



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**AW v ST (Civil Application E236 of 2021) [2022] KECA 387 (KLR) (4 March 2022) (Ruling)**

Neutral citation: [2022] KECA 387 (KLR)

**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT NAIROBI**  
**CIVIL APPLICATION E236 OF 2021**  
**K M'INOTI, J MOHAMMED & S OLE KANTAI, JJA**  
**MARCH 4, 2022**

**BETWEEN**

**AW ..... APPLICANT**

**AND**

**ST ..... RESPONDENT**

*(Application for stay of execution pending the hearing and determination of an intended appeal against the Judgment and Decree of the High of Court of Kenya at Nairobi (Mutuku, J.) dated 24th June, 2021 n HC Family Appeal No. 63 of 2019)*

**RULING**

1. On 24th June 2021 the High Court, (Mutuku, J.) allowed the respondent, ST, the biological mother of TNW, an eleven years old boy, to re-locate with her to the United Kingdom. The applicant, AW, the biological father of TNW is aggrieved by that decision and after duly lodging a notice of appeal, is now before us seeking an order of stay of execution of the decision of the High Court.
2. It is common ground that although the applicant and the respondent are the biological parents of TNW, they have never been married. After cohabiting for a short time, they went their separate ways in 2011, followed by litigation over custody and access to TNW. By a ruling dated 21st November 2013, the Senior Resident Magistrate's Court granted custody of TNW jointly to the two parents, with the applicant having unrestricted access. The court further ordered the applicant to pay half of the respondent's rent and TNW's school fees and related expenses. Both parents were to share his medical bills. It is again common ground that TNW lived with the respondent until 2019 when the applicant was given his physical custody. He is currently attending school in Nairobi.
3. The arrangement went on smoothly for about five years until the respondent got married and decided to relocate with her husband to the United Kingdom. On 19th June 2018, she applied to the court for an order to allow her relocate with TNW to the United Kingdom. The applicant opposed the application contending that it was not in the best interest of TNW to uproot him from his Kenyan



environment and relocate him to a new and foreign land. After interviewing TNW about his wishes and after considering his best interest, the learned magistrate concluded that removing him from Kenya to a foreign land at his age was not in his best interest. The Court however allowed the respondent control and access on half of all school holidays, including visits to the United Kingdom, but at her expense.

4. The respondent was aggrieved and lodged an appeal in the High Court. By a judgment dated 24th June 2021, the execution of which the applicant now seeks to stay, the High Court allowed the appeal and allowed the respondent to relocate to the United Kingdom with TNW, after finding that to be in his best interest.
5. In his motion for stay of execution, the applicant contends that his intended appeal is eminently arguable. Among the issues that the applicant would like the court to determine is whether the High Court erred by:
  - i. Misapprehending or misapplying the “exceptional circumstances rule”,
  - ii. holding that relocating the child to a new environment and detaching him from his home, school, friends, and younger brother was in his best interest,
  - iii. holding that the only reason the trial court declined to allow relocation of the child was because of his wishes, and
  - iv. holding that the applicant was not available for the child, having lived with him since 2013.
6. On whether the appeal would be rendered nugatory if it succeeded after TNW had been relocated to the United Kingdom, the applicant contends that it will be costly and disruptive to the life of TNW to remove him from his settled environment, school, family and friends that he has enjoyed since 2013, before the appeal is heard and determined.
7. On her part the respondent opposes the application on the grounds that the intended appeal is not arguable because it is premised on the applicant’s interests instead of those of TNW, in blatant violation of Article 53(2) of *the Constitution* and section 4(3) of the *Children’s Act*. She adds that TNW is a child of tender years whose best interests are served by giving the mother his custody and that by the nature of his work, the applicant is away most of the time, leaving TNW under the care of a nanny. In support of her submissions on the best interest of TNW, the respondent relied on *ANM v. RKM [2018] eKLR*.
8. Turning to whether the appeal will be rendered nugatory if it succeeds after TNW has been relocated, the respondent submitted that the answer is in the negative because the court can set up enforcement mechanisms as it did in *KMM v. JIL [2016] eKLR*.
9. We have carefully considered the application. As both parties submit, to succeed in his application the applicant must satisfy the Court that the intended appeal is arguable, or is not frivolous, and that unless we grant an order of stay of execution, relocation of TNW will render the appeal nugatory. (See *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others [2013] eKLR*). Whether or not relocation of TNW to the UK is in his best interest is at the heart of the issues that the applicant intends to canvass at the hearing of the appeal which he has an undoubted right to pursue. What is in the best interest of the child must depend on the peculiar circumstances of each case and that is an issue, not for us at this stage, but for the bench which will ultimately hear the appeal. Accordingly, we are satisfied that the applicant’s intended appeal is not frivolous.



10. As regards whether the appeal will be rendered nugatory or not, that also depends on the peculiar circumstances of each case. In this particular case, we are persuaded that it is important to maintain the prevailing status quo to enable this Court pronounce itself with finality on the question of the best interest of TNW as regards his relocation, particularly taking into account that under Article 53(1) (e) of the Constitution, TNW is entitled to equal provision, parental care, protection and responsibility of both parents, whether married or not. Other than being disruptive to TNW's life, relocation at this stage will entail more costs and further disruption should the appeal succeed and TNW has to be relocated back to Kenya.
11. Accordingly, we are persuaded that this is a deserving case for an order of stay of execution pending the hearing and determination of the appeal. However, we are equally satisfied that this is a matter that requires utmost urgency in resolution. In the circumstances, we shall only issue conditional stay of execution. The applicant must file and serve the intended appeal within the sixty (60) days from the date of this ruling. In default, the order of stay of execution shall automatically lapse. Costs of this application shall abide the outcome of the appeal. It is so ordered.

**DATED AT NAIROBI THIS 4<sup>TH</sup> DAY OF MARCH, 2022**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

**S. Ole KANTAI**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

