



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 14 OF 2017**

**E A M.....APPLICANT**

**VERSUS**

**P A A.....RESPONDENT**

**RULING**

1. Vide Notice of Motion dated 13/3/2017 filed under certificate of urgency, the applicant/appellant sought for the following orders

- i. That application be certified urgent.
- ii. That service of application be dispensed with at the first instance owing to the urgency.
- iii. That there be a stay of execution of the ruling delivered on 17/2/2017 by children's court pending hearing of the application and until further orders.
- iv. Similar order as in prayer two pending the hearing and determination of the intended appeal.

2. When the file was placed before Judge Ougo on 13/3/2017, the honourable Judge certified the matter urgent and directed applicant to serve. When the matter came up for interparte hearing on 6/4/2017, counsel for the respondent who had already filed a Preliminary Objection dated on 16/3/2017 requested the court to dispense with the Preliminary Objection first as the outcome of the same would automatically dispose of the applicants' application.

3. Basically, on 18/12/2015, learned Magistrate in Milimani Children's case No. 11/15 gave actual custody of the minors (children) to the father the defendant herein and directed the mother to release the children. According to the learned Magistrate, the mother who is the appellant/applicant herein then residing and working for gain in Juba Southern Sudan could not qualify for custody order given her geographical location and that the alternative prayer for her parents to have legal guardianship was not applicable given the priority order in awarding custody in accordance with Section 103 of the Children's Act.

4. Aggrieved by the trial Magistrate's orders over custody, the plaintiff /applicant/appellant filed application dated 3/8/2016 seeking to review the said orders so that the children could remain with their maternal parents. The court dismissed that application on 17/2/2017 and cited the plaintiff/applicant/appellant for contempt. The court gave 21 days to purge the contempt by handing over the children to the respondent in default warrant of arrest to issue.

5. It is this ruling of 17/2/2017 that the appellant is seeking stay pending hearing of an appeal which is yet to be filed. The application therefore is challenging the legality of the contempt orders and subsequent issuance of the warrant of arrest by the court Suo Motto without the respondent moving the court for such orders.

6. Mr. Kopere counsel for the applicant filed a Preliminary Objection dated 15/3/3017 citing four grounds. The learned counsel argued that, the appellant/applicant has no right of audience before purging the contempt and to continue entertaining the appellant will lower the dignity of the court.

7. Lastly, counsel said that similar application had been made in the lower court and the same dismissed hence the application before the High Court is meant to delay the hearing of the main suit now scheduled for 27/4/2017.

8. When the matter came for hearing, Dr. Kamau Kuria senior counsel for applicant urged the court to hear both the Preliminary Objection and the application simultaneously as the issues are basically the same and that the respondent be given time to file replying affidavit. In the circumstances, he prayed for the court to grant prayer 2 pending hearing and determination of the application based on the apprehension that the intended appeal may be rendered nugatory if warrant of arrest in force is executed. Counsel relied on several authorities thereby inviting the court to exercise discretion. Mr. Kopere insisted on proceeding with the preliminary objection first before the main application. He too relied on several authorities.

9. I have considered the application herein, orders of the trial court dated 17/2/2017 and the preliminary objection herein. It is true that the appellant has not complied with the court orders directing release of the children to the father. The appellant is challenging the legality of the contempt orders which were issued to Suo Motto without the respondent applying for the same. That being the gist of the application before me and considering that grant of stay orders are within the ambit of the court's discretion, I am inclined to order that the Preliminary Objection be heard first as the outcome will determine whether the application will be heard or not.

10. I have observed carefully the authorities cited by both counsels all of which are in agreement that to hear a contemnor or not depends on the circumstances and merits of each case and therefore falls within the discretion of the court. In the case of **Miwani vs Mawani (1977) eKLR** quoted by senior counsel, the court held that,

**“a fact that a party to a cause has disobeyed an order of the court is not of itself a bar to being heard unless the contempt complained of impedes the course of justice and that the court will exercise its discretion”.**

11. Mr. Kopere quoted the case of *Rose Detho vs National Automobile Ltd. Civil Appeal No. 304/2006 (2007) eKLR* in which by majority the Hon. Judges dismissed the preliminary objection and proceeded to hear the application for stay by the contemnor.

12. However, considering the fact that warrant of arrest is still in force and considering that determination of the Preliminary Objection might take a little while, the applicant may be prejudiced and the hearing of her application and intended appeal rendered nugatory. In the interest of justice and in the spirit of fairness, I will allow prayer two of the application pending further orders after hearing the Preliminary Objection.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF APRIL, 2017.

J.N. ONYIEGO (JUDGE)

In the presence of:

.....for appellant

.....for respondent