



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. E1 OF 2020

RSGL.....APPELLANT/APPLICANT

-VERSUS-

AAVL.....RESPONDENT

RULING

A. Background facts

1. The applicant was aggrieved by orders given by Nyeri Senior Resident Magistrate on 21/09/2020 granting interim custody to the parties in this application pending the hearing and determination of Nyeri Children Case No. 11 of 2020. The case filed by the applicant herein against the respondent sought for orders for custody of their twin children referred to as EMHL and LMSL.

2. The learned magistrate on 21/09/2020 issued the following temporary orders:-

- a) **THAT** the interim legal custody of the children EMHL and LMSL is vested jointly in the plaintiff and the defendant
- b) **THAT** the defendant to have interim physical custody of the children.
- c) **THAT** the plaintiff be allowed unlimited access to visit and spend time with the children and parties be at liberty to structure the visits.

3. In the said case applicant is the plaintiff while the respondent herein is the defendant.

4. The applicant was dissatisfied with the orders of the Senior Resident Magistrate and lodged this appeal pending the hearing and determination of the appeal. The applicant now seeks orders for stay of execution of the said orders in his application dated 24/09/2020.

5. Before this application for stay was heard, the applicant filed the second application dated 12/01/2021 seeking the intervention of the court in regard to temporary orders of limited access granted by this court on 21/01/2021. The orders were to the effect that the applicant was to pick the children from the respondent every Friday evening and return them every Sunday afternoon.

6. The applicant argues that the said orders of the court were never complied with by the respondent and that the applicant's efforts to gain access to the children has been frustrated by the respondent.

7. By the time the application dated 12/01/2021 was filed, this court had already directed the parties to file their submissions on the first application dated 24/09/2020 which was done. This means that this court has two applications to determine before it and in my view this court will determine the two application in this ruling. This action is intended to achieve expeditious disposal of this appeal and not to delay the pending custody case.

B. The Application dated 12/01/2021

8. This application seeks the intervention of the court against the respondent who failed to comply with the orders of limited access given by this court on 21/01/2021 and which directed the parties to agree on the modalities.

9. The applicant argues that since the parties failed to agree on the modalities, this court must step in to ensure that the children's right to access to their father is maintained. The applicant urged the court to consider that on the basis of a consent order made between 17/02/2020

and 21/09/2020, he was in sole custody of the children and that in the past the respondent has failed to take care of the children. It was further argued that the children have a strong and loving relationship with their father which they are not enjoying any more. The applicant relied on Section 24(1) of the Children's Act that places both parents at par as far as custody and access to the children is concerned.

10. The respondent in her grounds of opposition stated that the application is ill-conceived and bad in law and that the applicant's intention is to drive this court to usurp the powers of the Magistrates' court.

11. It was further argued that the applicant has not yet filed an appeal and therefore his application has no foundation. It was further argued that any orders made by this court should not pre-empt the hearing of the custody case pending before the Senior Resident Magistrate's court.

In determining this application, I wish to state that this court in making the orders of 21/01/2021 intended to assist the parties to have an amicable solution to custody pending the disposal of the application dated 24/09/2020 that sought for stay pending determination of the appeal. The orders were temporary in nature and were to last for as long as the said application was pending. In this twin ruling this court will determine the application dated 24/09/2020 and once this is done, it may not be necessary for the parties to focus on the orders of the court issued on 21/01/2021.

12. I am in agreement with the respondent's contention that the lower court case is still pending due to the filing of the appeal and of the applications. The said custody case requires expeditious disposal to enable the parties know their fate as far as the custody of their children is concerned. In my view, both parties in this matter should focus more on the determination of the custody case as opposed to the applications herein which are only dealing with temporary orders of the two courts.

13. The other issue is whether there exists an appeal herein. On perusal of the file I note that on 28/09/2020, the applicant filed a memorandum of appeal dated 24/09/2020. It was received by the court and this appeal was opened as HCA E1 of 2020. There is no doubt that an appeal was filed together with the notice of motion dated 24/09/2020. If the applicant omitted to serve the respondent with the memorandum of appeal, then this was an omission due to an oversight or a reason not known to this court.

14. Consequently, I find that an appeal exists and therefore it provides a basis for this application and for the one dated 24/09/2020.

15. I therefore reach a conclusion that the orders made on 21/01/2021 are not enforceable through the application such as this one before the court and that the life of temporary orders end with the determination of the two applications that are subject of this filing.

16. Consequently, I find no merit in this application and it must fail.

C The application dated 24/09/2021

As regards the application dated 24/09/2021, the applicant seeks for stay of execution of the orders given by the magistrate on 21/09/2020 in children's case No. 11 of 2020. It is not in dispute that the orders were of temporary nature pending the determination of the custody of children case.

17. The respondent argued that the application has no foundation for there is no existing appeal. This court has found that there exists an appeal except that the same has not been admitted for hearing. An appeal will be ready for admission once the appellant moves the court that the proceedings of the lower court case have been typed. The admission will be followed by filing and serving the record of appeal. As such the arguments on the allegation that there is no appeal have already been dealt with herein and the court's considered view is that an appeal is in existence.

18. The respondent further argued that this application dwells on issues that were canvassed before the magistrate. The issues before the magistrate were in respect of temporary orders for custody pending the determination of the said case.

19. I have perused the ruling of the learned magistrate and it is correct that she dealt with the said issues that include the capacities of the parties for custody orders to be issued in their favour. This court is yet to hear the appeal lodged against the magistrate's ruling. Considering and determining the said issues herein would be tantamount to pre-empting the appeal.

20. In regard to the orders for stay sought, this court has to take into consideration the best interest of the children which call for expeditious disposal of the pending custody case. The children are of tender age and are likely to be traumatised by prolonged delay of the custody case before the lower court. The court ought to ensure that the said case is heard and determined expeditiously. This principle of expeditious disposal will not be promoted by granting the orders sought in this application.

21. The respondent argued that the appeal lacks merit. This issue is not relevant in this application and ought to be put on hold until the hearing of appeal. However, the court cannot lose sight of the fact that the orders appealed against are of a temporary nature and the trial court is yet to make its determination on the issue of custody. The prolonged delay of the said case is likely to have an adverse effect on the children.

22. For all the reasons above stated, the applicant has not convinced this court that he deserves stay pending appeal in respect of the temporary orders issued on 24th September 2020.

23. Consequently I find no merit in the application dated 24/09/2020.

24. The two applications dated 12/01/2021 and 24/09/2020 in my considered view lack merit and are hereby dismissed.

25. Costs to be in the cause

26. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 29TH DAY OF APRIL, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 29th day of April 2021.