



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO 77 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 D M, 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 4<sup>th</sup> March 2016 to obtain an interpretation on its judgment especially with regard to access to the minor. The trial court made its pronouncement on what its order meant on 31<sup>st</sup> April 2016. The trial court's interpretation of its order was that the Respondent would have actual custody of the child during the periods of access and access did not mean visitation. The Appellant then filed an application to file appeal out of time on in Machakos High Court Miscellaneous Cause No 95 of 2016, which application was allowed by consent on 6th June 2016, and consequently filed the appeal herein by way of a Memorandum of Appeal filed on 9th 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 Courts orders on access to the minor D M by the Respondent, pending the hearing of the appeal, and that in the best interest of the Minor D.M., during the grant of orders of stay of execution, the Respondent be granted visitation rights as the court shall see fit.

The grounds for the application are that if stay of execution pending appeal is not granted, substantial loss may occur to the minor upon surrender of his custody to person(s) who are of questionable moral character, and whom have not been subjected to a necessary assessment on whether or not they are able to offer care and protection over the child, and in particular one M M, whom the Appellant states was named as a party in the divorce proceedings in the trial Court as having been in an adulterous relationship with the Respondent.

According to the Appellant, if the stay of execution orders are granted the minor will be exposed to a hostile environment and a person likely to cause him damage, and that she is willing and ready to afford the Respondent visitation rights as the Court may order as a condition for the stay of execution pending appeal.

The Appellant's Advocates, Kanui & Company Advocates, filed submissions on the application dated 29th November 2016 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) 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.

Further, that the Children's Act at section 76 further states that in making orders regarding a child the court ought to consider any harm/loss that the child is likely to suffer if the orders are not granted. In this regard it was submitted that the Appellant had demonstrated in her supporting affidavit to the application that the child is at risk of suffering harm if stay of execution is not granted, as she has demonstrated that the Respondent has a wife named M M; the child is of tender years; that when the Respondent accesses the child he leaves the child with the said M M; and that that the said M M was adversely mentioned in the divorce proceedings before the lower court as a co-adulterer with the Respondent, and has not been subjected to any assessment on whether she can offer care and protection over the child.

On security for costs, the Appellant submitted that she acknowledges that the father to the child (the Respondent) needs to see the child, and she has requested the court to grant him visitation rights as it shall deem fit if it grants the stay orders prayed for.

### **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 3<sup>rd</sup> 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 subject child, arising from the fact that when the Respondent has access to the child, 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 note in this respect that the Appellant also filed a similar application for stay of execution in the lower Court by way of a Notice of Motion dated 15<sup>th</sup> April 2016, in which a ruling and additional orders were given by the trial magistrate for a social inquiry to be undertaken as regards this individual, namely M M.

Pending the results of such inquiry, it is my view that 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 11<sup>th</sup> August 2016 is therefore allowed, and the orders given in the judgment and decree issued in Divorce Cause No. 6 of 2015 in the Chief Magistrate's Court at Machakos on 19th November 2015 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 1<sup>st</sup> 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 27<sup>th</sup> day of March, 2017.

**P. NYAMWEYA**

**JUDGE**