



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**CIVIL APPEAL NO. E042 OF 2020**

**EKR.....APPELLANT**

**VERSUS**

**SKK.....RESPONDENT**

*(Being an Appeal from the Ruling and Order of the Children Court at Milimani of Hon. Mary Otindo dated 4<sup>th</sup> day of September, 2020 in Children Case No. 327 of 2020)*

**RULING**

(1) The Appellant / Applicant herein **EKR** filed in the High Court the Notice of Motion dated 2<sup>nd</sup> November 2020 seeking the following orders:-

**“1. SPENT**

**2. THAT this Honourable Court be pleased to stay the proceedings before the Children Courts being Milimani Children Case No. 327 of 2020 – SKK versus EKR and Kiambu Children Case No. 7 of 2020 EKR versus SKK, touching on the same subject minor, L.C pending the hearing and determination of this application.**

**(3) THAT this Honourable Court be pleased to call for and examine the record of proceedings in Milimani Children Case No. 327 of 2020 – SKK versus EKR, touching on the same subject minor and give proper directions in the best interest of minor and in the best interest of justice.**

**(4) THAT this Honourable Court be pleased to stay the proceedings being Milimani Children’s Case No. 327 of 2020 – SKK versus EKR and Kiambu Children Case NO. 7 of 2020 EKR versus SKK, touching on the same subject minor, L.C pending the hearing and determination of appeal.**

**(5) THAT costs be in the cause.”**

(2) The Application was premised upon **Article 53** of the **Constitution of Kenya 2010**, **Section 1A, 1B, 3A** of the **Civil Procedure Act, Cap 21, Laws of Kenya**, **Sections 3, 4 and 22** of the **Children Act 2001**, **Order 42 Rule 6** of the **Civil Procedure Rules 2010** and under the inherent powers of the Court and was supported by the Affidavit dated the **12<sup>th</sup> November 2020** sworn by the Applicant.

(3) The Respondent **SKK** opposed the Application by way of the Replying Affidavit dated **26<sup>th</sup> January 2021**. The Application was canvassed by way of written submissions. The Applicant filed his written submissions dated **14<sup>th</sup> February 2021** whilst the Respondent relied on the submissions dated **5<sup>th</sup> May 2021**.

**BACKGROUND**

(4) The Respondent herein on **13<sup>th</sup> March 2020** filed in the **Milimani Children’s Court Suit No. 327 of 2020** seeking the following orders:

**(a) A custody order vesting the legal custody of the said child of the relationship upon the Plaintiff and a structured right of access to the Defendant.**

(b) A declaration that the Defendant has parental responsibility over the child of their relationship.

(c) A maintenance order requiring the Defendant to make monthly financial payments, as the Court shall deem fit, to the Plaintiff in respect of the maintenance of the said issue. To wit,

- (a) Shelter                      Kshs. 29,000/-
- (b) Food                        Kshs. 20,000/-
- (c) Clothing                  Kshs. 10,000/-
- (d) School Fees              as per the fee structure
- (e) Medical Cover
- (f) Entertainment          Kshs. 8,000/-
- (g) House Help              Kshs. 7,000/-
- (h) Utilities – Water        Kshs. 1,000/-
  - Electricity Kshs. 3,000/-
  - Gas            Kshs. 2,000/-

(d) Costs of this suit and interests therein at Court rates.

(e) Any other relief that this Honourable Court may deem fit.”

(5) On 21<sup>st</sup> July 2020 the Applicant filed a Notice of Preliminary Objection alleging that the suit filed at the **Milimani Children’s Court** was sub-judice as there existed another suit being, **No. 7 of 2020** filed at the **Kiambu Children’s Court**.

(6) That Preliminary Objection was heard and the learned trial Magistrate in her Ruling delivered on **4<sup>th</sup> September 2020** dismissed the same as lacking in merit. In that Ruling delivered on **4<sup>th</sup> September 2020** the learned trial Magistrate declined to have the two suits consolidated. She directed that the suit filed at the **Milimani Children’s Court**, having been filed first would take precedence.

(7) The Applicant then filed an application dated **21<sup>st</sup> September 2020**, seeking inter alia that the trial Magistrate recuse herself. In her Ruling dated **15<sup>th</sup> October 2020** the trial Magistrate declined to recuse herself from hearing the matter. The Applicant then filed the Memorandum of Appeal dated **2<sup>nd</sup> October 2020** and also filed the present application for stay of the proceedings in the Children’s Court pending the hearing and determination of the Appeal. As stated earlier the application was vehemently opposed by the Respondent.

#### **ANALYSIS AND DETERMINATION**

(8) I have carefully considered this Notice of Motion, the Affidavit in Support, the Replying Affidavit filed by the Respondent as well as the written submissions filed by both parties. The only issue for determination is whether the Applicants prayer for a stay of the proceedings in the lower Court as well as stay of the order issued by the trial Court on **4<sup>th</sup> September 2020**, during the pendency of the Appeal is merited. In making that determination the Court only needs to be satisfied that the Applicant has an arguable Appeal and that the Appeal is likely to be rendered nugatory if the stay orders sought are not granted.

(9) The Applicant submits that there are two cases pending in one before the **Kiambu Children Court** and the other at **Milimani Children Court** involving the same parties. He sought to have the two cases consolidated. On the other hand the Respondent claims that the Applicants move to file the suit **No. 7 of 2020** at the **Kiambu Court** was a deliberate action aimed at scuttling the hearing of the suit she had filed earlier in **Nairobi**. This is a matter which I believe will be argued during the forthcoming Appeal and this Court will not make a finding on that issue.

(10) Suffice to say I am mindful of the fact that both cases involve the maintenance and welfare of minors and the law obliges a Court to give priority to the best interests of minors. (See **Article 53(2) Constitution of Kenya 2010** and **Section 4(2) Children Act 2001**). In that regard cases which involve the welfare of minors ought to be heard and disposed of as soon as reasonably practicable. To grant a stay pending Appeal would only serve to delay the determination of the Children’s Case.

(11) Whilst the Applicant may have an arguable Appeal I am not persuaded that his Appeal would be rendered nugatory if the orders of stay were not granted. This Court is ready and willing to hear the Appeal in an expedited manner and thus the Applicant will not suffer any prejudice.

(12) Finally taking all factors into account I find that this application for stay is not merited. As such I dismiss in its entirety the Notice of

Motion dated **2<sup>nd</sup> November 2020**. For avoidance of doubt the interim orders which had been granted in this matter are hereby lifted. Each party to pay its own costs.

Dated in **Nairobi** this **25<sup>TH</sup>** day of **JUNE, 2021**.

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**MAUREEN A. ODERO**

**JUDGE**