



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CHILDREN'S CASE NO.1 OF 2017**  
**IN THE MATTER OF S L K AND S L K – MINORS**  
**A W K alias A E L W.....APPLICANT**  
**VERSUS**  
**DR. S K K.....RESPONDENT**

**RULING**

1. This ruling is in respect of the application dated 8th February, 2017 in which A W K *Alias* A E L W (hereinafter the appellant) seeks orders:

1. Spent

2. THAT the honourable court be pleased to order stay of proceedings in Nakuru Children's Case No.25 of 2016 pending *interpartes* hearing and determination of this application.

3. THAT the honourable court be pleased to order stay of proceedings in Nakuru Children's Case No.25 of 2016 pending *interpartes* hearing and determination of the appeal.

4. THAT the honourable court be pleased to grant actual custody, care and control of the minors subject herein to the appellant pending hearing and determination of this application.

5. THAT the honourable court be pleased to grant temporary orders or maintenance of the minors' subject herein at Kshs.200,000/= per month by the respondent pending hearing and determination of this application

6. THAT the honourable court be pleased to confirm the orders of custody and maintenance as sought under prayer (iv) and (v) above pending hearing and determination of the appeal herein.

7. THAT the costs of this application be provided for.

2. The application is based on grounds:

1. THAT the Resident Magistrate's court at Nakuru granted actual care, custody and control of the minor, S L A K to the Respondent and that of S L K to the Appellant herein.

2. THAT the Respondent thereafter left the country for the United States of America leaving the minor S L A K in the Appellant's care.

3. THAT appellant is apprehensive that the Respondent may attempt to forcefully remove the minor S L A K from the Appellant's custody.

4. THAT the appellant is currently unable to maintain the issue without assistance from the Respondent as the Appellant is currently unemployed while the respondent is in gainfully employed.

5. THAT the minors are of school going age and therefore are in need of school fees and other needs.

6. THAT the appeal is arguable and has overwhelming chances of success.

7. THAT the Respondent is proceeding to fix the matter in the Resident Magistrate's court for hearing and the Appellant will suffer substantial loss if the stay is not granted.

8. THAT the application is made timeously without any undue delay.

9. THAT it would be in the minors' best interest and to safeguard their welfare that the orders sought do issue.

and supported by the appellant's affidavit sworn on the 8th December, 2017.

3. The gist of the grounds and the supporting affidavit is that the Resident Magistrate's court at Nakuru granted actual care, custody and control of minor S L A K to the Respondent and that of minor S L K at the Appellant.

4. The Respondent has since left the country for the United states of America leaving minor S L A K in the the custody of the appellant.

5. The appellant seeks maintenance orders for the minors against the Respondent. She avers that she is not employed while the Respondent is. She is apprehensive that the Respondent may attempt to forcefully remove minor S L A K from her custody.

6. A divorce petition being Nakuru Divorce Cause No.41 of 2016 was filed by the Respondent after he brought the Appellant and the minors back to Kenya from the United States of America.

7. It is averred that the respondent has obtained orders restricting the movement of the minors from Kenya. The Appellant's attempts to lift these orders at the Magistrate's Court have come to naught. She is thus unable to travel to the U.S.A. where she would be able to secure employment since she cannot leave the minors unattended in Kenya.

8. The orders of the Resident Magistrate are impugned in that the court failed to grant maintenance orders yet there was evidence of earnings, by the Respondent showing he earns \$73,000 in the appointment letter as Campus Dean at [Particulars Withheld] in Washington.

9. The minors' needs are particularized as hereunder:

i. Rent Kshs.100,000.00

ii. Food Kshs.30,000.00

iii. House-help – 10,000

iv. Water and Electricity Kshs.20,000.00

v. Entertainment Kshs.10,000.00

vi. Clothing Kshs.10,000.00

vii. Medical Kshs.20,000.00

10. It is urged that the appeal filed against the ruling of the Resident Magistrate has overwhelming chances of success.

11. The application is opposed and Dr. S K K (hereinafter the Respondent) has in a replying affidavit sworn on the 20th February, 2017 deponed that the application herein is a waste of judicial time and comes in the way of the main trial at the lower court where all issues should be laid and determined.

12. He urges that he obtained restrictive orders to prevent the Appellant relocating to Canada with the children where her mother and other siblings reside.

13. The Respondent states that his desire to take the minors to America is well intentioned as being citizens in the U.S.A., the minors are assured of better social welfare arrangements as well as better free education.

14. It is denied that the Appellant is living with good Samaritans and that she declined to live in a house the respondent had rented for her. He denies ever having thrown her out of their home.

15. The ruling by the trial court is supported as having been based on material before court. It is averred that the applicant sends Kshs.10,000/= a week to the Appellant, that he pays school fees for the minors at Kshs.1,000,000 per term and Kshs.330,000/= per month plus other school related expenses at an international Boarding School. The demand for money by the Appellant is said to be for her selfish needs not in the interests of the minors.

16. Directions were given that the application be canvassed by way of written submissions. Both parties did file submissions.

17. I have considered the application, the supporting grounds/affidavit, the replying affidavit and submissions of counsel.

18. It is common ground that the main trial before the Resident Magistrate has not taken place (same is slated for 25<sup>th</sup> April 2017). I must state and re-emphasize (as I did, at the *ex parte* stage of the hearing of this application) that the main hearing of this matter through the offering of evidence and the testing of its veracity is crucial in order to determine once and for all the issues affecting the minors herein. This is the path that will effectively serve the best interests of the minors herein.

19. Since the main suit is pending, this court exercising its appellate jurisdiction must be careful not to make any determinations or take positions that might shackle the mind, jurisdiction and independence of the Lower Court in determining the suit before it. The resolutions of the main issues must be left to the trial court based on evidence presented before it and that court must be left free from looking over its shoulders at what the High Court has stated. I must therefore be alive to that and steer clear of any action that may prejudice the trial of course all the while retaining the powers to sit on appeal against the final orders of the trial court should that become necessary.

20. That said, however, I am seized of current application (and the appeal) and I proceed to deal with the same as follows.

21. The emerging question for determination is whether sufficient grounds exist to set aside to set aside and/or substitute the interim orders issued by the trial court as relates to:

- i) The custody of the minors
- ii) Maintenance orders
- iii) Restrictive orders.

22. In addressing these issues, I am alive to the provisions on survival and best interest of the child as espoused by **Section 4(i), (2) (3) (a) (b) (c)** of the **Children Act**:

**“S.4(1) Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.**

**(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.”**

23. In the review application before the trial court, the court was being urged to review orders on the restriction of travel by the minors, and the custody of the younger minor to the respondent herein and maintenance.

24. On the material before me, I note that circumstances have changed and the younger minor is in the actual custody of the appellant, the respondent having left for America in pursuit of employment. The order granting him actual custody is in my view in these circumstances impractical and a recipe for conflict and confusion in the minor's life.

It is in the best interest of the minor S L A K that actual custody be granted to the appellant on the interim pending the hearing and determination the main suit.

25. The respondent shall have unlimited access to the two (2) minors whenever within the country structured on a mutually agreeable schedule by the parties in default of which the trial court is to give guidelines.

26. As regards maintenance, it is obvious that the lives of the two (2) minors herein will not take a break during the pendency of the suit. The minors' daily need of food, shelter, education, medical care, clothing etc must be met during the pendency of the suit. Those needs will have to be met by none other than the parents of the minors. **Article 53(1) (e)** of the **Constitution of Kenya** provides:

**“53(1) Every child have a right -**

**(e) to parental care and protection which includes equal responsibility of the mother and father to provide for the child whether they are married to each other or not.”**

27. This responsibility falls squarely on both parents. The evidence available as of now is that only the respondent is in gainful employment. While this court would prefer to leave the final determination on

the issue of means of the parents to the trial court and noting that the respondent indicates that he is paying school fees for the minors and he sends Kshs.10,000/= weekly to the Appellant, it is important, in my considered view and in the best interest of the children that this court puts in place a structured maintenance programme for certainty.

28. Suffice to say that these maintenance orders will be interim pending the determination of the main suit at trial and in no way absolve the appellant from her share of responsibility as provided for in law.

29. Doing the best I can, in the circumstances and taking note that I am disadvantaged in not having the luxury of interrogating the full means of the parties herein, I will make an order for maintenance against the respondent in the following terms:

- i. Rent Kshs. 70,000.00
- ii. Food Kshs. 30,000.00
- iii. House-help – Nil (the appellant is not working and should take up these responsibilities)
- iv. Water and Electricity Kshs. 10,000.00
- v. Entertainment Kshs. 10,000.00
- vi. Clothing Kshs. 5,000.00
- vii. Medical; Kshs.10,000.00

30. On issue of restriction of travel of the minors out of the court's jurisdiction, the orders of the lower court are to remain in force. It is crucial that the minors remain in the jurisdiction of the court during the pendency of the suit herein. This will prevent removal of the minors outside the jurisdiction of court an act that would render nugatory any orders the court may issue at the final hearing.

31. With the result that the application herein is partially successful. There shall be orders:

- 1) That custody of S L A K be and is hereby granted to the Appellant pending the hearing and determination of Nakuru Children Case No.25 of 2016.
- 2) The respondent shall have unlimited access to the two (2) minors whenever within Kenya structures in a mutually agreeable schedule by the parties and in the absence of an agreement through guidelines by the trial court.
- 3) The maintenance orders against the respondent do and are hereby issued on a monthly basis as follows:
  - i. Rent Kshs.70,000.00
  - ii. Food Kshs.30,000.00
  - iii. House-help – Nil (the appellant to take up such duties now that she is making no other contributions)
  - iv. Water and Electricity Kshs.10,000.00
  - v. Entertainment Kshs.10,000.00
  - vi. Clothing Kshs.5,000.00

vii. Medical Kshs.10,000.00

4) The restraining order of the trial court against relocation of the minors from Kenya are upheld.

5) That Nakuru Children Case No.25 of 2016 be heard on a priority basis.

6) Each party to bear its own costs of this application.

**Dated, Signed and Delivered at Nakuru this 29th day of March, 2017.**

**A. K. NDUNG'U**

**JUDGE**