



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
CIVIL APPEAL NO. 96 OF 2016

A SY.....APPELLANT/APPLICANT

VERSUS

D J

B R MRESPONDENT

(Being an appeal from the order of Honorable Mbatia (Resident Magistrate) made on 15th August 2016 in Miscellaneous Children's Case No. 92 of 2016)

A S Y.....APPLICANT

VERSUS

D J

B R MRESPONDENT

RULING

1. The applicant was aggrieved by the orders of the Children Court in Miscellaneous Case No. 92 of 2016 issued on 15th August 2016. She filed the instant appeal on 5th October 2016 and with it asked for the stay of proceedings before the Children Court until the appeal was heard and determined. The application was certified as urgent. It was asked that a priority date within 14 days be set for its hearing. When the application came on 17th November 2016 counsel for the applicant was absent and the matter was stood over generally. On 16th March 2017 the applicant went to the registry and was given 8th June 2017 as the date for the hearing of the application. When the lower court asked that the proceedings before it come for hearing on 25th May 2017, on 18th May 2017 the applicant filed another motion before this court seeking the stay of the proceedings pending before the lower court until the stay application slated for 8th June 2017 was heard and determined.

2. The respondent filed grounds of opposition to say that a similar application for stay is on record; that the applicant was denied certificate of urgency, and when matter came for hearing on 17th November 2016 she was absent and matter was adjourned, and she was condemned costs which she did not pay; that the present application is an abuse of the process of the court, and an attempt to use the back door to get

what she had earlier on not got. The applicant christened her application as “temporary order of stay”.

3. The record shows that the applicant’s application filed on 5th October 2016 was certified as urgent, and it was asked that it be heard within 14 days. A date was indeed given. It was not heard owing to the absence of counsel for the applicant. There was no basis to allege that the matter was no longer urgent. On 17th November 2016 the applicant was asked to pay costs for the day. The respondent’s counsel gave the impression that before the costs were paid the applicant was in breach. There was no order that costs be paid before the next hearing, or before the applicant was given further audience. It followed that the costs that were given on 17th November 2016 would be taxed at the end of the matter.

4. The court can appreciate the desperate situation the applicant found herself in when her advocate failed to attend court on 17th November 2016.

5. So that this application can be put in perspective, the dispute between the parties was over three children whose mother was the applicant. The respondent was the grandfather of two of them. The father of these two was the son of the respondent. He died, leaving the applicant as the only parent. The applicant went to the Children’s Court in an *ex parte* application and got a guardianship order. That aggrieved the respondent who went before the same court and, also on *ex parte* basis, obtained orders against which the present appeal was filed. The applicant sought stay of the lower court’s pleadings. The dispute, therefore, was about the guardianship of the children.

6. Under **Article 53(2)** of the Constitution 2010 and **section 4** of the **Children Act (Cap.141)**, the primary and paramount consideration in this dispute should be the best interests of the children in question. In my view, the best interests of the children include expeditious disposal of any dispute which involves them.

7. Both in the lower court and in this court the children are entitled to these rights. What is now standing in the way of the determination of the dispute by the lower court is the appeal before this court. It is for this reason that I make the following orders:-

- (a) the appeal filed by the applicant shall be heard on 8th June 2017;
- (b) the applicant should file and serve the record of appeal within 3 days from today;
- (c) such record should be a certified photocopy of the original proceedings of the lower court, just in case the typing of the proceedings may cause delay;
- (d) parties should exchange written submissions on the appeal; and
- (e) in the meantime, the lower court proceedings stand stayed.

DATED, DELIVERED and SIGNED at NAIROBI this 31ST MAY, 2017

A.O. MUCHELULE

JUDGE