



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL APPEAL NO. E097 OF 2021**

**VMO.....APPLICANT**

**VERSUS**

**WNM (*suing as father and next friend of baby/minor child*).....RESPONDENT**

***(Appeal from judgment and orders of the Chief Magistrates Court at the Children's***

***Case No. 388 of 2020 by Hon. M.A. Otindo (Ms) S.R.M. dated 7<sup>th</sup> September 2021).***

**RULING**

1. The applicant VMO and the respondent WNM met in 2018. A relationship begun and as a result the child A.M. was born on 10<sup>th</sup> December 2020. The child was born with compromised immunity levels. She is on continued clinic attendance and medication.
2. Following a suit filed by the respondent at the Children Court at Milimani, the court granted the parties joint legal custody. It was ordered that actual custody be shared so that the respondent shall have the child from Wednesday at 3.00 pm to Saturday at 3.00 pm while the applicant shall have the child from Sunday at 3.00 pm to Wednesday at 3.00 pm. It was further ordered that each party shall take care of the needs of the minor as the law required during the time the minor is in the custody of the respective parent.
3. The applicant was aggrieved by these orders and filed an appeal to this court. The Memorandum of Appeal had several grounds, but the substance of the appeal was that the child in question was of such tender age and that, given the availed expert evidence, actual custody ought to have been given to the mother (the applicant). There was a further ground that the respondent was an unfit parent and a perpetual drunkard who ought not to have been given actual custody.
4. In the present notice of motion dated 24<sup>th</sup> September 2021, the applicant sought that, pending the hearing and determination of the appeal, this court does vary and/or set aside the orders of the trial court and grant full custody of the minor to the applicant. It was sought that the respondent be ordered to pay Kshs.50,000/= monthly towards the minor's immediate sanitary provisions, dietary provisions and towards supply of toys.
5. In the supporting affidavit it was deponed that the best interests of the minor dictated that, given her age, actual custody be given to the applicant who was the mother. It was deponed that the trial court had relied on extraneous and spurious factors in granting shared actual custody, and that it had ignored the general rule that mothers are usually given custody of children of tender years unless they have been shown to be improper or unfit, which had not been shown in this case.
6. The respondent filed both grounds of opposition and a replying affidavit to oppose the notice of motion. He defended the decision of the trial court, and pointed out that, despite the orders, the applicant had failed to comply leading to his filing contempt proceedings which are pending in the trial court. His case was that the application sought the review orders when there was pending before the trial court a similar application by the applicant.
7. The notice of motion substantially seeks the variation of the orders of the trial court so that actual custody of the minor is given to the applicant. She further seeks that the respondent be ordered to pay to her Kshs.50,000/= per month towards the upkeep of the minor. The appeal challenged the orders contained in the judgment delivered by the trial court on 7<sup>th</sup> September 2021. The appeal has not been heard and determined. The trial court received evidence from the parties before reaching the decision that it did. On appeal, this court will be required to reconsider that evidence and make a determination whether the conclusions arrived at were supported by the evidence and were in line with the best interests of the minor under **Article 53(2)** of the Constitution and **section 4(2)** of the **Children Act**. Reviewing and/or varying

the orders of the trial court at this stage will certainly compromise the hearing and determination of the appeal. For instance, the applicant has stated the the respondent is an improper and unfit parent to be granted actual custody of the minor. It will be interesting to know whether such a claim was made before the trial court, what evidence was tendered and what the respondent stated in rebuttal. It is only after the consideration of such evidence that a decision may be made to deny the respondent, the father of the child, the custody of the child. Such consideration will follow during the hearing and determination of the appeal.

8. The record of appeal has not been filed, and the appeal has not been admitted to hearing. The appropriate direction that I give is for the applicant to expedite these preliminary, but important, processes and have the appeal heard expeditiously as it relates to a minor child.

9. Otherwise, I find no merit in the application and dismiss it. Each party shall bear own costs.

**DATED AND SIGNED THIS.....DAY OF MARCH 2022**

**A.O. MUCHELULE**

**JUDGE**

**DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 28TH DAY OF MARCH 2022**

**A.O. MUCHELULE**

**JUDGE**