



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 41 OF 2017**

**H O .....APPELLANT/APPLICANT**

**VERSUS**

**E T K.....RESPONDENT**

**RULING**

1. H O the Appellant/Applicant and E T K the Respondent herein are a married couple and parents of 2 daughters B A born on 2.6.12 and A N born on 8.4.14. The marriage experienced challenges and the parties separated in April 2016. The Respondent relocated to Nairobi while the Appellant/Applicant remained in Mombasa with the children. On 21.12.16, the Appellant/Applicant filed the Tononoka Children's Court Case No. 461 of 2016 seeking actual and physical custody of the children. He also sought orders that the children remain in Mombasa and that the Respondent be given limited access with upfront communication and arrangements on venue and times of access.

2. In its judgment of 4.12.17 the Children's Court ordered *inter alia* that:

***a) Both the Plaintiff and the Defendant shall have Joint legal Custody. The Defendant (Mother) shall have Actual Physical Custody while the Plaintiff (Father) shall have Unlimited Access during School days, whenever he is in Nairobi and shall be entitled to half of all school holidays;***

***b) The Plaintiff (Father) shall cater for School Fees for the Children together with transport -at a school to be agreed upon by both Parties in Nairobi where the Defendant resides while the Defendant (mother) shall cater for all other school related expenses;***

***c) The Defendant (Mother) shall cater for shelter and Utility Bills as well as pay the Salary of the Househelp;***

***d) The Plaintiff shall make a monthly financial contribution of Kshs. 15,000/= per monthly for upkeep of the Children payable to the Defendants on or before the 5<sup>th</sup> of every month of w.e.f February 2018 when the Children have settled in their new school in Nairobi;***

***e) Medical needs of the Children shall be catered by both the Plaintiff and the Defendant;***

***f) Entertainment shall be shared between the parties with each Party catering for it during- the period they are in actual physical custody;***

***g) Clothing needs of the child shall be shared between the Parties and in the event not less than twice every Year;***

***h) Each Party to bear his own costs and shall be at liberty to apply.***

3. Being aggrieved by the judgment of the Children's Court, the Appellant/Applicant filed an appeal on 13.12.17. The Appellant/Applicant also filed the present Application dated 14.12.17 seeking the following orders:

**1. Spent**

**2. THAT pending the interparties Hearing of this Application:-**

***a) There be Stay of Execution of the Judgment delivered before the Subordinate Court on 4/12/2017, and All/Any***

*consequential Orders/Process subject thereof;*

*b) The Parties be restrained, whether by themselves, their agents, servants, employees, representatives or whosoever claiming through them, from interfering with and/or in any way, manner or form, generally interrupting the Minor's Schooling at [Particulars withheld], MOMBASA, and [Particulars withheld] ACADEMY, MOMBASA, respectively;*

*c) The Appellant be granted Unlimited Access to the Minors upon prior, reasonable Notice, whilst they are in the Custody of the Respondent during the pendency of the current School Holidays and upon lapse of the Holidays, Custody of the Minors do vest in the Appellant, with Unlimited Access, upon prior reasonable Notice, to the Minors by the Respondent;*

*d) "Status Quo" pertaining prior to delivery of the Judgment of the Subordinate Court on 4/12/2017, be Maintained in totality;*

**3. THAT the Interim Orders subject of Prayer/Order No. 2 hereinabove do persist until the Hearing and Determination of the Appeal subject hereof;**

**4. THAT Costs of this Application be provided for;**

4. The Application is premised on the grounds therein and on the facts set out in the Affidavits of the Appellant/Applicant sworn on 14.12.18 and 14.2.18. In a nutshell the Appellant/Applicant's case is the parties and their children have all along resided in Mombasa where he works at [Particulars withheld] Academy while the Respondent worked at [Particulars withheld]. Following disagreements, the parties separated with the Respondent relocating to Nairobi while the Appellant/Applicant remained in Mombasa and retained full custody and care of the children. Be A is enrolled in [Particulars withheld] Academy, Mombasa as a fee paying student while A N is enrolled at [Particulars withheld] Nursery, Mombasa on scholarship. He filed the case in the Children's Court to formalize the custody arrangement after the Respondent blatantly refused to return the children after the school holiday and hiding them. An order was issued directing that the children be returned to Mombasa to continue with their education and to reside with the Appellant/Applicant who has since single handedly taken care of all their needs. The Respondent is also of no fixed abode. The Appellant/Applicant further avers that by virtue of his employment he was entitled to scholarship for his children in any of the [Particulars withheld] schools but only in Mombasa. He got admission for A on 3.10.17 and was due to secure admission for B in January 2018.

5. The Appellant/Applicant avers that the orders of the Children's Court in its judgment of 4.12.17 are entirely against the best interests of the children. He timeously filed an appeal which in his view has overwhelming chances of success. He is ready and willing to abide by any conditions set by the Court on the grant or the orders sought herein. If stay is not granted the appeal will be rendered an academic exercise and therefore nugatory. Substantial loss shall result to the children and to him as their educational schedule and their lives will be disrupted and he will be constrained to comply with the impugned orders to his detriment. No prejudice will be suffered by the parties if the orders sought are granted.

6. In her Grounds of Opposition dated 19.12.17, the Respondent argues that the Application is mischievous and made in bad faith. The Application does not meet the threshold for stay orders. In her Replying Affidavit sworn on 6.2.18, the Respondent avers that the parties married on 13.2.10. The Appellant/Applicant caused a separation on 8.4.16 due to infidelity on his part and abandoned the Respondent and forcefully took away the children to an unknown place. She averred that the Appellant/Applicant allowed her to see the children on 29.4.16 for a few minutes and they looked traumatized, emaciated and withdrawn which caused her a lot of pain as their mother. Thereafter the Appellant/Applicant denied her access to the children in spite numerous calls to text messages and email to him.

7. The next time the Respondent saw the children was on 3.12.16 after the Appellant/Applicant abandoned them at his foster parents' home in Kenyatta Market area at 11pm the previous day. The Appellant/Applicant filed the suit in the Children's Court and obtained *ex parte* orders on 4.1.17 directing her to return the children to Mombasa. He picked up the children from her on 10.1.17 with armed policemen. Thereafter the Appellant/Applicant denied the Respondent access to the children. He moved houses and took the children to different schools without her consent. She stated that they lived in Nairobi and only moved to Mombasa on 2.4.14 when the Appellant/Applicant got his present job. The first child was born in Nairobi while the 2<sup>nd</sup> child was born just a week of their moving to Mombasa. She further avers that while she was with the children she took care of their needs and was always available for them as a mother while the Appellant/Applicant was busy working and making money. She accuses the Appellant/Applicant of placing barriers to block her access to the children.

8. The Respondent asserts that the children who are aged 5 years and 3 years and they need to be with their biological mother. She doubts the scholarships allegedly secured for the children as no evidence in respect thereof has been produced. She opposes the application for stay and asserts that the lower Court did consider the weight of evidence and issued its orders in the best interests of the children. The children are female and of tender years and ought to be with their mother and not their step mother. She is employed and lives in rented premises just as they did while in Mombasa. She urged the Court to dismiss this Application and give the children an uninterrupted life with their mother as required by law.

9. In his Supplementary Affidavit sworn on 14.2.18, the Respondent reiterates

10. I have considered the Application and the rival affidavits and submissions together with the authorities relied on. It is the duty of every Court when considering a matter concerning children as I am in this Application herein to bear in mind the provisions of Article 53 of the Constitution of Kenya 2010. Article 53(2) provides:

**“(2) A child's best interests are of paramount importance in every matter concerning the child.”**

The best interest of the child imperative is also stipulated in Section 4(2) of the Children Act which provides:

***“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.”***

11. The Appellant/Applicant seeks stay of execution of the orders of the Children’s Court of 4,2,17 pending appeal. It is trite law that grant of stay of execution of an order pending appeal is discretionary. Order 42 rule 6 (2) contains 3 factors that the Court must consider in exercising its discretion in determining whether or not to grant a stay of execution:

***“(2) No order for stay of execution shall be made under subsection (1) unless-***

***(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***

***(b) such security as the court order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”***

12. On whether substantial loss will be suffered if the orders sought are not granted, the Appellant/Applicant submitted that the children’s educational schedule and their entire lives will be disrupted and the Appellant/Applicant will be compelled to comply with the orders to his detriment. The Respondent argues that the children are in kindergarten, the younger only having joined school in January 2018. As such will not suffer substantial loss by changing schools and moving to Nairobi to be with their mother.

13. It would appear to me that the Appellant/Applicant’s concern is the education of the children in [Particulars withheld] Academy where he says he has secured a scholarship for the children. While it is commendable that the Appellant/Applicant wants the best education for his little girls, the welfare and needs of the children encompass much more than just education. A good education in a school such as the [Particulars withheld] Academy does not in and of itself in my view guarantee the best interest of the children herein. In any event, the older child is yet to join the school.

14. In matters concerning children, the Court has to look beyond the possible substantial loss to be suffered by an applicant and consider the substantial loss to be suffered by the children involved. The interests of the children supersede those of the parties and must be upheld at all times. The potential loss of the opportunity by the children who are of the tender ages of 3 years and 5 years to study at [Particulars withheld] Academy weighed against the loss of opportunity of the children to be nurtured by their biological mother is minimal while the latter loss is substantial. While there are other schools that the children can attend in Nairobi and get a great education, the children have no other mother and being of tender years, they need to be with their mother.

15. I am not persuaded by the Appellant/Applicant’s assertion that if the orders sought are not granted the children’s educational schedule and lives will be disrupted. My view is that changing schools will not upset their educational schedule. The children are both in kindergarten and the younger one has only had one term of school. Enrollment in a particular school is not adequate reason to deprive children of tender years the nurture of their mother. It is not lost on the Court that the Appellant/Applicant has himself the intention of transferring the older child from her current school to [Particulars withheld] Academy once a vacancy is available. Is this not a ‘disruption’? His argument of disruption of the children’s educational schedule and their lives does not therefore hold water. To my mind, the greater good and the best interests and indeed justice for the children will be best served if they are with their biological mother pending the hearing and determination of the Appeal.

16. The judgment which is the subject of this Application was delivered on 4.12.17. The Application was filed on 14.12.17. I am satisfied that the Appellant/Applicant has made this Application timeously and without unreasonable delay.

17. The Appellant/Applicant argues that the Appeal herein will be rendered nugatory of the orders sought are not granted. Further, profound irreversible prejudice would be suffered by the minors through disruption of the social, spiritual and educational lifestyle and schedules. The net effect of which would be too onerous to remedy. I do not see how the children living with their biological mother pending Appeal will render the Appeal nugatory with an effect too difficult to remedy. Should the Appeal succeed, the children will have suffered no harm. Indeed my view is that the children being of the tender age of 3 years and 5 years stand to suffer substantial loss if they continue to be away from their mother for the duration of the Appeal.

18. In view of the foregoing, I consider that a stay of execution would militate against the best interests of the children herein. Accordingly I find and hold that the Application dated 14.12.17 lacks merit and the same is hereby dismissed. This being a matter between a married couple though separated, the Court shall not antagonize the parties further by condemning either to bear all costs. There shall therefore be no order as to costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 13<sup>th</sup> April 2018**

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**M. THANDE**

**JUDGE**

In the presence of: -

..... **for the Appellant/Applicant**

..... for the Respondent

.....Court Assistant