REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 34 OF 2016

A M M…...……...1ST APPELLANT/APPLICANT

R W M……...…2ND APPELLANT/APPPLICANT

VERSUS

M N K……1ST RESPONDENT

P K M……..…….2ND RESPONDENT

RULING

On 27th June, 2016 the applicants filed a chamber summons of even date principally seeking an interim stay of execution or suspension of the orders given on 26th June, 2016 in **Mukurweini Principal Magistrates' Court Children Case No. 3 of 2016** initially pending the hearing and determination of the summons and subsequently, pending the determination of the appeal filed against those orders. They also sought for an order that the first appellant retains the custody of the first respondent who is a minor also pending the hearing and determination of their appeal. The summons is based on **order 42 rule 6** of the Civil Procedure Rules; it is also said to based on **sections 24(3)(4)(7) and (8), 117** and **73** of the **Children Act, 2001** as read with **section 73** of the **Guardianship of Children (Practice and Procedure) Rules**, **article 53** of the Constitution of Kenya, 2010 and all other enabling provisions of the law.

According to the affidavit sworn by the first appellant and filed in support of the summons, the person named as the first respondent is a minor and a daughter to the second appellant. The second appellant herself is the first appellant's daughter and therefore the first appellant is the maternal grandmother of the first respondent.

The first appellant has sworn that the second respondent is the father of the first respondent but apparently, he was no longer living with his daughter; the couple had separated because of what she termed as "an abusive relationship". Her daughter then left the country for Bahrain leaving the minor in the custody of the first appellant. Since her departure, so the first appellant has sworn, the second appellant has been sending sufficient funds for the upkeep and education of her daughter.

On or about the 11th May, 2016, the Children officer of Mukurweini sub county children's office moved the court to have the minor's father secure her custody. The court (Hon. V.O. Chianda, SRM) granted the order ex parte and gave the father the custody of the child.

The first appellant quickly moved court through a chamber summons dated 18thMay, 2016 and obtained an order to stay the execution of the order of 11th May, 2016. A copy of that order exhibited to the

affidavit of the first appellant shows that the court ordered that the status quo be maintained pending further directions; the court explained the status quo to mean that the first appellant was to remain in custody of the minor. It further directed that the matter be mentioned in court on 31st May, 2016.

The 1st appellant also swore that the magistrates' court did not have jurisdiction to preside over children's cases and that the only competent court in the region seized of the requisite jurisdiction was the magistrates' court at Nyeri. She swore that she has an arguable appeal and that it would be rendered nugatory if the order for stay is not granted because, going by the violent character of the minor's father, the minor is likely to be harmed if he is given the custody of the child.

The second respondent filed a replying affidavit in which he admitted that the minor is his child and the second appellant is his wife. Being the father of the minor, he has sworn that he bears the parental responsibility of the minor together with her mother but since she deserted him and left the minor in his custody, he was the best placed person to take care of the minor. He also swore that he handed over the child to the 2nd appellant on 17th November, 2015 through the children's office at Buruburu in Nairobi; she then left the child in the custody of the first appellant when she left for Bahrain.

He also swore that the prayers being sought by the applicant are similar to those sought by the same applicant in a similar application filed in Mukurweini principal Magistrate's Court and in Nyeri children's court Cause No. 17 of 2016 and therefore the current application is res judicata. For this reason, he raised a preliminary objection to the applicant's application.

The court directed that both the preliminary objection and the applicant's application be canvassed and disposed of simultaneously by way of written submissions.

A copy of the magistrates' court record exhibited to the affidavit of the second respondent shows that on 11thMay, 2016, Jackson Mogaka, the Mukurweini Sub-County children's officer, appeared before Hon. V.O. Chianda and asked the court to put the minor into the custody of the father; apparently there were no formal pleadings before the learned magistrate but he still granted the order of custody in favour of the minor's father. Perhaps to fully appreciate what transpired on that day, it is necessary that I reproduce the proceedings:

> ***Coram:***
>
> ***Hon. V.O Chianda***
>
> ***C/A Kariuki***
>
> ***Children officer: Mogaka***
>
> ***Mogaka: we want father to take care of the child until further orders. The mother has relocated to Saudi Arabia on work business.***
>
> ***Court: So ordered. Having studied the children's officer report, same is in furtherance of the interest of the child herein especially continuation of her education.***

The order was immediately extracted. The 1st appellant who was then in custody of the minor, was obviously aggrieved by this order and therefore she moved with haste and applied, vide a summons dated 18th May, 2016, filed under certificate of urgency, to have the order reviewed, varied suspended or discharged. She also sought for leave to file a defence presumably to the suit out of which this order was given. According to her learned counsel, the 1st applicant's application was mainly on the basis that the order of 11th May, 2016 was fraudulently obtained.

The learned counsel for the first appellant informed Hon. J.M. Munguti before whom he appeared ex parte, that the order had not been executed and therefore he asked for its stay. The learned magistrate

ordered for maintenance of the status quo if at all the first appellant was still in custody of the minor; he also set the application for mention, apparently for directions, on 31st May, 2016 when all the parties were expected to be in court.

On 31st May 2016, parties appeared before Hon. J.M. Munguti as directed; counsel, only identified on record as Mwara, is recorded to have held brief for Mr Machira for the 1st appellant. He informed the court he had a preliminary objection on the manner the proceedings in the magistrates' court were commenced by the children officer. He was concerned that despite the fact that there were no formal pleadings on the record, the court proceeded to issue what in effect was a final order without hearing from the first appellant who, as noted, was in custody of the minor.

Mr Kiboi who is recorded as appearing for the interested party proceeded to argue what appears to have been non-existent application. He concluded his submissions as follows:

> ***I apply that the applicant's application and custody be granted to the father. I submit the proceedings before court are in order and the best interest of the minor, dictate that the custody be granted to the father. The interested party is not immoral.***

On the 22nd June, 2016 the learned magistrate delivered his ruling; he proceeded on the premise that the oral statement which was made by the children's officer before Hon. Chianda on 11th May, 2016 asking the court to put the minor in custody of the 2nd respondent was the application before court. The learned magistrate then went ahead and confirmed the order which was issued on that day; he dismissed the first appellant's application and her preliminary objection in the process.

Being aggrieved by the learned magistrate's decision, the first appellant appealed to this honourable court. It is in this appeal that the present application has been filed.

As noted earlier, the second respondent issued a notice of preliminary objection to the first appellant's application mainly on the ground that it is res judicata. The basis of this objection is that two similar applications by the 1st appellant have previously been dismissed by the magistrates' court in Mukurweini and at Nyeri.

It has been noted that the application filed by the first appellant in the magistrates' court at Mukurweini sought in principle to review, vary, suspend or discharge a court order made on 11th of May 2016 and also to grant the first appellant leave to file a defence to the suit, if any existed. That application was dismissed and it is because of this dismissal that the first appellant has now moved this court under **order 42 rule 6** of the Civil Procedure Rules for stay of that dismissal order pending the hearing and determination of appeal. That rule provides as follows:

> ***6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***
>
> *(2)* ***No order for stay of execution shall be made under sub rule (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 orders for the due performance of the decree or order as may ultimately be binding on him has been given by the applicant."***

By invoking this rule, the applicant has simply sought to stay the execution of the order of 11th May, 2016 which though was final for all intents and purposes, it was 'confirmed' by the ruling of Hon. Munguti on 22nd June, 2016. In my humble view, the first applicant's application is perfectly within the four corners of this rule. Perhaps, the only legitimate question the second respondent ought to be asking is whether the first appellant has satisfied the conditions for grant of stay under this rule.

As far as the suit in Nyeri magistrates court is concerned, the much I gather from the material before me is that the suit was struck out because a similar suit involving the same parties who were disputing over the same subject was pending for determination in Mukurweini magistrates' court. I presume that the suit must have been struck out because it contravened **section 6** of the **Civil Procedure Act** which prohibits any court from proceeding with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed.

Having been struck out rather than dismissed, the suit cannot be said to be *res judicata* as contemplated under **section 7** of the Civil Procedure Act because it was not disposed of on merits; in other words, the contested issue or issues were not heard and finally determined by the court in Nyeri.

It follows therefore that the second respondent's preliminary objection dated 4th July, 2016 has no merits and I hereby dismiss it.

Without pre-empting the outcome of the appellants' appeal, there is some force in the argument that the proceedings in the magistrates' court were flawed from the word go. For a start, a final order was issued at an ex parte stage and without any formal application before court. The 1st appellant who effectively was the person against whom the order was issued was not party to the proceedings and neither was she given any chance to be heard before the order was given. Besides the 1st appellant, the 2nd respondent in whose favour the order was given was also not part of the proceedings at the time the order was issued.

To compound matters even further, the court proceeded to hear a non- existent application on a date when the 1st appellant's application was set to be mentioned for directions. It is clear from the ruling delivered by the learned magistrate that apart from the 1st appellant's application there was no other application before him yet he proceeded and gave the 2nd respondent custody of the child as if there was an application by him for such custody. With all these flaws, the chances of the 1st appellants appeal succeeding are quite high.

I am minded, however, that an applicant who invokes **order 42 rule 6** of the **Civil Procedure Rules** to his aid is subject to a different standard and not just the chances of success of his appeal; for instance, he has to satisfy the court that he will suffer substantial loss if the order for stay is not made and that he has provided security for the performance of the decree against him in the event his appeal fails. Again, he has to demonstrate that he has filed his application for stay without undue delay.

Ordinarily, the immediate question would be whether the appellant has satisfied these conditions before the court can consider exercising its discretion in her favour. However, I am of the humble view that decrees or orders involving children particularly on their custody are not ordinary; by their very nature they cannot be executed or stayed like any other decree or order arising from, say a claim in contract or tort. I reckon that where the stay of execution of a decree or order involves custody of a child, any or a combination of the conditions set out in order **42 rule 6** must be considered in the context of what is in the child's best interest; as much as the applicant may prove that he or she will suffer substantial loss or that he or she is ready and willing to provide such security as the court may order and that the application for stay of execution has been timeously made, the overriding consideration that ought to ultimately influence the court's discretion is what is in the child's best interest; of course what is in the child's best interest will vary depending on the circumstances of each particular case but ultimately, it is a consideration which the court seized of the case cannot ignore.

Lest I am mistaken for being adventurous and conjuring up my own theory on the interpretation and application of **order 42 rule 6** of the Civil Procedure Rules, my proposition is founded on nothing else other than **article 53 (2)** of the Constitution which is categorical that in all cases concerning children, their best interests are of paramount importance. Needless to say, being a constitutional provision it overrides any other statutory enactment or procedural formalities. The provision states as follows:

> ***52. (2) A child's best interests are of paramount importance in every matter concerning the child.***

I believe the appeal and the application before court is such a matter that the constitution has in mind since it concerns a child; this court, and indeed any other court seized of any dispute involving a child or children must not only take this provision into account in its decision but it must also be seen to have considered it.

If I consider the 1st applicant's application from this perspective I cannot ignore the fact that the minor is a girl child who is now aged 9; I cannot also ignore the fact that she has been living with her maternal grandmother, the 1st appellant since November, 2015. It is also apparent from the 2nd respondent's own affidavit that she has been enrolled in an academy and she should be in the middle of the second term in that school. When I consider all these factors I am compelled to conclude that it would not be in the best interest of the child to uproot her from her grandmother and take her to her father.

Accordingly, I am persuaded to allow the appellant's application dated 27th June, 2016. Costs will abide the outcome of appeal.

Dated, signed and delivered in open court this 24th February, 2017

Ngaah Jairus

JUDGE