



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NO. 53 OF 2016

A. M.....APPLICANT

VERSUS

M. M.....RESPONDENT

RULING

1. The Applicant herein A.M, instituted a suit in the **Kitui Children's Court** by way of Plaintiff seeking legal custody and maintenance of two (2) minors, the subject of this matter.
2. Judgment was delivered in the matter where the Respondent was granted access orders to the two (2) minors on alternate weekends and over school holidays starting **20th** and **21st August, 2016**. The Respondent was to retain custody of the children. On maintenance of the minors the Respondent was to contribute a total sum of **Kshs. 50,000/=** per month.
3. The Applicant was however dissatisfied with the decision of the Court. She sought review of the Judgment on the grounds *inter alia* that the Court overlooked some very important facts like the fact that the Respondent was married to another wife, **E. S**, and were blessed with a child; On several occasions the Respondent attempted to harm the Applicant and the two (2) children following his addiction to Miraa and alcohol. The Respondent denied the allegations. To establish the truthfulness of the allegations the Court directed the Children's Officer to investigate the matter and file an independent report thereto. In the mean time, the Court granted an order allowing the Respondent to have access of the children on interim basis. He was to have unhindered access of the children on the **24th** and **25th November, 2016** and to be supervised by the Children's Officer, Kitui.
4. It was upon this background that the Applicant moved to this Court on the **13th December, 2016**. By way of Notice of Motion, the Applicant sought orders that: The Lower Court proceedings be stayed pending hearing and determination of the Appeal and that the Respondent, his agent, servant or any person acting on his behalf be restrained from taking into custody the children, the subject of the Lower Court suit in a manner that violates the dignity, rights and interests of the children until disposal of the Appeal.
5. The Applicant swore an affidavit in support of the application where she deponed that the Appeal filed has a high chance of succeeding. The children are of tender age, require parental care and protection that the Respondent cannot provide; the children have suffered mental torture following the Court Order; the Respondent and his Counsel have threatened and intimidated the Applicant; the Lower Court that is biased has committed her to jail for no apparent reason.

6. In response, the Respondent filed grounds of opposition where he stated that the Appeal and application were based on misapprehension of the nature of the directory orders issued by the Court on the **23rd November, 2016** which were pursuant to the Applicant's application on review which were never argued substantively hence remaining in favour of the Applicant; The Judgment delivered on **2nd August, 2016** that is not challenged on Appeal therefore remains valid and binding.

7. At the hearing the Applicant submitted that she had appealed against the order granted following the application for review and she intended to appeal against the Judgment delivered on **2nd August, 2016** and she also wished to file contempt proceedings against the Respondent. Further, she added that the children were not willing to go with the Respondent because they have been away from him for long such that they could not recognize him.

8. In response, **Mr. Kimuli**, Counsel for the Respondent opposed the application. He submitted that the order the Applicant seeks to appeal was directory and interim. The trial Magistrate directed the Children's Officer to file a report. The order was to be in force for only two (2) days. He argued that the Judgment of the Lower Court contains orders above access and ought to be executed. The welfare of children cannot be supervised if stay is granted.

9. It is trite that the following conditions must be satisfied before stay of execution is granted:

- That the application has been made without unreasonable delay.
- That substantial loss will result to the Applicant unless such an order is made.
- Security for due performance of the decree has been given by the Applicant (**See Order 42 Rule 6 of the Civil Procedure Rules; Kiambu Transporters vs. Kenya Breweries**).

10. No doubt, the application herein was made timeously. In **Sewankambo Dickson vs. Ziwa Abby HCT – 00 – CC MA 0178 of 2005** the **High Court of Uganda** at **Kampala** stated:

“Substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal.....”

In the case of **Absalom Dova vs. Tarbo Transporters (2013) eKLR**:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage; but administers the justice that the case deserves. This is in recognition that both parties have rights.”

11. The Applicant herein filed a document with a title **“Memorandum of Appeal”** on the **7th November, 2016**. The opening statement reads thus:

“RE: APPEAL TO REVERSE VERDICT ON MY CHILDREN CUSTODIAN:

I A.M. being the Appellant herein do certify this appeal is urgent and the same ought to be dispensed with at first instance on grounds that:

It is appeal against the ruling of resident magistrate of children case No. 20 of 2014.”

12. The content of the document is a narration of what transpired before the learned Magistrate on the **23rd November, 2016**.

The last sentence stipulate:

“Following what happened, the children have undergone into depression and psychological torture and stressed that they could not sleep nor eat. It is humble request that this court that the matter be reviewed and consider that; the children should be taken to a common ground in the presence of their mother for the father to interact with them and returning them in the evening as ordered.”

13. It is evident that no Appeal has been preferred against the Judgment of the trial Court. The purported Appeal is against an order of the Court dated **23rd November, 2016**. The order was made by the trial Court following an application for review of the Judgment by the Applicant herein. The order made was to enable the Children’s Officer investigate the circumstances in which the Respondent was living following allegations made by the Applicant. In the circumstances the Respondent was granted access to the children which was to be facilitated by the Children’s Officer, Kitui from **8.00 . to 6.00 p.m.** for two (2) days. At the point of filing the application on the **13th December, 2016** the order had been overtaken by events.

14. Consequently the order sought to be stayed has been overtaken by events. This means that if the order sought is not granted the Applicant or any other person for that matter will not be worse off. She will suffer no disadvantage or loss.

15. In the premises the application is devoid of merit and is dismissed. Children are involved in the matter therefore there are no orders as to costs.

16. The file shall be placed before the trial Court for further orders.

17. It is so ordered.

Dated, Signed and Delivered at Kitui this 26th day of April, 2017.

L. N. MUTENDE

JUDGE