



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
CIVIL APPEAL NO. 82 OF 2013

R N N..... APPELLANT/APPLICANT

VERSUS

D K K.....RESPONDENT

(Being an appeal arising from the Ruling of the Honourable Principal Magistrate A.K. Mwicigi (Mr) in the Children's Court at Nairobi in Children's Case No. 406 of 2006 delivered on 5th November 2013)

BETWEEN

R N N.....PLAINTIFF

VERSUS

D K K.....RESPONDENT

RULING

1. It is not in dispute that the appellant/applicant R N N and the respondent D K K have a boy child called P.M. (or P.M.N. according to the applicant) who is aged 11. The child has always lived with the respondent who provides for it. He is in school. On 5th November 2014 the trial court delivered itself on an application made by the applicant to review an earlier order regarding him access to the child. His case was that the respondent had denied his access to the child, and that there was need to sanction her. This is what the court stated in its ruling:-

“It is my considered view that even when the child cannot be compelled to visit with the father, mechanisms must be in place to ensure that they bond with each other to break that barrier. The plaintiff is a fit parent, there is no evidence to contrary. To that end access must be structured to encourage the bonding which is in the child's best interest. This should start at school and the school authorities should take notice. The father has an inalienable right to his son. He has the right and authority to spend time with his son within school regulations. The school will suggest the time when the plaintiff can visit his son at school, which shall be at least twice in a week pending further orders. The father will also spend alternate Saturdays with the child from 9.00 am to 4.00 pm. And this will be reviewed in two months. These visits will not be supervised as there has been no basis for such supervision. It is so ordered.”

The plaintiff was aggrieved by the ruling and appealed to this court. His case was that the court had erred in law by failing to find that the respondent's refusal to foster and encourage the father and son relationship between the applicant and the child was ground to divest the respondent of the custody of the child and grant it to the applicant. Secondly, that the court had erred in law by granting the applicant access to the child but failed to indicate when the right was to commence and how and where the child was to be collected from and/or dropped. He wanted this court to fault the lower court for not granting him custody and for not taking into account the past orders and their not being executed because of the respondent. Lastly, that the court had failed to consider the recommendations in the Children Officers' reports and failed to appreciate that both parents had equal rights and duty to care for the child under **Article 53** of the Constitution of Kenya 2010. This court was asked to:-

- a. vary the ruling delivered on 5th November 2013;
- b. determine the suit finally; and
- c. award costs.

2. On 17th December 2014 the applicant filed this application under sections 113, 114, 115, 116, and 117 of the **Children Act No. 8 of 2001** seeking that the court varies the structure created by the lower court by its ruling of 5th November 2013 to:

“effect the best interests as declared by the lower court and provide and protect a father child relationship”.

The application was based on the grounds that the structure created by the lower court could neither give effect to the best interests of the child nor provide for a good father child relationship. The response of the respondent was that what was sought in the appeal was the same prayer sought in the application, that is the variation of the orders in the ruling dated 5th November 2013, and therefore the proper thing would be to await the determination of the appeal. She was saying that if the application is allowed, for instance, that would dispose of the appeal.

3. Counsel filed written submissions on the application. I have considered them.

4. Essentially, the application seeks the same orders as those sought in the appeal. If the application is determined there would be no need to hear or determine the appeal. I agree with the respondent that it amounts to abuse of process to make the same prayers in the appeal and application. What would be appropriate in the circumstances would be to await the resolution of appeal. The appeal has neither been admitted, nor directions given on it.

5. In the circumstances the order that commends itself to me is to dismiss the application with costs. Because the matter involves a child, I ask that the Deputy Registrar takes immediate steps to have the appeal processed for hearing. I ask that the appeal be mentioned before the Deputy Registrar on **25th January 2016** to give effect to these orders.

DATED and DELIVERED at NAIROBI this 18TH JANUARY 2016

A.O. MUCHELULE

JUDGE