



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 168 OF 2019

JACOB KIPTOO SEMBELE.....APPLICANT/APPELLANT

VERSUS

JOSEPHINE GICUKU IRERI.....RESPONDENT

RULING

1. The applicant (**JACOB KIPTOO SEMBELE**) by an application dated 7th January 2020 seeks orders for stay execution of the ruling delivered on 15th November 2019 pending the hearing and determination of the appeal.
2. The application is premised on the grounds that the applicant who is the guardian ad litem in Children's case no. 164 of 2019 sought orders for custody of the minors, subject of this application after they were abandoned by the respondent in September, 2019. The court, while acknowledging evidence of child neglect and abandonment by the respondent (**JOSEPHINE GICUKU IRERI**) made an order separating the minors by sharing them between the applicant and the respondent. The result is that the first and last child have been given to the respondent, whilst the 2nd and 3rd have been given to the applicant.
3. The applicant lodged a memorandum of appeal on 19th November 2019 which was filed on 21st November 2019 against the order separating the minors. The trial court declined the application for stay vide its ruling delivered on 18th December 2019. The enforcement of the impugned orders which are the subject of the appeal is imminent yet the best interest of the minors and their welfare is at stake as the orders separating the minors are prejudicial to the minors.
4. He contends that the respondent will not be prejudiced in any way as she wilfully abandoned the minors in September 2019 in the applicant's care. He laments that he is the one who will suffer great loss by being separated from the other children. The appeal will be rendered nugatory as there will be nothing left to prosecute, and the minors will suffer irreparable harm. They are aged 11 years, 9 years, 4 years and 5 months.
5. The applicant submitted to the court that he is willing to meet any conditions as to security although he has been meeting the needs of the minors. He urges this court to find that the application has been brought timeously and without undue delay, pointing out that the ruling was given on 15th November 2019, and the application for stay was made on 21st November 2019, less than 7 days later. The application was decided on 18th December 2019, and he did not disobey the ruling as he was prosecuting an application. He urges the court to look at the circumstances that led to the children being with him, laying emphasis that they were abandoned wilfully by the respondent and the court acknowledged that. Further, that from September 2019 to date the 4th minor has stopped breastfeeding after breastfeeding was unnecessarily stopped by the respondent, and he has approached the court in good faith.
6. The respondent filed grounds of opposition on 5th February 2020 stating that the applicant has failed to demonstrate the criteria for issuance of orders of stay of execution as established in **MNN v MOK & Another (2017) EKLR**. The application is described as an abuse of the court process and that the applicant is guilty of approaching the court with unclean hands contrary to the interest of the minors, and this court ought to find that the application has been preferred to sanitize the applicant's disobedience of court orders.
7. The respondent argues that the main suit has not been heard and determined. She states that nature of the application is such that seeks to stay one limb of the order i.e. custody of the children which was granted at the discretion of the court which had the benefit of hearing the respondent's argument. She cited the decision in **MM v MOK** to justify her submissions that the court must be careful not to impose its decision without the benefit of what the trial court heard and assessed. Did the decision fail to meet the test of law i.e. was it erratic and infringing principles of law?
8. In directing that the lastborn child be immediately released to the mother, the trial court took into account the fact that she is 4 months old and was still breastfeeding. In stay of children's matters, the court has to travel beyond the provisions of order 42, certain elements of

children's matters cannot be stayed such as breastfeeding.

9. The court is urged to make critical observations as to:

a) the separation of the minors;

b) The children in the interview alluded to domestic violence within the home; and questioned the suitability of the environment in raising the children.

10. This court is urged to hold that it was on the best interests that the minors be separated, and to bear in mind that meeting financial needs can't be the yardstick, as there are also emotional needs to be considered. Further, that these are interim orders, the main suit has not been heard and granting stay orders amounts to denying the right to be heard. That stay was issued in 2020, the applicant has refused to give custody of the children for 2 months contrary to the orders of the court.

11. The applicant is accused of approaching the court with unclean hands, the contention being that he should have complied with the orders first even if he was not happy with them. That in the event this court finds that the minors should not be separated, then they all be given to the respondent.

ISSUES FOR DETERMINATION

a) Whether the court should stay the execution of the ruling delivered on 15th November 2019

WHETHER THE COURT SHOULD STAY THE EXECUTION OF THE RULING DELIVERED ON 15TH NOVEMBER 2019

As observed in *Bhutt v. Bhutt Mombasa HCCC NO. 8 of 2014 (O.S.)*, in determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution **Order 42 rule 6 of the Civil Procedure Rules**, must be complemented by an overriding consideration of the best interest of the child in accordance with **Article 53 (2) of the Constitution** which provides-

“In exercising its jurisdiction to grant stay of execution, the High Court is required by Order 42 rule 6 (2) of the Civil Procedure Rules to be satisfied that –

1. The applicant will suffer substantial loss if stay is not granted;

2. The application for stay has been brought without undue delay; and

3. The applicant has provided security for the due performance of the decree

The court granted the applicant temporary stay pending the hearing and execution of the present application.

In granting the orders with regards to custody, the court took into account the interview of the minors and the children's report dated **9th October 2019** where the issue of violence came out clearly. The applicant has claimed that the respondent is an unfit mother and that she abandoned the children and locked them in the house on 5th September causing them to miss school for 2 days.

In addressing these issues, the court should consider the provisions on survival and best interest of the child as espoused by **Section (2), (3) (a) (b) (c) of the Children Act:**

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

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to -

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as it necessary for the welfare of the child and in the public interest.”

Notably, this court did not have the benefit of hearing the children's interview or perusing the report therefore it shall rely on the record of the lower court as espoused in the ruling annexed to the application.

The Court of Appeal in *J.O. v S.A.O (2016) eKLR* stated:

There is a plethora of decisions by this court as well as the High Court that in determining matters of custody of children and especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother because mothers are best suitable to exercise care and control of the children. Exceptional circumstances include: the mother being unsettled; where the mother has taken a new husband; where she is living in quarters that are in deplorable state; or where her conduct is disgraceful and/or immoral.

In *Martha Olela & another v Jackson Obiera C.A 16 of 1979* the court explained the general principle that custody of young children should be awarded to the mother unless special circumstances and peculiar circumstances exist to disqualify her for being awarded custody. The exceptional circumstances would include “**disgraceful conduct, immoral behaviour, drunken habit, or bad company.**”

Section 2 of the Children Act provides;

“**child of tender years**” means a child under the age of ten years

Three of the minors were children of tender years therefore the 2nd, 3rd and 4th minors were children of tender years and therefore the custody of the three minors should have been granted to the mother.

The applicant has not produced any evidence to prove that the respondent is an unfit mother or that she deliberately abandoned her children. In the premises I find no reason to interfere with the trial court’s decision as this is an issue that will be determined in the appeal.

The respondent did not obtain stay orders, but decided to ignore the lower court’s orders and retain the children, then come up with a face-saving excuse that it is because he was prosecuting an application whose outcome he was waiting for. But what about now? Has he released the two children as had been directed? I fail to detect how the appeal will be rendered nugatory... surely if he succeeds then he simply gets back the children as there is no suggestion that the respondent intends to remove them from the jurisdiction of this court. I find no reason to stop the orders issued by the lower court, and the application herein fails and is dismissed with costs to the respondent.

E-Delivered and dated this 22ND day of MAY 2020 at Eldoret

H.A. OMONDI

JUDGE