



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

FAMILY APPEAL NO. E062 OF 2021

IN THE MATTER OF ABE (A MINOR)

CEAAPPELLANT

VERUS

BA.....RESPONDENT

RULING

1. Before this court is the Notice of Motion application dated **21st July 2021** by which the Applicant **CEA** seeks the following orders:-

“1. SPENT

2. SPENT

3. THAT pending the hearing and determination of the application herein, the respondent be and is hereby restrained by themselves, their agents, officers, representatives, assignees, servants or anybody acting on their behalf from removing the minor, ABE (a minor).

4. THAT pending the hearing and determination of the Appeal, being High Court at Nairobi Family Appeal No. E062 of 2021, the Court be pleased to issue an order for stay of execution of the judgment and orders issued by the Children Court at Nairobi in Civil Case No. 1534 of 2019 (in the matter of ABE, a minor) on 14th July 2021.

5. THAT pending the hearing and determination of the Appeal, being High Court at Nairobi Family Appeal No. E062 of 2021 the court be pleased to issue an order allowing the Appellant access to the minor, ABE., at such terms as it may deem fit, just and property in the interest of justice.

6. THAT the costs of this application be provided for.”

2. The Application was premised upon **Article 50 (i), 45, 159 & 165 of the Constitution of Kenya 2010, Sections 1A, 1B 3A & 63 of the Civil Procedure Act, Order 22 Rule 22 Order 42 Rule 6, Order 40 Rules 1,2,4 & 10, Order 51 Rule 1** of the **Civil Procedure Rules** and all enabling provisions of the law and was supported by the Affidavit of even date and Further Affidavit dated **9th August 2021** both sworn by the Applicant.

3. The Respondent **BA** opposed the application through the Replying Affidavit dated **2nd August 2021**. The Application was Canvassed by way of written submission. The Applicant filed the written submissions dated **20th September 2021** whilst the Respondent relied upon his written submissions dated **17th October 2021**.

BACKGROUND

4. The Appellant a **Kenyan Citizen** and the Respondent who is a **German National** residing and working for gain in the **Republic of Kenya** got married to each other in the year **2005**. Their union was blessed with one child a son (the minor who is the subject of these proceedings) who is now aged about **six (6) years** old. The marriage between the parties fell into problems and the couple separated on **5th May 2019**.

5. This application arises from a Ruling delivered on **14th July 2021** by **Hon M.A. OTINDO Principal Magistrate** in **Nairobi Childrens Case No. 1534 of 2019**. In that case the Plaintiff (the Respondent in this Appeal) had filed a suit against the Defendant (the Respondent herein) vide the Amended Plaint dated **18th March 2021** seeking the following orders:-

(a) **Shared custody, care and control of the minor ‘ABE’.**

(b) **Access and shared maintenance of the minor.**

(c) **Travel with the minor overseas.**

(d) **Costs of the suit.**

6. The matter was heard and the trial court delivered judgment on **14th July 2020** making the following orders:-

“1. THAT the plaintiff is hereby granted primary custody of the minor.

2. THAT the Defendant is granted access to the child in the following terms; alternating weekend i.e. Saturdays 10:00 am to Sunday 3 pm until the Defendant is deemed to be financially independent. During the school days, she is at liberty to visit the child and also participate in school activities as per the school rules.

3. THAT leave to travel granted and shall be exercised during the time he has custody and/or access to the minor.

4. THAT each party shall provide for the food and shelter expenses when they are in their care, the Plaintiff however shall fully take care of the education, medical and clothing expenses of the minor whether in his custody or not, on his own volition at liberty to support the Defendant when the minor is in her care for access when she is still financially incapacitated.

5. THAT no orders as to costs.

6. THAT the Defendant do facilitate the process of the German passport.”

7. Being aggrieved by the decision of the trial court the Appellant filed the Memorandum of Appeal dated **21st July 2021** challenging the entire judgment. Contemporaneously with the Memorandum of Appeal the Applicant filed the present application seeking to stay execution of the judgment of the **Childrens Court** and also seeking to be allowed greater access to the minor.

8. As stated earlier the application was opposed by the Respondent.

ANALYSIS AND DETERMINATION

9. I have carefully considered this application, the Affidavits on record as well as the written submissions filed by both parties.

10. Prayer **(3)** of the Application which sought to stay the orders granting leave to the Respondent to travel with the child to **Germany** was compromised through a **consent** entered into by the parties on **13th August 2021**. Under the terms of that consent, it was agreed that the Respondent would travel to **Germany** with the minor in **August** and again in **December** for the Christmas vacation.

11. Therefore the only issue remaining for determination by this court is whether the orders of access made by the trial court ought to be stayed and/or varied.

12. Grant of stay of execution of an order pending appeal is discretionary. **Order 42 rule 6(2)** of the **Civil Procedure Rules** contains the factors that the Court must consider in exercising its discretion in determining whether or not to grant a stay of execution and as provides as follows:

“(2) No order for stay of execution shall be made under subsection (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”.

13. The Applicant submitted that her relationship with her son is likely to suffer adversely if the orders sought are not granted. That the minor being a child of tender years is entitled to maternal love and care which he may lack to his prejudice if the stay orders are not granted. The Applicant cited decisions, which held that custody of a child of tender years ought to be awarded to the mother. She urged the court to preserve the mother-child relationship pending appeal.

14. In opposing the application the Respondent submitted that the application was ill-conceived as the Applicant had in fact been granted

reasonable and adequate access to the minor by the trial court. That the issue of taking the child out of the country had been settled by the consent entered into by the parties on **13th August 2021**. The Respondent submitted that in coming to its decision the trial court had given consideration to the best interests of the child. He urged the court to dismiss the application with costs.

15. The first thing the court needs to determine is whether this application was filed in a timeous manner. The judgment in question was delivered on **14th July 2020**. Both the Memorandum of Appeal and the present application were filed on **26th July 2021** barely a fortnight after delivery of the judgment. I therefore find that this application was filed without any undue delay.

16. This court cannot lose sight of the fact that this is a case, which involves the welfare of a minor. **Article 45(2) of the Constitution of Kenya 2010** provides as follows:-

“A child’s best interests are of paramount importance in every matter concerning the child.

17. The Children Act elaborates further at **Section 4(3)** that:

“In all actions concerning children whether undertaken public or private social welfare institution, courts of law, administrative or private social welfare institutions, courts of law, administrative authorities or legislature bodies, the best interest of the child shall be a primary consideration.” (own emphasis)

18. Therefore in order to merit the stay of execution being sought the Applicant must satisfy the court that said stay is in the best interest of the minor, not of herself or the Respondent. In the case of **MNN-V S- MOK & ANOTHER (2017) eKLR** the court stated that:-

“...in determining an application for stay of execution in cases involving Children, the general principles for the grant of stay of execution under order 42 Rule 6 of the Civil Procedure Rules must be complemented by an overriding consideration of the best interest of the child in accordance with Article 53(2) of the Constitution.” (Own emphasis).

19. At **Paragraph 13** of her Supporting Affidavit dated **21st July 2021** the Applicant avers as follows: -

“13. THAT while the Childrens Court granted me access to the minor only at school during school related activities it failed to consider the long school holidays when I can neither see nor talk to my child.”

20. This averment is not entirely correct. I have carefully perused the official copy of the Decree issued by the **Childrens Court** on **21st July 2021** (Annexure ‘**AB-1**’ to the Replying Affidavit dated **2nd August 2021**). The said Decree at **Para 2** that reads as follows: -

“the Respondent is granted access to the child in the following terms, alternating weekends, i.e., Saturdays, 10.00 am to Sunday 3 pm until Defendant is deemed to be financially independent. During the school days she is at liberty to visit the child and also participate in school activities as per the school rules”.

21. Therefore contrary to the averments made by the Applicant the court granted her access to the minor on alternate weekends. It is not true that her access was limited only to visits in the school. The Applicant argued that the trial court failed to make orders for her access to the child during the school holidays. The consent dated **13th August 2021** has catered for this. The periods when the Applicant will have access to the minor are set out in that consent. Children’s matters are special and unique in nature and in order to interfere with the orders made by the trial court the Appellate court must be satisfied that such a move would benefit the minor. I am not so persuaded.

22. I have perused the judgment of the trial court in which it was noted that the Applicant had no house of her own and neither did she have a source of income. In the circumstances, the learned trial magistrate deemed it best to grant actual custody to the father (the Respondent) until such time as the Applicant becomes financially independent. This order in my view was made in the best interest of the child.

23. The Applicant has not demonstrated to this court how having access to the minor on alternative weekends would cause loss and/or suffering to the child. Obviously, the ideal situation would be that the parents live in the same home. However life is not always ideal and in situations such as this where the parents are estranged, then the best thing is to ensure that each parent has **reasonable access** to the minor.

24. The minor deserves to have stability in his life. Children who are shunted about from one place to another often develop emotional problems. The minor is now settled in a home and has a routine. I am not inclined to interfere with the minors living arrangements at this stage.

25. Finally, I find no merit in the present application. The Notice of Motion dated **21st July 2021** is dismissed in its entirety. Each party shall pay its own costs.

DATED IN NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

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MAUREEN A. ODERO

JUDGE