

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MISC. APPLICATION NO. 110 OF 2017

MMM..... APPLICANT

VERSUS

SKN.....RESPONDENT

RULING

1. The applicant is the mother of the minor I K K. whose father is the respondent. On 23rd May 2017 the Children Court at Milimani in Cause No. 1290 of 2016 granted to the respondent interim custody, care and control of the minor. The applicant was granted unlimited day access. The minor was by then in the custody of the applicant. She did not hand over the minor to the respondent. On 19th July 2017 the court issued a warrant of arrest against her for the refusal to obey the order. On 24th July 2017 she applied to stay the orders issued on 23rd May 2017. She wanted the warrant lifted. The application was scheduled for hearing on 4th August 2017. On 25th July 2017 there was a temporary order of stay to allow her time to hand over the child. She was given up to 4th August 2017 to comply.

2. While that was going on, on 24th July 2017 the applicant filed an appeal before this court to challenge the order of custody, care and control issued on 23rd May 2017. The grounds in the appeal were that the lower court had erred in law and fact in granting the custody of a three year old minor to the respondent as opposed to her; the court had failed to consider that she had had custody of the child for two years without any complaint; the court had relied on a social report that had not been shared with the parties; the court had failed to allow the DNA to confirm the paternity before granting the custody to the respondent; the best interests of the child had not been considered; and that, the minor's existing status on custody had been disturbed in the process.

3. Along with the appeal was the present application under **section 4** of the **Children Act (No. 8 of 2001)**, **section 3A** of the **Civil Procedure Act** and **Order 51** of the **Civil Procedure Rules** which sought the stay and/or suspension of the orders issued on 23rd May 2017, and the lifting of the warrants of arrest issued on 19th July 2017. These orders were to allow for adequate time for the applicant to prepare the minor mentally for the hand over to the respondent.

4. It is clear that the applicant was not seeking the stay of the orders until the appeal is heard and determined. She wanted the orders to be in place as she prepared to hand over the custody of the minor to the respondent. From the record, the paternity of the child was not in dispute.

5. This is not the forum to deal with the merits of the appeal. In the affidavit sworn to support the application it was deponed that the child had not been handed over because it was not well and on medication.

6. The applicant has the unqualified obligation to respect the orders that were issued on 23rd May 2017, and repeated on 19th July 2017 (**Mutitika –v- Baharini Farm Ltd [1985]KLR 227**). Four months have

passed since the orders of 23rd May 2017 were issued. There is no evidence to show that the minor is unwell, or that there is any other issue standing in the way of handing over the child to the respondent as was directed.

7. In short, I find the application dated 24th July 2017 not merited and dismiss it. I make no order as to costs.

DATED and DELIVERED at NAIROBI this 21ST day of SEPTEMBER 2017

A.O. MUCHELULE

JUDGE