



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL CASE NO. 113 OF 2018

MI.....APPLICANT

VERSUS

MB.....RESPONDENT

RULING

1. The applicant MI is a Kenyan woman who resides in Kilifi. The respondent MB is a German man who resides in Dubai. They are the biological parents of a minor MB who was born on 1st December 2013. The minor is about seven years old. In **Children Cause No. xxx of 2018** at Nairobi, the respondent sued the applicant seeking legal and actual custody of the child. The applicant counterclaimed seeking medical cover, maintenance and school fees for the child, and general damages. The claims were heard orally by the trial court. On 27th September 2018 a judgment was delivered giving joint legal custody of the child to the two. Physical custody was given to the respondent during school days and to the applicant during school holidays. The respondent was to go with the child to Dubai for its education and to bring it to the applicant during school holidays. During school holidays the respondent was to give to the applicant Kshs.30,000/= for the child’s upkeep.

2. The applicant was aggrieved by the judgment and orders and filed a Memorandum of Appeal dated 25th October 2018, seeking that the orders be set aside and the custody of the child granted to her. She then filed the instant application dated 19th December 2019 seeking the stay of the execution of the orders by the Children Court pending the hearing and determination of the appeal. The application was brought under **Order 42 rule 6(2)** of the **Civil Procedure Rules**. The applicant’s apprehension was that since the respondent was a foreigner, if he is allowed to take away the child to Dubai he may not return it and she may never see her child again. The respondent’s case was that, since the judgment, the applicant had refused to release the child to him and that, despite subsequent orders, she had run away and hid the child.

3. It is evident that despite several applications and orders by the trial court, the applicant has refused to release the child to the respondent as directed. There is a warrant of arrest against her because she has gone underground with the child.

4. **Order 42 rule 6(2)** of the **Civil Procedure Rules** provides as follows:

“(2) No order for stay of execution shall be made under subrule (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.”

5. The appeal was filed on 26th October 2018. The application for stay was filed on 19th December 2019. This means that the application was filed over one year following the filing of the appeal. If the appeal was filed because the applicant was not satisfied with the lower court’s decision, why did it take her that long to seek the stay of the execution of the orders therein? The applicant has not given any reason for the delay. I find that, in the circumstances where the applicant stated that she desperately wanted to keep her child from the respondent, the time taken to file the application for stay was inexplicably and inordinately long.

6. The primary consideration in this application for stay is the proof by the applicant that, if the stay is not granted, she will suffer substantial loss. She has to show that if the application is not allowed, and she ultimately succeeds on appeal, she will have been placed in an irreparable position that will negate the very essence of the appeal (**Silverstein –v- Chesoni [2002]IKLR 867**).

7. It is also material to consider that, in such an application, the court is exercising discretionary power to balance the right of the applicant in seeking to appeal and the right of the respondent who has a judgment that he is entitled to execute (**Port Reitz Maternity –v- James Karanja Kabia, Civil Appeal No. 63 of 1997**).

8. It was claimed that the respondent was working and staying in Doha in Qatar before he moved to Dubai, and that, therefore, he is a foreigner who is migratory and who may disappear with the child. Secondly, because the respondent is a busy person he may not have the time to fully attend to the child. It is material that the lower court was cognisant of the fact that the respondent was a foreigner and made him to deposit Kshs.500,000/= to court to show that he would always avail the child to the applicant as directed. It is further notable that in April 2018 the respondent requested to have the child visit him for two weeks during school holidays. The respondent enrolled the child into a school in Dubai. When the applicant protested and got her lawyer to write to him, he returned the child. On basis of the applicant's own evidence, it would seem that the fear that if the respondent takes the child to Dubai he will disappear with it is not founded.

9. In short the claim that the applicant will suffer irreparable and substantial loss if stay is not granted has not been materially demonstrated.

10. The important thing, however, is that the applicant, even as she comes before this court for stay, is a fugitive from justice, as it were. She is on the run and there is a warrant of arrest because she has refused to avail the child, both to the lower court and to the respondent. Such a person cannot benefit from the discretionary power of this court.

11. Consequently, I dismiss the application with costs.

DATED and DELIVERED at NAIROBI this 27TH MAY 2021.

A.O. MUCHELULE

JUDGE