

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 25 OF 2017

A N N.....APPELLANT

VERSUS

M K K.....RESPONDENT

(An appeal arising from the decision by the Children’s Court at Nairobi made by the Hon. GM Gitonga (Senior Resident Magistrate) on 13th April 2017 in Children’s Case No. 78 of 2017)

RULING

1. The instant matter was filed herein on 25th April 2017; vide a memorandum of appeal dated 25th April 2017. The appellant filed the memorandum of appeal simultaneously with a Motion of even date, under certificate of urgency, seeking interlocutory orders, stay of the orders made by the lower court on 13th April 2017.

2. The appeal and the application relate to orders made by the lower court on 13th April 2017. The court had ordered that the respondent father be granted limited access to the minor the subject of the proceedings on alternate weekends during school sessions, with the parties being granted liberty to agree on modalities, failing which the access hours were to 10.00 am Saturday to 5.00 pm Sunday. The other order was that during Easter holidays, the appellant mother was to have the child from Friday 14th April 2017 to Saturday 15th April 2017, and the respondent father from Saturday 15th April 2017 to Monday 17th April 2017, with liberty to agree on pick-up and drop-off points. It was further directed that there was liberty to the appellant to provide evidence of her need to travel out of the country to assist the court give appropriate directions.

3. In the Motion, the appellant sought to have the said orders stayed in the interim pending the hearing and determination of the application and during the hearing and disposal of the appeal. In her affidavit in support of the application, the appellant avers that she and the child are dual citizens of Kenya and the United States of America (USA), both are residents of the USA, with the appellant working there and the child in school there. It is further averred that there were pending proceedings in US courts, and orders had been made therein concerning the child, one of which was a parental agreement between the parties entered by the consent of both and adopted by the US court for the benefit of the child. It is averred that the lower court disregarded that agreement and the orders of the US court, which took away the appellant’s rights, accrued under that agreement, without affording her a hearing. She argues that the life of the child and her well-being have been endangered.

4. The respondent replied to the application vide his replying affidavit sworn on 10th May 2017. He avers that after the orders were made the parties did enter into a consent on 27th April 2017 on his access to the minor as required by the order, and argues that in that sense the said application has been overtaken by events. He further states that the appellant and the child had been resident in Kenya for some ten (10) months within which period the child has been enrolled and is schooling at [particulars withheld] Academy. He states that he and the appellant did enter into a parental agreement, but argues that the same was only applicable in the USA. He further argues that the lower court was not obliged to accede to the orders of the US court in view of the provisions of the Foreign Judgments (Reciprocal Enforcement) Act, Cap 43, Laws of Kenya. He states that the lower court matter is still pending and the orders made were merely interim. He argues that the order was made in the best interests of the child. He states that the

issue of the parties going back to the USA was out of question given that the child has been in school at [particulars withheld] Academy since August 2016. He says that the appellant was a fight risk and the orders ought to remain in place.

5. The application was urged orally before me on 8th June 2017. Ms. Kilonzo argued the case for the appellant, while Mrs. Morara urged the respondent's case.

6. I have carefully perused the application and the supporting affidavit. The principal ground upon which it is founded is that the appellant and the child were US citizens, working and schooling there. The supplementary ground is that there was an order of a US court entered by consent of the parties on the parenting of the subject child. The appellant complains that that order was ignored by the lower court when it was making the impugned order. I have juxtaposed the averments in the application and the affidavit to those in the memorandum of appeal on record dated 25th April 2017. The principal ground of appeal revolves around the parental agreement executed in the USA, with the supplementary ground that the respondent was a fugitive from justice who posed a danger to the life of the subject child.

7. Whether the lower court was entitled to have regard to the alleged parental agreement and the US court order founded on it is matter that is the subject of the pending appeal, and I shall not advert to it at all. The only point for me to determine is whether I should stay the access order made by the lower court. There are claims in the memorandum of appeal, the application and the affidavit in support relating to the respondent being a fugitive from justice and a danger to the life of the minor. There is no elaboration with respect to in what sense the respondent was a fugitive from justice and a danger of the child. These allegations are very strong, and could found a solid basis upon which the court can grant the stay order sought. However, facts as to how the respondent was a fugitive from justice and a danger to the child ought to have been deposed to and elaborated on in the affidavit sworn in support of the application. I do not in the circumstances find any basis upon which I can grant the order sought. I shall not even venture to examine whether the trial court was justified to make the orders it made since the matter is alive before the said court, and certainly it is matter that shall be for consideration at the time the appeal will come up for argument.

8. On the whole, I do not find any merit in the Motion dated 25th April 2017. I shall accordingly dismiss it with costs to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 25TH DAY OF JULY, 2017.

W. MUSYOKA

JUDGE