



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CHILDREN CIVIL APPEAL NUMBER E005 OF 2021

MMG (suing as the mother and next friend of PMK, TA, FB, DK and EM).....RESPONDENT

VERSUS

TO.....APPLICANT

DIRECTIONS

1. What is before me is the Notice of Motion dated 4th March 2022, brought under **Order 42 rule 6(1) and rule 51 (sic) Rule 1, 2, 3 and 4**. It seeks interlocutory orders pending the hearing and determination of the Appeal and Cross Appeal herein.

2. The subject of the prayer is one DK (9) the sister to PK (13), TA (11) and FB (10) all of whom were subject of the custody dispute between their parents in Nakuru Children's Case Number E00X of 2021. The learned trial magistrate in the Judgment under appeal decreed that PK, TA, FB and DK, would be shared between their parents in the following terms;-

a) That the plaintiff and defendant are granted joint custody of PK, TA, and FB.

b) During the school holiday, the defendant now the plaintiff will be the first to have custody of the subjects 70% of the holiday while the plaintiff now defendant will have custody of the minors 30% of the period before schools open.

3. With respect to DK, *the court granted custody, care and control to the defendant now plaintiff*, and with respect to access;

“The plaintiff now defendant will have access toDK on Saturday and Sunday every fortnight from 9.00 a.m. to 5.00 p.m.”

This was interpreted by the court to mean that the child would be dropped by the mother at 9.00 a.m. on the Saturday, picked by the father, taken to the father's house, returned by the father at 5.00 p.m., taken to the mother's house. On the Sunday this be repeated all over again meaning the child would not spend the night at her father's home with her other siblings.

4. Looking at the provisions of **Section 4 of the Children Act**, and **Section 76 of the Same Act**, and considering the judgment of the learned trial magistrate. I made the following observations; -

i. That the facts of the case were that this child had lived with the father and the other siblings, for five (5) years without any problem before the dispute arose.

ii. There was no explanation for the differential treatment of the child, other than age, separating her from her siblings, denying her the access of his father equally with her siblings, yet, they are generally in the same age group; 9, 10, 11 and 13 years old.

iii. The welfare of the child was not taken into consideration and the likely effect of her separation from her siblings and her father, in the manner that the custody and access orders were issued.

5. Hence, while alive to the fact that the learned trial magistrate has the jurisdiction to review her own orders, and while alive to the legal issues raised by counsel for the respondent, the real issue here is the welfare of DK, and also of her siblings in view of the fact that the four children have grown together since they were babies.

6. Having that in mind, and in view of the provisions of **Section 4 and 76 of the Children Act**, I make the following orders;

That pending the hearing and determination of the Appeal and Cross Appeal, the order (a) and (b) in the Learned Trial Magistrate's Judgment dated 24th June 2021 on custody and access during school holidays with respect to PK, TA, and FB to apply to DK. *mutatis mutandis*.

This will ensure that she together with her siblings get to spend time together, and also get to spend equal time together with their father, and equal time together with their mother.

Orders accordingly.

GIVEN AT NAKURU THIS 31ST DAY OF MARCH 2022.

Mumbua T. Matheka

Judge

In the presence of;

CA Edna

Mr. Kibet for Applicant

Mr. Ouma for Mrs. Mukira for the Respondent