REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 3 OF 2018

V N M.....APPELLANT

VERSUS

D K R.....RESPONDENT

RULING

1. The appellant is the mother of the minor while the respondent is the minor's father. The respondent filed an application in Nairobi Children Case No. 1516 of 2017 dated 19th December 2017 seeking orders for custody and an order restraining the appellant from transferring the minor from [particulars withheld] School without the respondent's consent and that the minor be returned to his house in Embakasi. The application is pending before the Children Court.

2. Through the ruling issued on 11th January 2018 and extracted vide an order dated 12th January 2018, the court in Children case No. 1516 of 2017 ordered that, among other orders, the appellant and the respondent do take steps and identify a suitable school with a vacancy and enroll the minor there for his studies, and that in the event they fail to agree the minor to remain at [particulars withheld] School and not removed unless with the consent of both parents ,or with leave of the court. The appellant and the respondent are yet to agree on a school in which to enroll the minor. The appellant, however, obtained admission for the minor at [particulars withheld] where the minor is now schooling.

3. Being dissatisfied with the orders, the appellant filed a Memorandum of Appeal dated 16th January 2018 and the current application dated 17th January 2018 under certificate of urgency seeking the following orders:-

> (a) that the court be pleased to order stay of execution of the ruling issued on 11th January 2018 in Nairobi Children Case No. 1516 of 2017, decree thereof and all the consequential orders emanating therefrom pending the hearing and determination of this application;
>
> (b) that pending the hearing and determination of this application the court do direct that the minor attends [particulars withheld];
>
> (c) that this court do stay the proceedings of Nairobi Children Case No. 1516 of 2017 pending the hearing and determination of this application;
>
> (d) that this court orders stay of execution of the ruling issued on 11th January 2018 in Nairobi Children Case No. 1516 of 2017, the decree thereof and all consequential orders emanating therefrom pending hearing and determination of this appeal;
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> (e) that the court do stay the proceedings of Nairobi Children Case No. 1516 of 2017 pending hearing and determination of this appeal; and
>
> (f) that the costs of the application be provided for.

4. The application was supported by the appellant's supporting affidavit dated 17th January 2018, a supplementary affidavit dated 1 February 2018 and submissions dated 4th February 2017. She alleged that in line with the court order, and in the best interests of the minor, she searched around her current residence in Kiambu County and felt that [particulars withheld]was the best school for the minor; that she informed the respondent of her choice through his lawyers but the respondent disapproved [particulars withheld]and insisted that [particulars withheld] School was the best choice for the minor; that she later found out that the respondent had sought re-admission of the minor to

[particulars withheld]School after she had issued a letter withdrawing the minor from the school; that she was summoned to [particulars withheld]School by the head teacher/academic director and explained to him the circumstances surrounding the withdrawal of the minor; that the head teacher/academic director informed them that he had withdrawn his decision to re-admit the minor to the school until such a time as the parents would agree; that the order directing that the minor remains at [particulars withheld]School was unenforceable and left the minor without a school; that it was in the best interest of the minor that he be enrolled at [particulars withheld]which school was convenient to him in terms of distance and in respect of which school the mother had already paid school fees for; and that the minor would suffer in more than one way if the order requiring him to remain at [particulars withheld]School was not stayed.

5. The application was opposed by the respondent. He requested the court to dismiss the appellant's application because the appellant had approached the court with unclean hands, was in breach of **section 84** of the **Children Act** and did not deserve the orders sought. In his replying affidavit dated 30th January 2018, he stated that the lower court's order was clear that the minor attends [particulars withheld]School in the event that both parties failed to agree which was currently the case; that the appellant withdrew the minor from the school without consulting him in contravention to the court order; that despite there having been a reserved vacancy at [particulars withheld] School for the minor, the appellant acted against the best interests of the minor and demanded for its withdrawal from the school; that the appellant now resides with her parents and has abandoned all her responsibilities with regards to the minor to her parents whereas he is able to stay with the minor in his house and cater for the minor as he always did; that the minor's commute time was shorter from his house in Embakasi to the minor's school as compared with that from the appellant parents' home to the minor's school; and that he disapproved of the minor being enrolled at [particulars withheld]because the proposed school would be a downgrade and not in the best interests of the minor.

6. The matter came up for hearing on 5th February 2018. Ms. Mukururi was present for the appellant and Mr. Kalama for Mr. Mundala was present for the respondent. All the evidence has been considered. The court is faced the question whether the appellant has shown that she is deserving of the discretion of the court.

7. I note that matter had proceeded in the subordinate court where interim orders were granted requiring that the appellant and the respondent to take steps and identify a suitable potential school with a vacancy and enroll the minor there for his studies, and that in the event they failed to agree the minor was to remain at [particulars withheld] School and was not to be removed unless with the consent of both parents, or with leave of the court. The appellant stated in his affidavit in support of his application that she was present when the orders were issued. This means that the appellant was aware of the orders. The orders have not been varied or set aside. The appellant was required to comply with these orders, or seek their variation. She did not comply with the orders. The explanation given by the appellant for non-compliance thereof was that the new school, [particulars withheld], was closer to her parents' home where she was currently residing with her parents, hence it was in the best interest of the minor that the minor be admitted to attend that particular school. Closeness to her parents' home was not a consideration in the orders. In my view, this explanation did not change the fact the appellant had failed to honour the terms of the orders. I reiterate the sentiments of Romer LJ in **Hadkinson -v- Hadkinson (1952) P 285 at 288** that:-

> **"It is plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."**

Having not complied with clear orders, the appellant came with unclean hands. He who seeks the court's discretion must show that he deserves the same.

8. It is for these reasons that I dismiss the application dated 17th January 2018 with costs.

DATED and DELIVERED at NAIROBI this 22ND FEBRUARY 2018.

A.O. MUCHELULE

JUDGE