



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CHILDREN'S APPEAL NO. E004 OF 2021

JMK.....APPELLANT

(Suing as father and Next Friend of the minor)

VERSUS

CWK.....RESPONDENT

(Appeal from the ruling and order of the Chief Magistrate's Court (Hon. P. Achieng (SPM), dated 4th February, 2021 in MCCHCC26 of 2019 at the Senior Principle Magistrate's Court, Ngong)

JUDGMENT

1. On 4th February, 2021, the trial magistrate declined to grant the appellant's application dated 9th October, 2020 for interim parental access and directed instead that the main suit proceed to hearing.
2. The appellant was aggrieved with that order and filed a memorandum of appeal dated 4th February, 2021, and raised the following grounds, namely:
 1. *That the learned magistrate erred in law by failing to grant interim access of the minor to the plaintiff who is the father contrary to the provisions of article 45, article 53 (1)(e), (3) of the Constitution and sections 24(1) of the Children's Act.*
 2. *That the learned magistrate erred in law and in fact by finding that interim access must await the hearing and determination of the main suit despite there being no paternity dispute, protection order or supervisory order against the father and against the weight of the facts and the children officer's report.*
 3. *That the learned magistrate erred in law and in fact by failing to grant interim access of the minor to the plaintiff on the basis of a previous application which the Court was unable to adjudicate on as it also touched on interim custody and control of the minor without appreciating the change of circumstances being that for over 1 year the plaintiff had not seen his child and that the rule of res judicata does not apply to children's matters.*
 4. *That the learned magistrate erred in law and in fact by failing to grant interim access of the minor to the plaintiff on the grounds that the minor was a child of tender years thereby acceding to the problematic and stereotypic approach that since the plaintiff was a man he would not be able to take care of his child till perhaps she reaches the age of 10 years yet there exists exceptional circumstance to not only grant access but deny the respondent custody.*
3. Parties filed written submissions and relied on those submissions in disposing of this appeal.
4. The appellant submitted through his submissions dated 23rd February, 2021 and filed on 24th February, 2021 and reply to the respondent's submissions dated and filed on 11th March, 2021.
5. He submitted that *res judicata* did not apply in children matters. he argued that the trial magistrate did not determine his application dated 9th October, 2020 on merit but because it was similar to one dated 15th July, 2019, which in essence meant the application was *res judicata*. He submitted that since *res judicata* did not apply to children matters the trial court had power to review, vary, suspend and discharge any of its previous orders in the best interest of the child.
6. According to the applicant, the trial court ought to have considered the application irrespective of whether or not there had been a similar application or determination. Had it done so, he argued, it would have noted changes in circumstances. He relied on section 117 of the Children's Act, the cases of ANM V PMN (Nbi HCCC No. 14 of 2015) and CN V DMK (Mks. CA No. 18 of 2019).

7. On whether he was entitled to interim access orders or should have waited for the final determination of the main suit; he submitted interim orders of access should be granted any time in the course of proceedings on just terms in the best interest of the child, except where a care order has issued which can still be granted under section 133 of the Children's Act. He relied on sections 114, 161(2) and 4(2) of the Children's Act.
8. The appellant argued that both applications were dismissed on grounds that the minor was of tender years and directed to await full hearing of the main suit and final orders. In so doing, the trial magistrate failed to consider the circumstances and a finding on how unjust it would be to grant interim access to the child of tender years before the full hearing and determination of the main suit.
9. He also submitted that according to the children's officer report of 9th October, 2019, no adverse orders had been sought and or issued against the appellant, thus it would be just to grant him interim access to the minor pending the hearing and determination of the main suit.
10. The appellant further argued that the minor's age should not be the sole consideration in granting interim access. He relied on **MAK v SNMM** (Msa Constitutional Petition No. 11 of 2018) and an article in the Daily Nation of 18th June, 2019 titled "**Missing in action; Why Kenya is in the grip of fatherhood crisis**" By Simon Mbevi, to buttress the argument that there is scientific evidence on how fathers' absenteeism will manifest itself in the children's future.
11. He submitted that by basing her decision on minor's tender age, the trial magistrate acceded to a wrong approach that since the appellant is a man, he would not be able to take care of his child because she was of tender years. This, he argued, was despite the fact that there existed exceptional circumstances to grant him access and deny the respondent custody. He relied on **JKN v HWN** (Nkru CA No. 40 of 2014); **CN v DMK** (Mks CA No. 18 of 2019) and **Re L (infants)** [1962] 3 All ER.
12. The appellant further argued that the issue this court should determine is whether everything is equal and if not, determination must tilt towards the interest of the child, notwithstanding age or gender. He relied on **Sospeter Ojaamong v Lynette Amondi Otieno**, (CA No. 175 of 2006) and **Martha Olela & Anor v Jackson Obiera** (C.A 16 of 1979).
13. According to the appellant, the respondent's act of removing the minor from school between May 2019 and September, 2019; denying the minor clothes he had bought for her; changing the minor to three schools within a period of only two years and instigating the schools to bar him from participating in the minor's education, amounted to a disgraceful conduct on the part of the respondent.
14. He submitted that the decisions by the lower court failed to address the issue of access and were made out of a wrong approach that a man would not be able to take care of his child until she is ten years, despite there being exceptional circumstances to grant him interim access and deny the respondent custody.
15. The appellant again relied on section 83 of the Children's Act, and **BOG v ENK** (HCA No. 20 of 2019) on the principles to be applied in making custody orders. He submitted that neither he nor the respondent has superior rights over the minor and their personal differences are not superior to the interests of the minor.
16. He submitted that although he had proposed a mode of access and maintenance to the respondent, it was declined and the respondent blocked his calls, text messages and emails. He therefore argued that the respondent's conduct had not been in the best interests of the minor. He maintained that the minor was removed from a playground where they had enrolled her at Kshs. 12,000/= per term and kept at home from May, 2019 to September, 201. His attempts to visit the school were also thwarted under the respondent's instructions. Thereafter the minor was enrolled in another school at Kshs. 154,000/= without his knowledge.
17. The appellant submitted that since the applications were dismissed without addressing the issue of access, there was no guarantee that upon determination of the main suit, access would be granted, given that the minor would still be below 10 years. He argued that he wanted to be physically involved in the minor's life and the children's officer report had confirmed that his home was habitable.
18. Regarding the conditions under which the minor should be kept, the appellant admitted that conditions are a relevant factor. He submitted that he is home early; that the respondent is not the primary caregiver of the minor but the nanny; that he has a home next to the baby's school; that he has engaged a full time nanny to care for the minor and that he is more present than the respondent.
19. He distinguished the case of **M.O. v M.E.M** [2015] eKLR cited by the respondent from the circumstances of this case. He prayed that the appeal be allowed, the lower court's decision be set aside and he be granted unlimited access. He also prayed that suit be heard by another judicial officer.
20. The respondent filed written submissions dated 10th March 2021 and filed on 11th March 2021. She submitted the appellant's application was not declined on grounds of *res judicata* but in the best interest of the child. The respondent agreed that *res judicata* did not apply to children matters, but argued that the issues in the application formed part of the issues to be decided in the main suit. According to the respondent, the appellant had not demonstrated that he had the best interest of the minor at heart as he has failed to push for the hearing of the main suit but was content with pursuing applications.
21. On whether the appellant was entitled to interim access orders, the respondent argued that the appellant failed to appreciate that the court was guided by considerations that were just and in the best interest of the minor. She submitted age of the minor was one of the factors to consider in granting interim access. It was her case that since the minor was 3 years and female, the court must bear in mind the best interest of the child against the authorities relied on. She contended that in the decision of **MAK v SNMM**, (supra), the respondent had shown she had no intention of alienating the father from the child as she was aware of his importance in the child's growth and development.
22. The respondent distinguished the circumstances in this appeal from those in **JKN V HWN** (Civil Appeal No. 40 of 2014). She relied on

M.O. v M.E.M [2015] eKLR to submit that she had demonstrated that the appellant had expressly stated that he already had a mistress which informed the decision of 6th February, 2020 to decline interim access orders. She also stated that the state in which the minor was returned to her demonstrated neglect and further that there was a possibility of a conflict between the appellant, his mistress and the minor.

23. Regarding the decision in CN v DMK (supra) and Re L (Infants) (supra), the respondent argued that the decisions agree that the custody of children of tender years ought to be granted to the mothers in the absence of exceptional circumstances.

24. Responding to the decisions in Sospeter Ojaamong v Lynette Amondi Otieno, (supra) and Martha Olela & Another v Jackson Obiera (supra), she submitted that no exceptional circumstances had been shown by the appellant why she should not continue with actual custody of the minor pending hearing and determination of the suit.

25. She maintained that the refusal to grant interim custody orders was well informed, taking into account the facts and circumstances of the case. She also argued that the Children's officers' report had pointed to the fact that the appellant admitted that he did not know how to take care of children such as feeding, changing diapers, general care and attention.

26. On whether the appellant was entitled to interim access, she submitted the trial magistrate noted the importance of hearing the main suit before making any orders. She argued that what is contained in the record of appeal is the appellant's partial testimony and without that of the respondent, and therefore, what the appellant stated were allegations which can only be proved in a full trial which is not yet done.

27. I have considered this appeal, submissions and the decisions relied on. I have also considered the impugned decision and perused the trial court's record. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, reevaluate and reanalyze the evidence afresh and come to its own decision on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for it.

28. In Williamson Diamonds Ltd and another v Brown [1970] EA 1, it was held that:

The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.

29. Similarly, in PIL Kenya Limited v Oppong [2009] KLR 442, the Court of Appeal held that:

It is the duty...of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanor and giving allowance for that.

30. This in an interim appeal and not an appeal from a full hearing. It arose from a ruling of the trial court on the appellant's application dated 9th October, 2020. The appellant had sought unlimited access to the minor pending the hearing and determination of the main suit.

31. The application was based on various grounds including that that the appellant had not seen the minor since 3rd October, 2019, because the respondent had continuously restrained the minor from seeing him. The appellant argued that the minor needed a secure relationship with both parents and it was necessary for the minor to relate with him as the father given that she was joining school and his presence and involvement would assist in making decisions. He therefore felt it was necessary to be granted unlimited access to the minor.

32. The respondent opposed the application through her replying affidavit sworn on 29th October, 2020. She stated that she had made several attempts to negotiate with the appellant on the terms of access and maintenance but they could not agree, leading to the filing of suit before the trial court.

33. She also deposed that on 25th July, 2019, she agreed to consent on the appellant's application dated 15th July, 2019 so that the appellant would have access to the minor on Saturdays from 11 a.m. to 5 p.m. but when she raised the issue of maintenance of the minor, the appellant stated that he would only cater for the minor's expense when he had access and custody. They were thus unable to agree.

34. The respondent further deposed that although the appellant had never provided for the minor's needs since birth and she had enrolled her to a play group the appellant proposed a school in Upper Hill which would force the minor to wake up early at 5. am, brave the morning cold and traffic jam to be in school at 8.00a.m.

35. She stated that the applicant had not shown interest in the minor but only raised the issue on 24th September, 2020 when the main hearing did not proceed. She maintained that the letters of 29th September, 2020 and 5th October, 2020 were intended to mislead the court that he was a caring and loving father who had been denied access to his child.

36. The respondent maintained that the appellant was allowed to visit the minor at her residence but he rejected the idea. She was of the view that with Covid-19 around and the minor being asthmatic, she was vulnerable. She took exception with the children's officer's report which stated that due to the appellant's upbringing, age and culture, he was not required to take on some tasks such as changing diapers which the house help could do. She argued that the children's officer failed to interview minor's care givers.

37. In its ruling delivered on 4th February, 2021, the trial court stated that the application before it was similar to that of 15th July, 2019 in which the court, (**Hon. B. Kasavuli (P.M)**), had directed on 6th February, 2020 that the main suit be heard before any orders could be made. The trial magistrate therefore declined to issue interim orders of access, and directed that the main suit proceed to hearing as it had previously been ordered.

38. In this appeal, the appellant raised several grounds of appeal, attacking the trial court's decision not to allow interim access. Both counsel relied on several decisions which this court has considered.

39. The trial court did not decide at all that it would not grant access to the appellant. It only declined to grant interim access until the matter had been heard. That was the same position earlier taken by **Hon. Kasavuli (PM)**, when the first application for interim access went before him. He was of the view that it would be proper to hear the main suit before making any orders regarding custody and access.

40. According to the record, after the ruling of 4th February 2021, the appellant testified but he was not cross examined. Further hearing was set for 11th March 2021, when the appellant would have been cross examined and possibly another witness taken. That could not be because soon after, the trial court's file was forwarded to this court on 3rd March 2021 and received on 10th March 2021, a day to the hearing of the suit before the trial court.

41. As already pointed out, this is an interim appeal. My reading of the trial court's record reveals that the trial court is yet to pronounce itself fully on whether it will grant custody and access or not. These are also the main prayers in the plaint namely; joint permanent custody and access.

42. What the trial court did was to manage the case before it. It declined to deal with the issue of interim access and instead, wanted to hear all parties in the suit and make an informed decision on the matter before it. The issues raised in the appeal, such as whether the second application was *res judicata* was not decided by the trial court. Similarly, issues such as who is properly suited to have custody, are yet to be decided and that can only happen after hearing parties.

43. I also note that immediately after the ruling was delivered on 4th February 2021, the appellant took the witness stand and testified. He was however stood down and was to be cross examined on 11th March 2021. As correctly argued by the respondent, the appellant's testimony was not complete and this court cannot consider it in this appeal. It is also clear that many of the issues raised in the appeal have not been resolved by the trial court. It would therefore be improper for this court to deal with them when they are still pending determination before that court.

44. On whether the trial court should have granted interim access before hearing the main suit, all I can say is that the trial court felt it was proper to hear the main suit before pronouncing itself on the matter. I cannot fault it as long as it was geared towards an expedited hearing and disposal of the main suit for the interest of the minor. That is the same approach this court took when it declined to hear the application by opting to hear the appeal. It is the only way of achieving quick disposal of cases as a means of access to justice.

45. Having given due consideration to this appeal, and noting that the trial court is yet to pronounce itself on the core issues of custody and access, I do not find reason to interfere with the trial court's direction that the main suit be heard before any orders were made. That in my view, would enable that court make an informed decision whichever way it goes.

46. Consequently, the appeal dated 4th February 2021 is declined and dismissed with no order as to costs.

47. The Deputy Registrar do ensure that the trial court's original file is returned to that court immediately, to enable parties take an expedited hearing date to conclude the hearing of the suit.

Orders accordingly.

DATED SIGNED AND DELIVERED AT KAJIADO THIS 9TH DAY OF APRIL 2021.

E C MWITA

JUDGE