



REPUBLIC OF KENYA



KENYA LAW
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**MWM v CAD (Civil Appeal E035 of 2024)
[2024] KEHC 4148 (KLR) (Family) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4148 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E035 OF 2024
HK CHEMITEI, J
APRIL 30, 2024**

BETWEEN

MWM APPLICANT

AND

CAD RESPONDENT

RULING

1. In her application dated 15th April 2024 the Applicant prays for the following orders:-
 - (a) That there be stay of execution of the judgement delivered by the Children’s Court on 12th April 2024 pending the hearing of this application or until the further orders of this court.
 - (b) That there be a stay of execution of the judgement delivered by the children’s court on 12th April 2024 pending the hearing and determination of the appellant’s appeal.
 - (c) Costs be provided for.
2. The application is based on the grounds thereof as well as the Applicant’s sworn affidavit dated 15th April 2024 and a further affidavit sworn on 18th April 2024.
3. The Respondent has opposed the application vide his replying affidavit sworn on 16th April 2024.
4. The court directed the parties to file written submissions which they did and further submitted orally.
5. The issues between the two parties are clear and straight forward and they seem to have been in the corridors of justice for a while.



6. The Applicant is the “mother in law “to the Respondent, the latter having had an affair with her daughter one Tracy Mugure Kebatta. In their union and although they did not formally marry had the minor Rowan Jomo –Legen Dary.
7. The two were living in New York America where the child was born. It is not disputed that the three of them are American citizens and Tracy is holding a dual citizenship.
8. There arose a dispute between them which led the two of them filed two suits in a New York court. The said suits are in relation to the minor child. It appears that the two suits are still pending.
9. The minor in the cause of time came to Kenya with the mother and for reasons which were explained at the trial court he stuck with his grandmother. The grandmother, the Applicant, then filed suit seeking *inter alia* the custody of the minor.
10. In its judgement dated 12th April 2024 the trial court dismissed her case and directed that the minor be given to his father and beside that he should be flown to America where his parents reside and where he is a citizen.
11. The Applicant being dissatisfied filed this appeal and simultaneously filed this application for stay pending the above appeal.
12. The parties submitted on why the court should or should not allow the application.
13. It was Senior Counsel Dr. Kurias case that the appeal shall be rendered nugatory should the lower courts decree not stayed. He went on to submit that what was paramount was the best interest of the child which this court cannot overlook.
14. He stated that it was clearly found that it was only the Applicant who was best suited to take care of the minor seeing that the Applicant was a person of means as opposed to the Respondent.
15. That the application had been brought within the shortest time possible and no undue delay. He relied among others on the case of *Jimba Credit Ltd V. Gitbunguri* Civil Appeal No 144 of 1988.
16. He also relied on the famous case of *Butt V. Rent Restriction Tribunal* (1982) KLR 417.
17. He submitted that he had laid 28 grounds of appeal which according to him were so weighty that this court ought to grant an opportunity the appellant to be heard.
18. The Respondent vehemently opposed the application vide the oral and written submissions on record. He argued that the applicant had not met the threshold for her to be granted the orders she was seeking.
19. It was his case that the respondent ought not to be denied the fruits of his judgement and he relied among others on the case of *RWW.v.EKW* (2019) eKLR.
20. It was his submission that the Applicant has no arguable appeal since what she was projecting were at variance with what she advanced at the trial court.
21. He said that there was no loss which the Applicant would suffer seeing that the child will be in the safe hands of the Respondent and by extension her mother who was already in New York. She could still reach the grandson if she wished.
22. He denied in his submissions that he was a man of straw as advanced by the Applicant. He said that his income was on record and in any case he was already supporting his child and the mother.
23. He therefore prayed for the application to be disallowed.



Analysis and determination.

24. The facts as stated in the pleadings and submissions both written and oral are not disputed. The only question before this court is whether in light of the provisions of Order 42 rule 6 of the *Civil Procedure Rules* the application stands.
25. The same states as hereunder:-
- “(2) No order for stay of execution shall be made under sub rule (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”
26. In summary all that an Applicant must prove is whether she has an arguable appeal; is likely to suffer substantial loss if the order is not granted; the appeal will be rendered nugatory if the orders are not granted and whether there is need to offer security pending appeal.
27. Looking at the matter at hand it is admitted that the same has been filed expeditiously and within a reasonable time.
28. As to whether the appeal is arguable I think this will be tested at the level when the parties will be arguing it substantively and the 28 grounds advanced shall be tested. For now, this court shall refrain from delving into them.
29. Will the Applicant suffer any substantial loss if the orders are not granted? I have anxiously looked at this suit as well as the history behind it.
30. First of all, the dispute is a “proxy war “fought by the Applicant on behalf of her daughter Tracy here in Kenya. The Respondent and Tracy have sufficient litigation in New York. The two matters there appears to me incomplete. The only advantage the Applicant has had over the period is the custody of the minor and has attempted respectfully to wrestle from the father.
31. I do not for a moment buy the idea that the Respondent was unable to support his son. There was no prima facie evidence to suggest that he was too impecunious to support both the child and the mother. As a matter of fact, there was an order already from the New York court directing him to provide periodical subsistence which he continued to honour till the minor was brought to Kenya.
32. I agree with the Respondent that even though the Applicant was materially and monetarily sufficient she should not be allowed to have the custody of the minor. Wealth is relative and it cannot be equated to happiness. Every parent is entitled to support his or her child according to his income and standing in life and it is superfluous to compare parentage.
33. Needless to state that the Applicant will still have the chance and opportunity to support the minor even from a far distance if necessary. Being a good grandmother and pecuniarily endowed she could support her grandchild while in the hands of either the father or the mother whether in America, Kenya or any other part of the world.
34. For now, I do not see any reason to suggest that the Applicant shall suffer any loss or harm. It must be emphasised that it is the interest of the minor which is at stake and not the parents or the grandmother



for that matter. In other words, where will the minor find his joy safety and protection? Is it with the parents or the grandparents? As it stands now all the three singularly are capable of taking care of the minor regardless of their differences.

35. The issue of whether or not the Respondent has the capacity or not was an issue pending at the New York court. Why should a Kenyan court be burdened to decide an issue which a court of competent jurisdiction has the capacity to decide? To the extent that the parties subjected themselves to that jurisdiction I think it shall be only fair and reasonable that they should be allowed to finalised their issues therein.
36. My attention is drawn to the ruling of my brother Onyiego J in Miscellaneous Application Number 89 OF 2019 involving the same parties where he said *inter alia* that;

“With the averment that the mother to the minor is in America and the father is also there, and further considering that the baby is about three years now and that there are two suits pending before the New York Court regarding custody and upkeep of the minor, it is this court’s view that the issues of custody before the New York Court should be canvassed to conclusion. Unfortunately, there are valid orders issued by a competent court in New York directing that the child be returned to New York for purposes of completing the case.

For this court to issue contrary custody orders when there are already orders over the same subject issued by a competent court duly prompted by both parties will to say the least amount to undermining or usurping the authority of the New York Court as well as sitting as an Appellate Court over its orders. It will also amount to abuse of the judicial system by extension abuse of the court process. The mother to the minor cannot obtain contrary orders to those of New York Court through the mother. Having submitted to the jurisdiction of New York court, both parents are bound by its orders and this court has no legal power in my view to overturn that court’s orders.”
37. That decision has not been overturned or set aside. The decision involved the same parties herein. All that the learned judge stated is for the parties to square their issues in New York.
38. As a matter of fact, to the extent that Justice Onyiegos ruling above is still valid and without prejudice to this appeal I think this matter is essentially res judicata. All that the applicant is doing is splitting hairs and by extension trying all manner of delays to ensure that the minor does not leave her hands.
39. In the premises I think I have stated much to show that there is no substantial loss likely to be suffered by the Applicant in the event that the application is disallowed and the trials court judgement and decree upheld for now.
40. The other ground of offering security pending appeal in my view is not irrelevant herein.
41. Consequently, and based on what I have indicated above this court does not find that the Applicant has satisfied the grounds set under Order 42 rule 6 of the [Civil procedure rules](#) above for all intent and purposes.
42. The application is hereby dismissed with no order as to costs.
43. The interim orders are hereby discharged.

DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 30TH DAY OF APRIL 2024.

H K CHEMITEI

JUDGE

