



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 4 OF 2017

S G KAPPELLANT

-VERSUS-

P M M.....RESPONDENT

R U L I N G

1. The court has before it an Appeal from the ruling of the Senior Resident Magistrate Hon. M. A. Otindo delivered in **Children's Case No. 1592 of 2016**.
2. The Appeal is brought by S G K who is the Respondent in the matter in the Lower Court. The Respondent in the Appeal is P M M. The Parties are the parents of two young children, J M M and S M M. They are about 10 years and 6 years old, respectively. Before this dispute they were attending [particulars withheld] Junior Academy.
3. The Appeal is brought under a Certificate of Urgency by Njeri Mucheru and Advocate. In it she states that the urgency is occasioned by the reason that a grave injustice was visited upon the Appellant by the Lower Court ruling "*making permanent final orders*" requiring that the "*Appellant surrenders Custody of her children to the Respondent*". The remainder of the Certificate argues that the merits of the Children's case. More pertinent to the Appeal is the assertion that the interests of the mother were not considered in making the orders appealed against. It is said unless the 'application' is heard urgently it will render the appeal nugatory. The appeal was filed on 18th January, 2017.
4. Notwithstanding that the Order of the Lower Court is being appealed against. The Appellant has filed a Notice of Motion seeking the following Orders that:
 1. This application be certified as urgent and be heard *ex-parte* on the first instance.
 2. This Honourable Court do order a stay of execution of the orders made in **CHILDREN'S CASE NO.1592 OF 2016** on the 17th Day of January 2017 pending the hearing and final determination of this application.
 3. An order do issue in terms of prayer 2 hereof pending the hearing and final determination of the appeal lodged herewith.
 4. This Application be heard *inter-parties* on such date at such time as this Honourable Court may

direct.

5. The costs of this application be provided for.

5. The Application is supported by the Affidavit of the Appellant, S G K . and the grounds set out in the Application and supposedly further grounds to be adduced at the hearing. The Grounds stated include:

a. The Honourable M. A. OTINDO (MS) SENIOR RESIDENT MAGISTRATE made an order on 20th December, 2016 in CHILDREN'S CASE NO. 1592 OF 2016 as follows:

i. THAT the status quo on custody be maintained with the Respondent.

ii. THAT the application be served for interpartes hearing on the 2nd day of March, 2017.

b. In making the above orders, the said Magistrate failed to consider the interests of the Appellant as the mother of the children and omitted to make any provision whatsoever in regard to the childrens' rights to visit with their mother.

c. On 1st January 2017, before the said order could be served on the Appellant, who was away upcountry with the children, the Respondent moved out of matrimonial home thereby evicting the Appellant and the children from the matrimonial home.

d. By moving out of the matrimonial home and thereby evicting the Appellant and the children there from, the Respondent changed the status quo.

e. The order made on 20th December 2016 was served on the Appellant on 3rd January 2017 after the Plaintiff had already evicted her and the children from the matrimonial home.

f. The Appellant filed an application in CHILDREN'S CASE NO. 1592 OF 2016 under certificate of urgency on 4th January 2017 seeking inter alia a review of the order made on 20th December 2017 and the reinstatement of the Appellant and the children of the marriage into the matrimonial home.

g. The Appellant's said application filed on 4th January 2017 was not considered by the Court until 11th January 2017, 7 days later, and only after the Respondent filed an application seeking for contempt orders against the Appellant.

h. On 17th January 2017, in CHILDREN'S CASE NO. 1592 OF 2016 was listed before the Honourable M. A. OTINDO (MS) SENIOR RESIDENT MAGISTRATE who made directions that the Plaintiff's contempt application be heard first on 27th February 2017 despite the fact that both parties were ready to proceed with the same, the Appellant having filed and served her replying papers on 11th January 2017.

i. After giving directions as stated above, the Magistrate then proceeded to hear the contempt application in part consideration only the submissions made by Counsel for the Respondent and there upon made an order directing the Appellant to surrender custody of the children to the Respondent by close of business on the same day.

j. No such orders had been prayed for in the Respondent's application dated 9/1/2017 before the Court.

k. On account of the further order made by the Magistrate, the hearing of the contempt application purportedly scheduled for 27/2/2017 was rendered an academic exercise as it in effect determined

the application for contempt as against the Appellant.

l. The Honourable Magistrate completely failed to take into account the submissions of Counsel for the Appellant that:-

i. No order had ever been made awarding custody of the children to the Respondent or directing the Appellant to surrender custody of the children to the Respondent after an inter parties hearing and consideration of the changed status quo so as to render the Appellant in contempt of court.

ii. The Respondent having changed the status quo prevailing at the time the order of 20/12/2016 was made cannot purport to enforce the very same order and accuse the Appellant of contempt of court.

iii. The current residence of the Respondent is unknown and it is not clear who will the children's care giver in place of their biological mother.

m. The Honourable Magistrate failed to give any justification or reason for not hearing the contempt application formally on 17th January 2017 and instead hearing it selectively in favor of the Respondent.

n. The orders made on 17th January 2017 contradicted the residence order issued by the same Magistrate on 21st December 2016 in Children's Case No. 1607 of 2016.

o. The Appellant was condemned unheard.

p. Substantive orders were made on a mention date which orders if enforced will have dire consequences to the Appellant including her arrest and committal to prison despite the fact that she was not accorded an opportunity to be heard.

q. The brutal and unlawful separation of a mother from her children and grant custody of the children to an unknown caregiver by a court of law depicts a justice system that cares nothing for interests of young children and their protection from torture and abuse.

r. No grounds or reasons were given by the Lower Court to justify denying young children the essential care and contact of their biological mother.

s. The Applicant has an arguable appeal with a high probability of success.

t. This application has been made without unreasonable delay.

u. Unless the orders sought herein are granted the Applicant and her children will suffer untold emotional and psychological suffering and the appeal will be rendered nugatory.

v. This application ought to be granted in the interests of equity and justice.

6. The 'Application' is supported by the Affidavit of S G K. There are no Grounds of Appeal included. The Application also attaches the Affidavits of other family members. Ground (a) States that the Learned Magistrate Hon. Otindo made an Order on 20th December 2016. A copy is exhibited as **SGK-1**. It records that the Learned Magistrate (Otindo) read (as opposed to heard) the chambers summons application dated 16th December 2016. Thereafter she order that:

i. Status quo of custody be maintained with the father and

ii. The application be served for an inter partes hearing on 2nd March 2017.

That was in **Children Case 1592 of 2016** (this Application came before this Court on 14th February 2017 so clearly that hearing was to be the subject of the stay prayed for.

7. Children Case 1592 of 2016 was the first application in the Children's case. The father sought specific orders for interim physical custody, care and control of the children. The order dealt with an interim position. At that stage the mother was said to be "threatening" to remove the children. It seems that is what she has in fact done by the time this application came to court. The Appellant Mother asserts she was in Meru when the order was made. She also states that she was in Meru when she was "evicted" from the matrimonial home. Said eviction was said to have been effected by the Respondent father vacating the home. The details of that eviction are contradicted by the Affidavit of her sister, A K and other documents filed later.

8. The Grounds state the Applicant's mother was served on 3rd January 2017. The Advocates entered appearance by drafting a memorandum of appearance there same day to be filed the next day. At the same time she filed her replying affidavit. Again at the same time, using the same Advocates, she and her Advocates prepared and filed an application in the High Court under **Case No. Misc 1/2017 (OS)**. In the supporting affidavit there she said she left for Meru on 23rd December 2016 and returned on 1st January 2017 to discover the husband had moved all their belongings from the matrimonial home. At paragraph 17 of the Replying Affidavit she says that she travelled to Meru on 10th December 2016 and returned the next day. She says she was convinced the father would evict her and she filed a suit. In fact that suit was not filed until after the Children's case had commenced. That application does not seek return of her belongings. She says on 1st January 2017 she returned to find the house empty. The husband alleges she removed her belongings when she moved out earlier in December 2016. The Replying Affidavit does not address the issues of the needs of the children in particular the assertions later made as to their education.

9. Immediately after the Respondent Father made his application on 20th December 2016, the Applicant Mother made an application of her own. She and her Advocates did not do so within the original file (**1592/2016**) but opened a new file (**1607/2016**) and brought an ex parte application. Whether or not that was done out of a deliberate intention to confuse the issue is a matter for trial. That Application came before the same Magistrate Hon. Otindo on the next day and on the facts before her she made the order that the children reside in the suit property. The matter was set down for inter partes hearing on 8th March 2017 and again was affected by the interim stay ordered by this Court.

10. Possibly having achieved the outcome she hoped for the Applicant Mother filed a further application, this time in **Children's Case No. 1592/2014**. In it the applicant's Advocate stated "*The Defendant is attempting to forcibly take the children away from the plaintiff using the status quo issued by this Honourable Court on 23rd December 2016*". The attached Chambers Summons sought orders that:

- i. Custody order of 20th December 2016 be set aside and be granted to the mother instead.
- ii. The mother and children be reinstated into the former matrimonial home.
- iii. The father to pay maintenance, mortgage repayments. Alternatively rent for the applicant mother.

The orders being sought also affect those sought in **Case No 1/2017 (OS)** and relate to matrimonial property rather than the immediate needs of the children. The Applicant Mother repeatedly asserts that the children have nowhere to live.

11. The Respondent Father in the face of the Mothers refusal to comply with the Court Orders obtained by the Father applied for leave to bring contempt of court proceedings and that leave was granted. The application for contempt was due to be heard on 27th February 2017. Again that was affected by the Stay initially granted.

12. In addition to the Grounds set out in the Application, Counsel for the Applicant Mother raised the following arguments:

- a) That the father obtained ex parte orders for custody from Hon SPM Otindo.
- b) That the mother was evicted on 23rd December 2016 by virtue of the Respondent moving out (how a joint owner can be evicted is not explained)
- c) On 23rd December 2016 the same court made an order for residency.
- d) The two orders are contradicting.
- e) That Hon Magistrate should have secured herself having issued 2 contradicting orders.
- f) There was no evidence before the court that the minors had not been attending school (in fact this was first stated by the mother).

13. The Applicant Mother's Counsel now asks the court to set aside orders of the Lower Court. However there is an application before Hon. Muchelule J seeking a series of those orders. That begs the question why such a prayer is justified. That application was filed on 4th January 2017. It has not been heard yet. The court would not go as far as to say at this stage that is an abuse of process but it is a strange way to conduct matters where children are involved.

15. This Court has considered the files in **Children Cases 1607/16** and **1592/16** as well as **OS 1/2017** and the evidence filed therein. In addition this Court has considered the report of the Children Officer filed in **Children Cases 1592/16**. This court is also cognisant of the fact that the orders complained of are all interim orders and that there has been no final decision (with or without a full hearing) upon the status of the parties and to that end what is presented to this court is misleading.

15. The Lower Court issued orders fully within its jurisdiction. Those orders were duly served and should have been obeyed but were not. The procedure was followed and there is a Notice to Show Cause to which the Mother must respond. Having considered the facts and the evidence they contain as well as the numerous applications made by the Mother, this Court does not consider the Orders made by the Lower Court to be contradictory. The object of both sets of Orders is that the children should return to their home in Rongata Rongai and reside there with their Father and attend the school there were at before uprooted by the Mother. The Father has been prevented from seeing the children and their lives have been disrupted. Against that background the interim order suggests a degree of consistence rather than inconsistency. The Applicant has had several opportunities to comply.

16. In the circumstances the grounds relied upon by the applicant are not made out. The stay previously ordered is not justified and is lifted forthwith i.e. immediately.

17. In relation to the argument that Hon. Otindo should recuse herself, again there is no justification placed before this Court for such a course of action. That is a matter that the Hon Magistrate can consider for herself but at present there is nothing apparent on the files to justify that. In fact the Judge/Judicial Officer who makes an order is, at the very least, as a matter of logic, best placed to deal with an alleged contempt of their orders. A Notice to Show Cause is not grounds for a Judicial Officer to recuse themselves although that would be convenient for the alleged contemnor.

18. It is further Ordered that the Orders of the Lower Court made on 20th December 2016 stand and the Children are to return back to their school.

It is so ordered,

FARAH S. M. AMIN

JUDGE

DELIVERED, SIGNED & DATED at NAIROBI this 19th day of April 2017

In the presence of :

Clerk: Patrick

Appellant: Ms Wenene Holding Brief for Mr Gathu

No Appearance: Respondent