REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL CASE NO. 62 OF 2019 (OS)

VUJ.....APPELLANT

VERSUS

KNMP.....RESPONDENT

(Being an appeal against the judgment and Decree of the Hon. M.W. Kibe (Ms) Resident Magistrate, delivered on 13th May 2019 in Children's Case No. 115 of 2017).

RULING

1. The appellant VUJ and the respondent KNMP got married on 11th June 2008. They were blessed with a son JP who was born on 19th April 2009. The marriage was dissolved on 18th March 2019. The appellant filed a suit against the respondent at the Children Court at Milimani seeking actual custody of the child and for the respondent to contribute to the maintenance of the child. The court heard the dispute and on 13th May 2019 delivered a judgment in which it granted legal custody to both parties; actual custody, care and control to the appellant; and the respondent to have access to the child on alternative weekends and half of the school holidays. The parties were to agree on the pick and drop points, and the times. The appellant and the respondent were to personally pick an drop the child. The respondent was to cater for the child's school related expenses, medical cover, pay school transport of Kshs.27,000/= per year and provide Kshs.10,000/= for food monthly. The appellant was to pay the child's fees, provide for clothing, rent and food (in case of short-fall). The parties were to equally provide towards the child's social activities. Each party was at liberty to apply.

2. The appellant was aggrieved by some of the orders in the judgment. Specifically, she complained that she had been ordered to pay more towards the upkeep and maintenance of the child, instead of equal responsibility. She complained that the order that she and the respondent do personally drop and pick the child would bring the two in contact, and yet they had divorced and that there could be occasions that she may not be personally available. She was aggrieved by the order of access, saying that the respondent had been given more access. Lastly, she complained that the court had not considered the report of the Children Officer in which the child had expressed its wishes, and that, in all, the best interests of the child had not been considered.

3. With the appeal was the present motion seeking the stay of the execution of the judgment delivered on 13th May 2019 and decree issued on 7th June 2019, and to reinstate the status obtaining before that, which was that, the respondent shall have access to the child on alternate weekends from 10.00am to 4.00pm. She sought these orders pending the hearing and determination of the appeal.

4. The respondent opposed the application and stated that he was a responsible parent and had done nothing to warrant the stay of the orders, including access. He deponed that the appellant had, despite the orders of the subordinate court, denied him access to the child. He was unemployed but had complied with the rest of the orders in the decree. He supported the orders in the decree.

5. Mr. Muriungi for the appellant and Ms. Mboya for the respondent filed written submissions which I have considered.

6. Section 24(1) of the **Children Act (No. 8 of 2001)** provides that

> **"24.(1) Where a child's father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility."**

7. Article 53(1)(e) of the Constitution provides that every child has the right to parental care and protection, which includes equal responsibility of the mother and the father to provide for the child, whether they are married to each other or not.

8. The application was made under **Order 42 rule 6** of the **Civil Procedure Rules,** under which the applicant has to show that she will suffer substantial loss if stay is not granted; the application has been brought without unreasonable delay; and that she has offered security of the due performance of the decree that may ultimately be binding on her. However, the application is peculiar in the sense that it involves a child, a minor. **Article 53(2)** of the Constitution states that:-

> **"A child's best interests are of paramount importance in every matter concerning the child."**

This provision is supplemented and complimented by **section 4(2)** of the **Children Act** which states as follows:-

> **"4(2) 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."**

9. The Court of Appeal in **Atwal –v- Amrit [2011]2 EA 20** observed the the best interests of the child are superior to the rights and wishes of parents; and that those rights incorporate not just the physical and monetary comfort of the child but the child's welfare in the widest interest, including its emotional and psychological welfare.

10. Lastly, the duty of the parents to maintain their child has been imposed by statute. When the court is dealing with an application to stay the custody, education, medical and upkeep orders made by the subordinate court it should be careful not to suspend the orders until the appeal has been heard and determined as this would compromise and jeopardize the welfare and best interest of the child **(Z.M.O. –v- E.M. [2013]eKLR)**. Unless the circumstances of the case are quite peculiar, the best option is to expedite the appeal so that all issues are finally heard and determined.

11. In the instant case, the appellant and the respondent have divorced, and the appellant does not want to see the respondent. However, the two are in a permanent relationship in the sense that they got a child during the marriage, and the law imposes on them the obligation of bringing up the child. They may not like each other, but they have to meet to review the education of the child, its medical needs, its upkeep, and so on. They have to decide which school the child will go to, and which hospital the child will visit. **Article 53(2)** of the Constitution and **section 4(2)** of the **Children Act** are not about their interests and preferences. The law is about their child, and its best interests.

12. If the entire decree is stayed, what happens to the orders made thereon in relation to the child? If the subordinate court did not consider the wishes of the child and its best interests, the court is prepared to take the earliest date available to the parties to hear the appeal, and therein consider these matters.

13. The result is that the application by the appellant for stay of the judgment and decree of the lower court lacks merits, and is dismissed with costs.

DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 30TH day of APRIL 2020.

A.O. MUCHELULE

JUDGE