



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISCELLANEOUS CIVIL APPLICATION NO 95 OF 2016

A K N.....APPLICANT

VERSUS

S M M.....RESPONDENT

(Suing as the next friend of D M M- Minor)

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 and decree 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 Applicant herein was to have actual custody of the Minor; that the Applicant 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 Applicant filed this miscellaneous application seeking leave to appeal out of time against the decree of the lower court. The said application was allowed by consent. The Respondent also asked to be granted leave to file an application to be granted access to the child which he claimed he was being denied by the Applicant. He was granted the leave and filed a Notice of Motion herein dated 9th June 2016 seeking the following orders:

1. THAT the Respondent be granted chance and/or access to the child one DM pending hearing and determination of the Appellant's appeal.
2. THAT the Respondent be granted chance and/or access to the child one DM pending determination of the Applicant's application for stay of execution in lower court orders as per Decree Nisi which was due for ruling on 717/2016.
3. THAT the Appellant be compelled by orders of this Court from denying the Respondent access to the child at a specified time and place as this Court deem fit and just.

The Applicant responded to the said application in a replying affidavit sworn on 19th July 2016 wherein she claimed that in December 2015 she had given the Respondent access of D M, who left the minor with strangers whereupon she went and took the child. That in April when he came to get the minor, DM was unwell. She also claimed to have given the Respondent access to the child on alternate weekends since

the orders of the lower court were granted.

The court directed the parties to file written submissions which they duly did. However, while the Respondent's application was pending, the Applicant filed an appeal against the decree of the lower Court in Machakos High Court Children's Appeal No. 77 of 2016 by way of a Memorandum of Appeal filed on 9th August 2016, and also filed an application therein 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 by the Respondent, pending the hearing of the appeal.

The Applicant had also filed a similar application in the lower Court by way of a Notice of Motion dated 15th April 2016 on which a ruling was given by the trial magistrate in which additional orders were given on 4th August 2016 on the access and custody of the minor. The Applicant then appealed against the said ruling in Machakos High Court Children's Appeal No. 80 of 2016, by way of a Memorandum of Appeal filed on 12th August 2016, and she also filed an application by way of a Notice of Motion dated 11th August 2016 seeking a stay of the said ruling and orders pending the hearing of the appeal.

The Respondent relied on the pleadings and submissions he filed herein as his response to the applications filed in the said appeals.

In light of this history, it is my view that as there are substantive appeals filed on the issue of the access and custody by the parties herein to the minor DM, and applications also filed in the said appeals on the same issue, it is more prudent and tidier to have the said issue resolved in the context of the said appeals. In addition, this miscellaneous cause was in any event filed for the sole purpose of obtaining leave to file an appeal out of time, which purpose has been fulfilled and the file therefore ought to be closed. Lastly, the Respondent still has the opportunity to ventilate his position and arguments in the applications filed in the two appeals.

The Respondent's Notice of Motion dated 9th June 2016 is therefore struck out and the issue of his access to the minor D M shall be addressed in the applications filed in Machakos High Court Children's Appeal No. 77 of 2016, and Machakos High Court Children's Appeal No. 80 of 2016. This file shall accordingly be put together with that of Machakos High Court Children's Appeal No. 77 of 2016.

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