



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL APPEAL NO. 22 OF 2021

SCM.....APPELLANT

VERSUS

JKM.....RESPONDENT

RULING

The applicant, **SCM** is the mother of the subject who is a boy aged **nine (9) years**. The respondent **JKM** is the father of the subject. There is a dispute relating to the custody of the subject which is now subject to judicial proceedings. The applicant and the respondent appeared before the Children's Court, which upon hearing them, made the following orders:

- “1. The custody of the minor is hereby granted to the applicant**
- 2. The applicant will ensure that the minor is enrolled at [Particulars Withheld] School.**
- 3. The applicant will provide for all the needs of the minor forthwith and shall ensure that the minor is comfortable.**
- 4. The 1st respondent (applicant) shall have the custody of the minor during the school holidays and shall ensure that during this period the minor is provided with all adequate diets and other basic needs.**
- 5. The Ruling is made in the best interest of the minor”.**

The applicant was aggrieved by the above decision. She has lodged an appeal against the same. Pending the hearing and determination of the appeal, the applicant has sought orders of this court to stay the giving effect of the said decision of the Children's Court. The applicant explained that she has been in custody of the subject and had enrolled him at [Particulars Withheld] primary school where he was a Grade 1 pupil. The applicant was apprehensive that if the decision is given effect to, it will result in the disruption and psychological torture to the subject who would have been removed from a familiar environment.

The applicant stated that there was no reason to remove the subject from her custody yet the respondent is married with other children. She was apprehensive that the subject would be mistreated if his custody is handed over to the respondent. There was no reason why his custody should be removed from her yet, as the biological mother, she had taken care of the subject in the seven (7) years since she parted company with the respondent. She urged the court to grant the orders craved for in the application.

The respondent swore a replying affidavit in opposition to the application. He stated the applicant had failed in her parental duties of taking good care of the subject. He pointed out that it was peculiar that the minor was now aged nine (9) years old and was still in Grade 1 yet children of his age were in at least Grade 3. He deponed that the applicant and her relatives have frustrated him from accessing the subject and therefore he was forced to seek the court's intervention in that respect. He doubted that the subject was indeed enrolled in [Particulars Withheld] primary school Nairobi, because he had information that the minor was living with his grandparents prior to January, 2021. He urged the court to take into account the best interest of the child, especially in regard to his education, because he was concerned that the applicant was not interested in the child's education and well being. It is in that regard that the respondent urged the court not to grant the prayers sought by the applicant in her application.

This court has carefully considered the rival argument put forth by the parties to this application. It is now settled law that in determination any matter where the welfare of a child is concerned, the child's best interest should be of paramount consideration. (See **Section 4(3) of the Children Act**). There is also another principle which this court is required to adhere to and that is where the custody of a child of tender years is in issue, such custody should be with the mother of the child unless there are extenuating circumstances. In that regard, in **KMM -vs- JIL [2016] eKLR** Mungai J held thus:

“...a child of tender years’ best interest and welfare are where the legal custody is awarded to the mother barring extenuating circumstances that would prevent the mother from providing protection and care of the child. Case law lends credence to the proposition that in cases of a child of tender years of less than 10 years as defined under Section 2(1) of the Children Act 2001, custody is granted to the mother”.

In the present application, it was clear to the court that the decision of the Children’s Court in effect amounted to the mother of the child, who is a child of tender years, was deprived custody where in actual fact no extenuating circumstances were proved or established. The concerns raised by the father regarding the education of the subject is valid but it is subject to the psychological well being of the child first being addressed. In this application, it was clear to the court that the child’s best interest in terms of psychological support and physical well being is with the mother. The father (respondent) is married and has other children. It would have helped the court if the wife of the respondent swore an affidavit to indicate her willingness to support the respondent in his quest to obtain custody of the subject. That was a missing plank in the respondent’s case that convinced this court that the best interest of the child will be served by his custody being with the mother and not the father.

As regards the subject’s education, the respondent proposes that the subject be admitted to a boarding school in Kitale. The applicant has seen the school and she did not express any strong reservations. However, it was evident that the school does not have boarding facilities that cater for children of the subject’s age. That being the case, this court will not make an order, for the time being, directing that the subject be admitted to the school. However, the respondent shall be at liberty to renew the application when the subject shall be of age where he can take care of himself in a boarding environment.

In the premises therefore, this court will allow the applicant’s application and make the following orders:

- (i) The order granting the respondent custody of the subject is hereby stayed pending further order of this court.**
- (ii) The subject’s custody shall remain with the applicant subject to visitation rights by the respondent which shall be agreed by the parties and if there is disagreement, the parties shall be at liberty to apply to this court for appropriate orders.**
- (iii) The respondent shall provide monthly financial support for the upkeep of the subject to the sum of Kshs.10,000/= until further orders of this court.**
- (iv) The respondent shall take medical insurance cover for the subject.**
- (v) The applicant shall ensure that the subject attends school and shall avail periodic academic reports to the respondent pending further orders of the court.**
- (vi) The subject shall be admitted in boarding school to continue with his education upon attaining an appropriate age where he is independent and can stay in a boarding environment.**
- (vii) Parties shall be at liberty to apply.**
- (viii) There shall be no order as to costs as this is a children’s matter.**

Dated at Kitale this 27th day of July, 2021.

L. KIMARU

JUDGE