



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Appeal No 80 Of 2016

A K N (Appealing as mother and next friend to D M, a minor)...APPELLANT

VERSUS

S M M.....RESPONDENT

RULING

The Application

The parties herein have recently completed divorce proceedings in Divorce Cause No. 6 of 2015 in the Chief Magistrate's Court at Machakos, in which their marriage was dissolved by a judgment issued therein on 19th November 2015, and orders given *inter alia* on the custody of and access to the only issue of the marriage, one DM, who is a male child aged 5 years old. The said court ordered that the Appellant was to have actual custody of the child; that the Appellant and Respondent shall have joint legal custody, and that the Respondent shall have access to the child on alternate weekends and half of the school holidays .Further, that the significant holidays shall be alternated annually.

The Appellant moved the trial court on 15th April 2016 on an application for stay of its orders issued on 19th November 2015 pending appeal some of which touched on access to the subject child named herein. In determining the application for stay presented before it the trial court gave the following further orders on 4th August 2016:

1. The Respondent accesses the child and remains in actual custody of the child for the entire period of access whether in the presence of the said M M or any other family member
2. That a social enquiry report as to the welfare of the child while in custody of the Respondent and in the presence of the said M M be prepared that shall cover a period of six months (limited to the Respondent's access period)
3. The Children Officer shall conduct impromptu visits to the respondent's home wherein he resides with his wife M M during the access period to ascertain the interaction between the child and M M
4. The child welfare report be filed after expiration of the period above stated or earlier if need be
5. Matter be mentioned on 09.01.2017

These further Orders of the trial court have aggrieved the Appellant, and the Appellant has filed an appeal against them by way of Memorandum of Appeal dated 11th August 2016.The Appellant also filed an

application by way of a Notice of Motion dated 11th August 2016, seeking stay of execution of the trial Court's ruling and orders given on 4th August 2016 on access to the minor DM by the Respondent, pending the hearing of the appeal.

The grounds for the application are that the said orders cannot co-exist with the appeal the Appellant has filed against the judgment delivered by the trial Court on 19th November 2015 in Machakos High Court Civil Appeal No. 77 of 2016, as the trial court by issuing further orders touched on the moot points that the Appellant wished to raise before the Appellate court in Appeal No. 77 of 2016.

The Appellant's Advocates, Kanui & Company Advocates filed submissions dated 29th November 2016 on the application, wherein it was urged that that the Appellant had brought the application for stay of execution without unreasonable delay taking into consideration the foregoing circumstances. Further, that substantial loss will occur if stay is not granted, as this is a children's matter governed by the Children's Act.

Therefore the threshold to estimate loss is different from that set by the Civil Procedure Act and Rules, in that whereas under the Civil Procedure Rules in Order 42 Rule 6 an Applicant must demonstrate what loss he/she will suffer, under section 4(2) and section 76 of the Children's Act the applicant is bound to demonstrate that the grant of stay of execution is in the best interests of the child.

It was urged that the orders given on 4th August 2016 should not be executed before the Appellant is given a hearing by the Appellate court on the grounds of Appeal she has raised in Civil Appeal No. 77 of 2016 against the trial court's decree and orders of 19th November 2015. This is especially so because the grounds of appeal relate to a M M, a person who has been mentioned adversely in a negative light in divorce proceedings before the lower court, and has not been subjected to any assessment on whether she can offer care and protection over the child.

The Response

The Respondent relied on the pleadings and submissions he had filed in support of Notice of Motion dated 8th June 2016 he filed Machakos High Court Miscellaneous Cause No 95 of 2016 seeking access to the minor, and which this Court ruled will be determined in the context of this appeal and application.

The Respondent in his supporting and further affidavits to the said application that he swore on 9th June 2016 and 12th August 2016 respectively, alleged that the Appellant has been frustrating his efforts to access to the child and despite his efforts to meet his parental responsibilities as per the Decree Nisi. He gave particulars of the instances when the Appellant has denied him access to the child. Further, that the Appellant has put the child in harms ways by placing him under care of strangers at her rural home at Kitui during vacation periods, thus seriously impairing his mental health as well as physiological well being for lack of proper fatherly care, love, affections and guidance.

The Respondent denied the Applicant's claims that the child would suffer during his tenure of access, and particularly when the child is at the hands of one M M, and he termed the said claims as fabrications and illusions. Further, that the Appellant was not only tainting his wife's name but also her ill will, hatred, and avenging her anger for having failed in her marriage. He also alleged that minor bonded well with all his family members during the December 2015 vacation. The Respondent reiterated these averments in his submissions dated 3rd October 2016.

The Determination

It has been held in various decisions that whereas the general principles for the grant of stay of execution are provided for in the Order 42 Rule 6 of the Civil Procedure Rules, the same are not expressly provided for with respect to decrees and orders made under the Children Act, and the said principles must be complemented by an overriding consideration of the best interest of the child in accordance with Article 53 (2) of the Constitution and section 4(3) of the Children Act . See in this regard the decisions in **BKC v BCS**, [2013] eKLR and **KWM v RN** [2015] eKLR.

Article 53(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. This principle is reinforced by the provisions of section 4(3) of the Children Act, which requires courts, when making decision on children, to be guided by the best interest of the child in the circumstances. Section 4(3) of the Children Act provides as follows:-

“(3) All judicial... institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat interests of the child as the first and paramount consideration to the extent that this is consent 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...”

In the present application, I note that the Appellant has raised concerns about the safety and welfare of the child arising from the fact that when the Respondent has access to the minor, they will be staying with a named individual who is alleged to be a person of questionable moral character, and who has not been subjected to a necessary assessment on whether or not they are able to offer care and protection over the child.

I also note in this respect that when the Appellant filed the application for stay of execution in the lower Court by way of a Notice of Motion dated 15th April 2016, the trial Magistrate did note that this was new evidence that was not before it at the hearing of the trial, which informed the additional orders that were given as to a social inquiry to be undertaken as regards the said individual, namely M M.

It is my view that such a social inquiry is necessary, and that pending the results of such inquiry, it would be in the best of interests of minor DM to be in the custody of the Appellant, with visitation rights given to the Respondent to safeguard the rights of both the minor and the Respondent to parental care.

The Appellant's Notice of Motion dated 11th August 2016 is therefore allowed and the orders given in the ruling and order issued in Divorce Cause No. 6 of 2015 in the Chief Magistrate's Court at Machakos, on 4th August 2016 as to the Respondent's access to the minor DM are stayed pending the hearing and determination of this appeal subject to the following conditions:

1. The Respondent be and is hereby granted visitation rights with respect to minor DM every alternate weekend with effect from 1st April 2017.
2. The Directorate of Children Services in Machakos County shall within 30 days of the date of this ruling undertake a social inquiry of the Respondent's living conditions, and of the members of his household particularly of one M M and their suitability to offer care and protection to the minor DM, and shall file a report on the same in this Court within 60 days. The Appellant shall follow up on the preparation and filing of the said report.
3. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 27th day of March, 2017.

P. NYAMWEYA

JUDGE