



**CLOO v BOO (Civil Appeal 19 of 2015)  
[2015] KEHC 7582 (KLR) (Family) (6 July 2015) (Ruling)**

*C. L.O.O v B.O.O [2015] eKLR*

Neutral citation: [2015] KEHC 7582 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**CIVIL APPEAL 19 OF 2015**

**AO MUCHELULE, J**

**JULY 6, 2015**

**BETWEEN**

**CLOO ..... APPLICANT**

**AND**

**BOO ..... RESPONDENT**

**RULING**

1. The respondent was born on 18<sup>th</sup> November 1993. He is aged 22. He is the son of the applicant. His parents are separated. He lives with his mother who takes care of him. He is a student at Nairobi where he is pursuing a course in Private Pilot Licence (PPL) and Commercial Pilot Licence (CPL). The total cost of the course is Kshs.4,393,820/=. It is a two year course.
2. On 23<sup>rd</sup> September 2014 the respondent went before the Children’s Court in Cause No. 1252 of 2014 at Nairobi seeking an order compelling the applicant to pay the said Kshs.4,393,820/=. At the same time he filed a motion seeking that, pending the hearing and determination of the suit, there be an interim order requiring the applicant to pay Kshs.400,000/= towards the fees and thereafter be made to pay such monthly instalments as are determined by the Court.
3. The applicant filed a replying affidavit opposing the application. His case was that, at the time when the respondent informed him of receipt of admission to the college he (the applicant) informed him that his net salary was only Ksh.130,000/=; that the fees was too high for his means; but, that he was agreeable to having the respondent pursue a parallel degree programme at the University. The respondent and the mother did not accept the offer for parallel degree programme and instead opted for the flying course. The applicant stated that he had had various discussions with the respondent and his mother but without success.



4. The respondent filed a supplementary affidavit to say that, before his admission, they tried to engage the applicant but without success. He was uncooperative, evasive and unwilling to discuss the matter. The respondent denied that the applicant had made the parallel degree offer. He stated that the applicant had the means to see him through the flying course as he had, in any case, seen him through his previous education in high cost schools. In the last school, the respondent was on I.G.C.S.E. education system.
5. From the proceedings in the lower court, it would appear that by the time the application for interim orders was heard the outstanding fees was Kshs.3,570,600/=. The difference of Kshs.824,220/= had been paid by the respondent's mother. She was also catering for the respondent's housing, food, clothing, etc.
6. The lower court heard the application and allowed it to the extent that the applicant was ordered to pay for the respondent's college fees for the duration remaining. The applicant was aggrieved by the ruling and came to this court on appeal. In the appeal, he complained that the order granted went beyond the prayers sought; the ruling had in effect concluded the case; the court had not sufficiently examined him to satisfy itself that he had the means to pay the fees; and, the case for the extension of parental responsibility beyond the respondent's 18<sup>th</sup> birthday had not been made out. It is in the appeal that he filed the present application under Order 42 rules 1 and 4 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act seeking the stay of execution of the orders in the ruling pending the hearing and determination of the appeal. In the grounds and affidavit sworn to support the application he repeated what he said in the grounds in the appeal. His basic contention was he did not have the means to pay the fees, having shown the trial court that his net monthly income was only Kshs.22,000/=. He stated that all that he can contribute towards the fees is Kshs.22,000/= monthly. Anything else would render him bankrupt and cause him to suffer both substantial and irreparable loss. The respondent opposed the application, repeating what he had stated in the trial court, that the applicant's statement of means was depressed by Kshs.173,410/= as his electricity, fuel, entertainment, motor vehicle insurance and housing were all catered for by his employer. He is Chief Engineer with [particulars withheld] Co. Ltd. He (the applicant) did not swear a further affidavit to deny that his employer caters for these expenses.
7. On the issue of extension of parental responsibility beyond the 18<sup>th</sup> birthday, the lower court made reference to section 28 of the Children Act 2001 and observed that a case had been made because the respondent's welfare was in question; that what he was seeking was college fees, and there was need to complete the course which was underway. When the appeal is heard the applicant will be at liberty to challenge that observation. However, it is on record that the applicant is the father of the respondent who was so concerned with his college studies that he was offering him university education, albeit on parallel basis.
8. Mr. Chege for the applicant and Mr. Wagara for the respondent addressed me on this application. Both agreed that the respondent's right to education, his best interests and the applicant's obligation were issues that are at play. Before dealing with these issues, however, I need to observe that, now that the applicant is Chief Engineer with a serious parastatal it would not be outlandish for his son to dream and aspire to be a pilot.
9. What must have taxed the mind of the trial court was what to do with the respondent who was already in flying school. If no order was given, there was the prospect of him dropping out until the suit was heard and determined. If the suit was eventually determined and a decision made for the applicant to pay the fees, time would have been lost with the possible need for the respondent to begin afresh. The other consequence would be that the Kshs.824,220/= would be lost.



10. It is difficult to apply the normal principles that guide courts in applications for stay of execution pending appeal when one is dealing with either the maintenance or education of a child (Ngata Muriuki –v- Susan Wambui Muriuki (suing on behalf of the minor) [2013]eKLR). This is because of section 4(3) of the Children Act which provides that:-

“All judicial institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that is consistent with adopting a course of action calculated to – safeguard and promote the rights and welfare of the child; conserve and promotion of the welfare of the child; secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.”

11. In my view, the respondent’s parents can offer guidance and information on the kind of educational and vocational opportunities that are available, and be able to indicate the kind of funds that they can reasonably marshal to enable him to pursue his dream. In all these discussions, however, the view of the respondent should be given proper consideration in the matter regarding his education and development. This value is inherent in the best interests of a child which is the fundamental principle enshrined in Article 53(2) of the Constitution of Kenya 2010 that states that:-

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

The same principle is to be found in section 4(2) of the Children Act which provides that:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

12. Both the Constitution and the Act place the child’s welfare at the epicentre of decision-making. Positioning children as a central concern of family law and policy must include children’s views and experiences about issues that so profoundly affect them. In the instant case, the respondent has made a choice to go to flying school. He has stated, without demurrer, that the applicant, his father, saw him through costly primary and secondary education. He does not see why the father should not finalise this responsibility and obligation by paying the balance of his fees, now that the mother is making quite some contribution towards not only his fees but also his upkeep.
13. In the Supreme Court of England in HZ (Tanzania) (FC) - .v. Secretary of State for the Home Department [2011]UKSC 4 the court was grappling with the question of what it should consider as constituting the best interest of the child where it is claimed it is a primary consideration. In paragraph 46 of the judgment, Lord Kerr stated as follows:-

“.....where the best interests of the child favour a certain course, the course should be followed unless countervailing reasons of considerable force displace them.....”

14. The applicant does not state that he has any other obligations, in the sense that he has another family or children that he is educating or supporting. When on 17<sup>th</sup> October 2014 he swore a replying affidavit in response to the respondent’s application for interim payment, he stated that his net salary was Kshs.130,000. He annexed his payslips and filed his affidavit of means. In the affidavit of means he stated that his surplus income was only Kshs.22,000, a month. That figure was at variance with the one on the replying affidavit. When one considers that he did not deny that his employer pays the expenses/ utilities in the payslip, an impression is created that he was not being candid about his means. The court cannot exercise its discretion to favour him. On the other hand, the respondent is in the middle



of a course and should be assisted to complete it. I do not find that he will suffer substantial loss if he is made to pay for the fees.

15. I have considered that since the order by the trial court he has not bothered to make any remittance to the school. Even when he stated that his net income was Kshs.130,000/= or Kshs.22,000/=: and indicated that he was willing to pay for the respondent's parallel programme at the University, he has failed to make any contribution towards his son's college fees. This failure cannot help him in this application.
16. In the premises, I find no merit in the application dated 24<sup>th</sup> April 2015 and dismiss it with costs. However, in the wider interests of justice, I adjust the order made by the trial court so that the applicant will pay Ksh.500,000/= directly to the flying school on or before the end of July 2015, and thereafter shall pay Kshs.100,000/= monthly to the school until this appeal is heard and finalised.

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF JULY 2015**

**A.O. MUCHELULE**

**JUDGE**

