



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CHILDREN APPEAL NO.1 OF 2020**

**AW, JK, GM (Suing through their father**

**SN APPLICANT**

**VERSUS**

**SWN RESPONDENT**

**RULING**

1. The applicant filed this application following a ruling delivered on 4th March, 2020, by Hon. Limo, SRM in Children Case Number 228 of 2018 concerning custody of the parties' four children.
2. In the said ruling, the trial magistrate ordered the defendant/respondent to have custody of the two children age 8 and 2 years old to the respondent together with their belongings on or before 5th March, 2020 by 12 pm; the respondent to collect the minors at the office of area OCPD who was ordered to facilitate and enforce the order.
3. The trial magistrate further granted interim custody to both parents in respect to the 2nd born child; both parents to have equal custody of the child during school holiday.
4. He further directed parties to propose interim apportionment of duties within 7 days to ensure welfare of the minors are catered for pending hearing.
5. The applicant being dissatisfied with the said orders/directives filed this application under certificate of urgency on 5th March, 2020. On 5th March, 2020, I heard counsel for the applicant ex parte. She submitted that in respect to the first-born child she is 18 years and capable of making independent decisions and she chose to remain with the father (Applicant). She stated that the second child is 13 years old schooling in boarding school in [Particulars Withheld] Primary and joint custody was ordered as earlier captured above.
6. Counsel for the applicant submitted that the 3rd child is 8 years old and handing him over to the mother will affect his schooling as the mother's place of abode is not known. On the 4th child, she submitted that she is 2 years old; that she is a child of tender years in need of care and protection. She submitted that the mother has not been present in her life; she submitted that since she has been staying with the house girl and the father, it would be in the interest of justice for her to stay there and the mother can have access.
7. Counsel for the applicant indicated that the trial court came up with substantive orders yet the matter had not been heard. She submitted that the court had made an order for the children's officer to prepare report on 19th February, 2019 and on 4th March 2020, the court made the orders of custody on its own motion. She said the matter was coming up for hearing on 4th March, 2020, that she sought the matter was not ready for hearing because after fixing a hearing date, she was served with defence and further affidavit which they filed a response and a list of witnesses and supplementary list of documents the previous day. She said the court delivered a ruling at 3 pm.
8. Upon considering, the application brought under certificate of urgency I indicated that I would not make any substantive orders before giving the respondent to respond to assertions by counsel for the applicant. In view of the reasons given by counsel for the applicant on why custody of the two children should not be given to the mother as ordered by the trial court, the court was of the view that the respondent should be given an opportunity to respond before further directions are given particularly in respect to custody of the 2 years old child. I ordered status quo to be maintained and respondent be served to enable me give further direction on custody of the 2 years old child awaiting hearing on the application in respect to the remaining prayers.
9. On 10th March, 2020, Mrs. Nancy Njoroge, Advocate for the respondent submitted that the applicant failed to comply with the court order

to release the children to the respondent despite her going to the children's officer as ordered. She submitted that the respondent was unable to see the children aged 6 and 2 years and took hearing date 4th March, 2020. She submitted that respondent attended court with her witnesses but counsel for the applicant insisted on filing replying affidavit to affidavit filed on 19th February, 2020. She said counsel took a step back and decided she would not go on with the case and that is what brought out the Ruling they are appealing against now. She said the applicant is seeking orders in this court after disobeying lower court order.

10. Counsel for the respondent submitted that in respect to 2 years old child, the age is critical and the child should stay with the mother. She stated that the court has not been told that the mother is of danger to the child and she has been staying with the children since then. She urged the court to look at the children's court.

11. Mrs. Ndeda for the applicant indicated that she agrees that the court should look at the best interest of the children. She further stated that the lower court recorded that the respondent is a danger to the children; that before she left, she threatened to kill herself. She further stated that the respondent as at now has no fixed abode; that she prayed to be given the children. She submitted that in the lower court, it is the applicant/father who went to court for custody of the children and be provided support by the applicant or she be taken back to the business of the applicant. She added that the respondent abandoned the 2 years old child in August 2019 and up to now; the father has been having the child. On disobedience of court order, she prayed that they be allowed to respond to it through an affidavit. That the applicant has had the children since August and they should not be disturbed as the mother has no fixed abode.

12. In a rejoinder, counsel for the respondent submitted that the applicant has not tendered evidence to show that the respondent is a danger to the child and counsel for the applicant has failed to disclose that the respondent filed a suit in Nairobi file No. 1614 of 2019, after her being thrown out of the matrimonial home which show that she did not abandon the children. She said despite not having employment, she is able to feed herself and she will feed the children; she stated that the court will make a finding whether the applicant should support the children. She urged court to put the interest of the children first as the parties are fighting their battles.

#### ANALYSIS AND DETERMINATION

13. My determination at this stage will be limited to custody of the 2 years old child awaiting inter-parties hearing. As concern the 8 years old child my orders for status quo will remain awaiting determination of the application after inter-parties hearing. Counsel for the applicant has argued that the respondent is a danger to the children and should not be granted custody. The other reason to deny her custody is lack of fixed abode. In respect to the first issue, I have perused the lower court record and have not found an averment by the respondent to the effect that she has made any threats to kill herself and the children.

14. I have also perused the children officers report dated 2nd March, 2020. The children officer recommended that the custody of the 8 and 2 years old children are of tender age and should stay with the mother and father be granted access to them. The children's officer never gave any negative report concerning the mother. It has not been demonstrated that she is likely to cause any harm to the child. Counsel of the applicant stated that from the time the applicant and respondent separated the children have been staying with the father and a house help.

15. In my view, in the absence of prove that the respondent can cause any harm to the child, it would be better for the child to be in the hands of the mother than a maid if the mother is alive. I agree with the children's officer that it would be proper for the children not to be separated but the 8 years old child is in a day school and changing place of abode mid-term may interfere with his studies. The child being 8 years old is also able speak out in case of mistreatment.

#### 16. FINAL ORDERS

1. Custody of G.M aged 2 years old is granted to the respondent/mother pending hearing and determination of this application.
2. The other three children to remain with the father with access from the respondent/mother pending hearing and determination of this suit.

Ruling dated, signed and delivered via email at Nakuru this 30th day of April 2020

**RACHEL NGETICH**

**JUDGE**

TO:

Sabaya & Associates Counsel for the Applicant

Nancy Njoroge Advocates Counsel for the Respondent