



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 29 OF 2020
PNC.....APPELLANT/APPLICANT
VERSUS
NMC.....RESPONDENT

(Being an Appeal against the Ruling of Hon. M.A Otindo, SRM given in the Children's Court at Nairobi, Children's case No. 1654 of 2019 on 30th November, 2020)

RULING

1. In a ruling delivered on 30th November 2020, the Children's Court at Nairobi in 1654 of 2019 made orders reviewing previous custody orders and granted shared actual custody and access of the minor and joint legal custody. The Court directed that the parties alternate actual custody and access on a weekly basis.
2. Being aggrieved by the said ruling, the defendant mother filed a Memorandum of Appeal dated 2nd December, 2020 and a Notice of Motion on similar date seeking a stay of execution of the order of the Children's Court and sought specific orders as follows:
 - a. That Pending the hearing and determination of the Appeal and or further Orders, the Honourable Court be pleased to stay the Orders issued by the learned trial Magistrate Honourable M. A Otindo(MS) Senior Resident Magistrate made on 30th Day of November, 2020 in Milimani Children's Case No. 1654 of 2019
 - b. That the costs of and incidental to this application do abide the result of the appeal herein.
3. The application was supported by the Appellant's affidavit dated 2nd December, 2020. It was her desposition that the trial Court issued substantive orders without the parties having ventilated their case in the main suit. Further, that the Children Officer's Report relied on by the Court is full of falsehoods and attempts to have it disregarded were thwarted. She stated that she was apprehensive that if the stay of execution of the orders of the trial Court is not granted, the minor stands to suffer substantial loss. The applicant asserted that her application had been brought without unreasonable delay and she was willing to furnish security as directed by the Court.
4. In opposition to the Application, by way of replying affidavit dated 9th December, 2020 the respondent deponed that the Orders issued by the trial Court were not substantive as alleged by the Applicant but were made in the best interest of the minor. Further, that the Orders of the Court were meant to prevent the minor from frequently movement in light of the Covid-19 pandemic. He also dismissed claims by the applicant that the Children Officer's Report is full of falsehoods asserting that the report stated that both parents are suitable to stay with the child. On the contention that the minor stands to suffer loss, the respondent averred that the Applicant had been denying him equal access and custody to the minor as ordered by the Court. He prayed that the application be dismissed with costs for lack of merit.
5. The application was canvassed by way of written submissions on the basis of the material filed by the respective parties. The applicant submitted that the interest of a child is paramount and everything must be done to safeguard, conserve and promote the rights and welfare of the child. Therefore, taking away a minor aged only 2 years will visit upon the child anguish and mental suffering. Further, that visitation rights of the father should be such that the minor shall not be allowed to suffer. It was submitted by the Applicant that they have a good case to warrant the grant of the orders sought in their application. She relied on the cases of **Court of Appeal in J.O vs S.A.O [2016] eKLR** and **Martha Olela & Another vs Jackson Obiera CA 16 of 1979** which dealt with the custody of children of tender years. She asserted that the subject minor is 2 years old and therefore qualifies under the provisions of **Section 2** of the Children's Act.
6. The Respondent submitted that **Section 83** of the Children's Act envisages that custody can be shared or joint. Further, **Section 24 (1)** of the Act, provides that neither the father nor the mother shall have superior right against the other in exercise of their parental responsibility. The respondent argued that a father is equally suited to exercise care and control over the child and every case should be determined on its

own merits. He contended that the Applicant had failed to demonstrate how the movement every week will cause emotional and psychological trauma to the child asserting that the minor is happy and bonding well with him.

7. I have considered the application and the response thereto, and the written submissions filed by the parties. The issue for determination is whether or not to stay of the order made on 30th November, 2020 granting the parties shared and joint custody alternating on a weekly basis pending appeal is in the best interest of the child.

8. Grant of stay of execution of an order pending appeal is discretionary. **Order 42 rule 6 (2)** of the Civil Procedure Rules contains the factors that the Court must consider in exercising its discretion in determining whether or not to grant a stay of execution:

“(2) No order for stay of execution shall be made under subsection (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 order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”

9. Beyond the requirements of **Order 42**, this being a matter concerning children, the Court is enjoined by the Constitution of Kenya 2010 and of the Children Act, to consider the best interests of the Children. The Constitution of Kenya 2010 provides at **Article 53(2)** that:

“A child’s best interests are of paramount importance in every matter concerning the child.

The Children Act elaborates further at **Section 4(3)** that:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

10. The first issue for consideration is whether Application for stay was sought without considerable delay. The Order appealed against was delivered on 30th November, 2020. Both the Memorandum of Appeal and the Application herein were filed on 2nd December, 2020. I am therefore satisfied that the application has been made timeously and without unreasonable delay.

11. On the issue of substantial loss, the Appellant/Applicant, asserted that this being a matter concerning a child, the guiding principle is the best interests of the child. She argued that the minor was of tender years and therefore it was in his best interest to stay with the mother. She was apprehensive that the order of the Court appealed against would inflict suffering on the child if the stay order is not granted. She was of the view that nothing was shown to suggest that she was incapable of raising her own child and therefore the orders granted were contrary to legal precedent set on custody of children of tender years. On his part, the respondent argued that he had bonded well with his son and allowing the instant application will disrupt the father-son-bond that is blooming.

12. The issue of substantial loss cited in the case of **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001**, where Musinga, J (as he then was) explained substantial loss in the following terms:

“...substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”

In the case of **Adah Nyabok -vs- Uganda Holding Properties Limited (2012)**, Mwera J (as he then was) stated that:

“Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal”

13. The case before Court involves the custody of a minor rather than a money decree. Reference to substantial loss must be quantified from the point of view of the affected child, who is subject of the subject of the orders being appealed against and is the one likely to suffer.

14. In consideration of the submissions. I note that other than stating that the child stands to suffer loss the Appellant/Applicant has not stated how spending each alternate week with his biological father will cause loss and suffering to the child. It is the view of this Court that children should not be deprived of one parent’s input in their lives unless there is a reason to keep one parent out of a child’s life.

15. The Applicant also argued that since the child is of tender years, she should be given priority in terms of custody. The position in law is that both parents enjoy equal parental responsibility on the one hand, and on the other hand the subject child has fundamental right to enjoy equal parental responsibility from both parents. Both parents to apply for custody, care and control orders from the Court with the exception of the caveat placed by the case law principle of “exceptional circumstances”.

16. A child of tender years is described under **section 2** of the children’s Act afore said as “a child under the age of 10 years. The child in issue is 2 years old and for this reason she falls into the category of children defined by the children Act No. 8 of 2001 as children of “tender years”. That by reason of the child being of a tender age, the most likely candidate to be considered for custody , care, and control orders is the mother unless if there are exceptional circumstances disentitling the mother from exercising her natural right of nurturing her child.

17. Having perused the pleadings by the parties and as stated earlier, both parties are fit to apply for custody orders of the minor. I am therefore not persuaded that this court should grant a stay order only on the basis that the child the subject of this application are of tender age. The court, therefore, does not find that substantial loss has been established, as it should be, on the part of the child for whose best interests the court is enjoined to always act, or the part of the appellant/applicant. Further, the appeal and application were filed without delay but in view of the finding on substantial loss test, the question of security for the stay of execution does not arise.

18. After careful analysis of the foregoing the Court notes that each party has accused the other of misconduct. In the circumstances, nothing would preclude the mother of a 2 years old infant to have care and control of the child. At this stage, this court will not dwell on the grounds on which the trial court granted joint, shared and equal custody of the minor to the father and mother. At this stage so as not to prejudice the hearing of the appeal, the court is not able to make concluded findings as to the suitability of the father or mother for the grant of individual custody of the minor child.

19. In the premise Notice of Motion dated 2nd December, 2020 is hereby dismissed with no order as to costs.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 27TH DAY OF MAY, 2021

.....

L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicant

In the presence ofAdvocate for the Respondent