



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CHILDREN APPLICATION NO. E009 OF 2021

IN THE MATTER OF S.C.K.K. & J.J.W.K (Minors)

SMM..... APPLICANT

VERSUS

ALEX A.K.A ANK..... RESPONDENT

RULING

1. The Application before the Court is a Notice of Motion dated 23/09/2021. It seeks for the following prayers.

- 1) *That the Application herein be certified as urgent service be dispensed with thereof and the same be heard ex parte in the first instance.*
- 2) *That pending the hearing and determination of this Application or further orders of the Court; this Court does grant the Applicant an order of stay of execution of the ruling and all consequential orders made on 22nd September, 2021 in Nakuru Chief Magistrate’s Court Children Case No. 5 of 2021.*
- 3) *That this Honourable Court be pleased to stay the execution of the ruling herein pending the hearing and determination of the Applicant’s appeal in Nakuru High Court Children Appeal No. E009 of 2021.*
- 4) *That pending the hearing and determination of this Application and the Appeal in Nakuru High Court Children Appeal No. E009 of 2021, this Court do issue an injunction restraining the OCS Nakuru from executing the orders made on 22nd September, 2021 in Nakuru Chief Magistrate’s Court Children’s Case No. 5 of 2021.*
- 5) *That pending the hearing and determination of this Application and the Appeal in Nakuru High Court Children Appeal No. E009 of 2021, this Court do issue an order that the status quo be maintained and the minors do remain in custody of the Applicant herein.*
- 6) *That the order do issue that the Applicant and the minors herein be allowed to travel and/or leave the jurisdiction of this honourable Court for purposes of enrolling in their respective schools in the US to avert violation of their right to basic education.*
- 7) *That an order do issue that the Immigration Departments in/at all the entry and exit points in the Republic of Kenya and the US Embassy to clear the Applicant herein to leave the jurisdiction of this Honourable Court with the minors.*
- 8) *That this Application be heard inter parties on such date and time as this Honourable Court may direct.*
- 9) *That this Honourable Court do issue any other order it deems just, expedient and reasonable in the best interest of the minors herein.*
- 10) *That the cost be in the cause.*

2. In brief, this is an application seeking for a stay of execution pending an interlocutory appeal against orders issued by the Learned Trial Court in the Children’s Case. The Trial Court gave interim custody to the Respondent (father) and ordered that the minors continue schooling in Kenya. The Applicant had sought to be given interim custody and as well as orders allowing her to move with the children to the United States where she lives and works for gain.

3. The essential facts of the case are that the Applicant and the Respondent were married. The marriage ended in divorce in 2010. The two lived in [Particulars Withheld], USA before their divorce. The divorce Court in Alabama awarded custody of the first child, SCKK to the Applicant. It would seem that the second child, JJWK was born in 2013 after the divorce but both parties do not deny that he is the biological child of both parents. As such, SCKK is 14 while JJWK is 8 at the moment. Since both children were born in the US, they are US citizens. By virtue of our constitutional provisions, they are also Kenyan citizens.
4. The Respondent relocated back to Kenya some time back. He is now a business man here. The Applicant had earlier intentions to relocate too but after a brief stint back in Kenya, she changed her mind. During that period, both children relocated back to Kenya. It is not denied that they lived with the Respondent and they enrolled in school here in Nakuru. SCKK has been at [Particulars Withheld] School for more than 5 years; while JJWK has been at [Particulars Withheld] for at least three years.
5. There are contestations about what the parents had agreed about the eventual relocation of the children back to the US; and how much contacts the Applicant has had with them in the last few years. These are matters which the Trial Court will eventually have to make findings on.
6. What precipitated the present legal imbroglio are two Applications the Respondent made to the Lower Court. He was primarily seeking orders preventing the Applicant from removing the children from Kenya. He wanted to be given actual custody of the children as he believes they should be left in Kenya where they can enjoy good education. The Applicant believes the opposite: that the children have a better chance at life if she went with them to the US. In the affidavits the two have now filed in this Court, they have filed numerous reasons why they believe they would be the better parent to have actual custody. Again, the Trial Court would need to make findings on those facts after taking the evidence of each.
7. Given the nature of the case and the fact that the interests of two children are in issue and need to be addressed immediately, I arranged for an expedited mention date for directions on 30/09/2021 and urged the two parents to try and settle the matter out of Court. I gave certain interim orders to preserve the status quo for this mediation to take place. The parents reported to me yesterday – 06/10/2021 – that they had failed to reach an agreement. I, therefore, scheduled for formal hearing today. Meanwhile, I had directed the Children’s Department to file reports on the two minors. The Department has filed two detailed reports in Court.
8. I listened to the oral arguments by the parties’ respective counsel today. Due to the resolution of the case that I have proposed, and due to the urgency of the matter, I will not rehash what the advocates presented before me. Suffice it to say that I have carefully considered what they had to say. Most of their ammunition was used on the question of who should be given custody of the children. I have also carefully considered the affidavits filed in the case as well as the impugned Ruling by the Trial Court. The arguments were presented, as Mr. Biko, one of the two advocates for the Respondents would sardonically point out later, as though this Court is the Trial Court on matters of custody for the children. The fact is, however, this Court is presently sitting in its appellate capacity – even though it has certain powers of the trial Court and can, in appropriate cases, peremptorily use them especially in cases involving minors.
9. The procedural posture, though, is that there is a ruling by the Trial Court dated 22/09/2021. Although that ruling is interlocutory and does not determine the rights of the parties with finality, it gave certain orders whose stay is requested. There is a substantive appeal pending against that interlocutory ruling.
10. The fundamental question is whether stay should be given and if so on what terms given the procedural posture of the case and the unique circumstances of this as a children case.
11. The Courts, in interpreting Order 42, Rule 6 of the Civil Procedure Rules, have required that an Applicant for stay pending appeal demonstrates four things in order to be entitled to a grant of such an order:
 - a. The appeal filed must be arguable;
 - b. The Applicant is likely to suffer substantial loss unless the order is made. Differently put, it must demonstrate that the appeal will be rendered nugatory if the stay is not granted;
 - c. The application was made without unreasonable delay; and
 - d. The Applicant has given or is willing to give such security as the Court may order for the due performance of the decree or order which may ultimately be binding on it.
12. I can, at the outset, provisionally see two reversible errors in the way the Trial Court handled the Case. *First*, I find the use of the Police to enforce the orders of the Court in the first instance in this case to be unwarranted. The use of armed Police Officers in child custody cases should be considered very sparingly and only in the rarest of cases where clear intransigence and impunity has been demonstrated by the party against whom the orders are being enforced. This is because of the great potential and danger to traumatize the innocent minors involved. Since the best interests of children is the prime directive in deciding cases involving children, the potential impact of an enforcement course of action need to be considered carefully in child custody cases.
13. In the circumstances of this case, the use of Police Officers to enforce the interlocutory Court orders was unwarranted and premature. The effects of the use of the Police on the minors can already be gleaned from the Counselling Report filed in Court. It ought not to have happened.
14. The second potential reversible error in the short ruling of the Trial Court is that the Court proceeded to award custody of at least one child of tender years to the father without conducting the relevant legal analysis required by our law to reach that decision. In Kenya, there is a *prima facie* rule that absent exceptional circumstances, the custody of children of tender years should be awarded to the mother. It is

incumbent upon the father or other person seeking custody of children of tender years to demonstrate the exceptional circumstances. In this case, the the Learned Magistrate decided to give actual custody of minor children of tender years to the father against the protestations of the mother without performing the requisite analysis impeaching the suitability of the mother to be the primary care giver as required by our decisional law.

15. I appreciate that the custody orders given were interlocutory in nature. Even then, especially in the circumstances of this case, it was incumbent upon the Learned Magistrate to do, even on a provisional basis, the analysis required before displacing the suitability of the mother to have custody during the pendency of the suit. In this case, that analysis is, of course, eminently complicated by the fact that the mother seeks to move the children out of the jurisdiction of the Court; and also that the children were living with the father for a substantial period immediately preceding the filing of the action. Those, though, are matters for the Trial Court.

16. The above analysis eminently shows that the appeal filed herein is eminently arguable. It is also quite easy to demonstrate that the other elements for the grant of stay are present: The application was made timeously; and there is no doubt that if stay is not granted and custody remains with the Respondent in Kenya, the effects would render the appeal nugatory. There is no place for a security for costs analysis in a matter involving children.

17. However, rather than deal with the narrow issue of stay only, given these circumstances, I propose to deal with this case in a way that the legal issues can be resolved substantively in the shortest period of time possible so as to minimize the great risk of permanent trauma to the children while ensuring continuity and predictability for the parents. The optimum resolution is for a Children's Court to determine the question of legal and actual custody of the children as well as the question of educational needs of the children with finality.

18. This case is complex for a number of reasons including:

- a. its path dependence (which parent has been living with the children and for what period of time);
- b. the fact that the two parents live in two different continents (Kenya and the USA);
- c. the fact that the children have been living and schooling in Kenya in the period immediately preceding this case;
- d. the fact that custody of SCKK was awarded to the Applicant by the Divorce Court in Alabama. The true legal effect of that award is to be tested in trial given that that award has not been adopted by a Court in Kenya and given that there are allegations that the parties voluntarily varied the effect of that award by conduct;
- e. the fact that the children are dual citizens;
- f. the fact that one child – JJWK – is a child of tender years; and
- g. the existence of the two children reports ordered by this Court which strongly recommend that actual custody be awarded to the Respondent in the circumstances of this case.

19. Consequently, after considering all the complicated aspects of this case, I have come to the conclusion that the most optimum outcome that is in keeping with the best interests of the children is for the questions of actual custody and the education needs of the two minors to be determined in the shortest period possible. It will serve no one's interests for these proceedings to snake their way into the Court system as an appeal against interlocutory orders only for the substantive case to be attended to later. Therefore, I have come to the conclusion that the correct outcome of this case is to remand it to the Trial Court so that it can deal with the question of custody substantively and within the shortest period of time given the unique circumstances of the case namely the urgent need for the mother to travel to the United States; and the need to determine the education needs of the children within the shortest period possible. I will, therefore, dispose of the Application dated 23/09/2021 in the following terms:

- a. There will be a stay of execution of the ruling of Honourable B.B. Limo, SRM dated and delivered on 22nd September, 2020.**
- b. The case is remanded back to the Trial Court for re-hearing of the substantive suit on a priority basis. In any event, trial to begin within the next seven (7) days of today.**
- c. In determining the question of custody, the Trial Court to take viva voce evidence and also to take into account all the evidence already placed on record including the various affidavits filed in the case and, especially, the two reports filed by the Children Department as requested by this Court.**
- d. The Chief Magistrate in-charge of the Station to assign the case to any Magistrate in the station with jurisdiction except the Learned Honourable B.B. Limo.**
- e. The *status quo* to be maintained until further orders of the Trial Court. For avoidance of doubt, *status quo* will mean the following:**
 - i. The children will remain in the actual custody of the Applicant (mother) but with the Respondent (father) having unrestricted access to them;**

ii. The Respondent to have custody of the children during the weekends during the pendency of the custody trial unless the Trial Court varies the order;

iii. The children to remain within Nakuru municipality during the pendency of the suit;

iv. The children must not be leave Nakuru municipality without prior order of the Court;

v. To preserve the rights of all parties including the children by preventing short-term radical changes which might be traumatic for them, the children will not be enrolled in school during the pendency of the custody case in the Trial Court unless the Trial Court orders otherwise. The Trial Court must make a determination on this question on a provisional basis if the custody trial takes more than 15 days from today.

f. This being a family matter involving children, each party will bear its own costs.

20. Orders accordingly.

Dated and Delivered at Nakuru this 7th day of October, 2021

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.