provided the trial court would still be required to make a determination on the access by the Applicant and any other orders within its jurisdiction.
26. It will be therefore premature for this court to determine that ground at this interim stage. The same goes with order number (d). There is no evidence that the same was complied with. However, it is not in dispute that the Respondent is employed by the United Nations.
27. On order (e) I think the parties are making a meal out of it. First of all, there is no evidence that the Respondent intends to take the child permanently out of the jurisdiction of the court. The issue of the Respondent being employed by the United Nations within the country for now has not been controverted. The same goes with the issue about the Hatheru house and the Kianda school for the child in January 2025.
28. In line with the above observations, I do not respectfully see any prejudice the Applicant stands to suffer. There is no sufficient evidence that the appeal will be rendered nugatory should the application be disallowed.
29. Nonetheless and based on her own averments the Respondent was willing to get a surety to ensure that the child comes back from Serbia after the holiday. I think to assuage any fears by the Respondent this wish ought to be granted.
30. In the premises the court directs that:-
- (a) The application is disallowed with no order as to costs.
 - (b) The Respondent in the event that she intends to travel with the minor outside the jurisdiction of this court shall provide a surety who is a close relative preferably a parent who shall stand to ensure that the minor is brought back to the jurisdiction of this court.
 - (c) The above surety must sign a personal commitment and or bond before the trial court.

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

H K CHEMITEI



JUDGE

