



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY AND PROBATE DIVISION
CIVIL APPEAL NO. 111 OF 2016

C M.....APPELLANT

VERSUS

J M.....RESPONDENT

(Being an appeal filed against the ruling delivered in Nairobi Children's Case No. 578 of 2016 on 18th October 2016)

RULING

1. There are two applications for determination dated 17th November 2016 and 8th December 2016. The first application seeks that the judgment delivered by the lower court be either stayed, varied or set aside; and that the appellant be allowed to file his pleadings and that the matter do start *de novo*. The second application seeks that the minor child, T X, be handed back to the appellant, and the police do assist in enforcing the order.
2. Regarding the first application, the appellant avers that the matter was heard and concluded without his input. He says that the trial magistrate proceeded to hear the case *ex parte* in his absence. He further states that despite the High Court in HCMisc. Case Number 124 of 2016 making an order of stay the trial magistrate went ahead and delivered a judgment. He alleges that there was disregard of court orders, and raises issues of natural justice and the welfare of the children.
3. The respondent has replied to that application through an affidavit sworn on 8th December 2016. She avers that the appellant alleges that the matter proceeded *ex parte*; yet his lawyer was in court on the day the matter proceeded but chose not to participate. She further avers that the court record will reveal that the appellant was granted more than three adjournments to put his house in order but despite that failed to file his defence.
4. Regarding the second application, the appellant states that he has always had physical custody of the children, but then the respondent forcefully imposed herself on the youngest child and took her away. She is said to have since gone underground, and is not in communication with the appellant, who is worried about the welfare of the said child. He urges the court to intervene as the child may suffer trauma from being separated from her siblings.
5. The response to the second application is through an affidavit sworn on 17th January 2017. The respondent avers that custody of the children was granted to her vide the judgment delivered on 18th October 20016, which the appellant has failed to obey. She states that he was the one who in partial

compliance with that judgment surrendered the youngest child, but chose to hide the other two. She accuses the appellant of traumatizing the children by causing publication of the matter in the media, and has attached copy of a news item appearing in the *Nairobiian*.

6. I called for the lower court file for the purpose of perusal. The same was availed and I have had opportunity to peruse it. The suit at the lower court was commenced by way of a plaint filed in that cause on 12th May 2016. The same was filed contemporaneously with an interlocutory summons, under certificate of urgency, seeking several orders – custody, production of the children, injunctions, release of birth certificates, among others. There is an affidavit of service on record, sworn and filed therein on 31st May 2016, indicating that the plaint and the summons were served on the appellant on 19th May 2016. The appellant swore an affidavit in reply on 30th May 2016, filed therein on 2nd June 2016. He subsequently filed notice of appointment of advocate on 7th June 2016. He then filed a notice on 14th July 2016 of intention to act in person.

7. The respondent herein filed another interlocutory application on 20th July 2016, of even date. She wanted the appellant called upon to show cause why he could not be punished for contempt of court, and why he could not bestow custody of the children on her. Notices to show cause were issued in the cause dated 28th July 2016. There is on record an affidavit of service sworn on 9th September 2016 and lodged therein on 13th September 2016, indicating that the notice was served on the appellant on 3rd August 2016. It would appear that service of the notice to show cause prompted the appellant to appoint counsel, who filed a notice to that effect on 20th September 2016, of even date.

8. The record of the handwritten notes of the proceedings indicates that there was an appearance on 2nd June 2016 before the trial magistrate. The appellant herein appeared personally and told the court that he had filed a replying affidavit which he had not served. He pleaded for time to file a defence. The court directed that the children be produced in court on a specific date, and the appellant was granted leave to file defence. The children were produced in court on 7th June 2016, the court interviewed them and made orders on interim custody and access. The appellant was in attendance with his advocate. The matter was then fixed for the hearing of the main suit.

9. When the matter came up for hearing of the main suit on 14th July 2016, the court noted that the appellant had not filed a defence, and gave him three days to file defence. On 13th September 2016 the court found that the appellant had failed to obey earlier court orders and directed that he be arrested, and a warrant was issued to be effected through the police. He was produced in court on 16th September 2016, when he was found guilty and sentenced to ten (10) days imprisonment. . The matter was then fixed for trial, in his presence, on 27th September 2016. On 27th September 2016, the appellant did not attend court, but the hearing proceeded with the respondent giving her testimony. The record reflects that Mr. Swaka, advocate for the appellant, walked in while the matter was going on, with the respondent in the witness box. He said he was unable to cross-examine the witness, and sought sometime. The court declined stating that the appellant had never filed a defence. Judgment was subsequently delivered on 18th October 2016, awarding custody of the children to the respondent.

10. I have also had occasion to have a look at the record in HCMisc. Case Number 124 of 2016. There is a ruling that Ougo J delivered on 9th November 2016, where it is indicated that interim orders had been made on 17th October 2016 staying delivery of the judgment on 18th October 2016. The court states that when the record of the lower court was placed before it, it noted that the lower court had delivered its judgment on 18th October 2016 as scheduled, and that there was nothing in that record to show that the order of the High Court had been served on the trial court.

11. The memorandum of appeal herein dated 17th November 2016 lists three grounds – that the appellant was denied a chance to be heard, that the rules of natural justice were not complied with and that the trial court delivered a judgment despite there being a stay order.

12. Did the trial court proceed *ex parte* and deny the appellant opportunity to be heard? The perusal of the record of the lower court reveals that the appellant had been properly served with the plaint way back on 19th May 2016. He appeared before the court in person on 2nd June 2016 and sought leave to file defence, and his plea was acceded to by the court. On 14th July 2016 the court noted that the appellant had not filed his defence, and, on its own motion, granted him three days to regularize the position by filing his defence. He never did. It cannot be said that the matter proceeded *ex parte*. The appellant had been granted time to file defence, but he never took advantage of the opportunity granted. The matter just had to proceed as undefended.

13. Secondly, the lower court record indicates that the date for hearing was fixed on 16th September 2016 for trial on 27th September 2016. The appellant was in court in person when this date was given. He was not present in court when the matter was called out on 27th September 2016, neither was his advocate. The record indicates that the trial commenced at 10.15 am, and by that time neither the appellant nor his advocate was in court. The advocate for the appellant strolled into court in the middle of the hearing at 10.35 am. Surely the court cannot be blamed in any way. Court matters ought not to proceed at the convenience of the parties. The ideal time for commencing hearings is 9.00 am, the appellant or his counsel ought to have been in court at the call over at which time the matter was allocated time for hearing. The appellant was the author of his own misfortune.

14. Did the trial court disregard the order of the High Court staying delivery of the judgment? The answer to that question can only be in the negative. The record in HCMisc. Case Number 124 of 2016 clearly indicates that Ougo J., who had made that order, did, on 9th November 2016, acknowledge that there was no evidence that the appellant ever placed the said order before the trial court for compliance. There can be no basis therefore for the plea that the trial court willfully ignored an order of the higher court.

15. In view of what I have stated above, drawn from what I gleaned from the record of the lower court, I find that there cannot be any basis for grant of the orders sought in the applications dated 17th November 2016 and 8th December 2016. The two applications have no merit whatsoever, and are prosecuted in abuse of the court process. They should suffer only one fate, that of dismissal, and I do hereby dismiss them, with costs. For avoidance of doubt the interim orders made herein on 18th November 2016 by Muigai J are hereby vacated.

DATED, SIGNED and DELIVERED at NAIROBI this 8TH DAY OF DECEMBER, 2017.

W. MUSYOKA

JUDGE