



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 20 OF 2016

CCM.....APPLICANT/ APPELLANT

VERSUS

RKC,

VDC (suing through mother and next of friend MNM).....RESPONDENT

(Being an appeal from the decision and Ruling of the Resident Magistrate, Hon. C.M. Nzibe delivered on the 8th June, 2016 in Malindi CMCC Children Case No. 3 of 2016)

RULING

The application dated 13th June, 2016 seeks an order of stay of the orders issued on 8th June, 2016 in Malindi CMCC Children's case No. 38 of 2016 pending the hearing and determination of the appeal. The application is supported by the appellant's affidavit sworn on 13th June, 2016. The respondent filed grounds of opposition dated 30th August, 2016.

Mr. Otara, counsel for the applicant/appellant submitted that the appeal herein raises triable issues with overwhelming chances of success. If the orders being sought are not granted, the entire appeal will be rendered nugatory. The respondent sought maintenance and custody before the trial court as per the plaint. Custody could only be given after the suit was fully heard. The trial court issued a custody order even before directions were taken. No affidavit of means was filed. The substantive prayers were granted at the interlocutory stage. The orders were to apply retrospectively from 5th June, 2016 yet they were issued on 8th June, 2016.

Mr. Otara further contends that there was another suit, vide Malindi Children's Case No. 38 of 2015. The minors are the plaintiffs in that suit. The respondent herein participated in that suit. The respondent, being the mother of the minors had an opportunity to file an application in that case instead of filing another suit. All what was heard by the trial court was a preliminary objection. The trial magistrate made a ruling on the preliminary objection and the entire application. The preliminary objection dwelt on section 6 of the Civil Procedure Act. The trial Court did not refer to that section in its ruling. There is another suit and the trial court ought not to have dealt with the new suit. The respondent has no means to take care of the kids. The children are in school and the applicant is taking care of them. The respondent would like to have the children and then beg for their maintenance. The applicant was condemned unheard.

Mr. Obaga, counsel for the respondent, opposed the application. According to Mr. Obaga the respondent filed a notice of motion dated 14th January, 2016 seeking interim custody and interim maintenance pending the hearing of the application inter-partes and pending the determination of the suit. In children matters, interim prayers can be similar to the main prayer in the suit. The total maintenance is Kshs.60,000/=. The respondent only sought Kshs.30,000/= as she works with a non-governmental organization. The applicant did not respond to the application but filed a preliminary objection. The preliminary objection was dismissed leaving the application undefended. The respondent is not a party in Children's Case No. 38 of 2015. She was only called to produce one of the minors. The issue of sub-judice does not arise. The minors are girls under the age of ten and should be living with their mother.

The application herein was filed without the proceedings of the trial court included for the benefit of this court. I have gone through the records of the trial court. There is an application dated 14th January, 2016 by the respondent. The application sought interim custody of the two children pending the determination of the application. The respondent also sought maintenance of Kshs.30,000/= monthly. Mr. Otara filed a notice of preliminary objection on 3rd February, 2016. The objection states that the suit is an abuse of the court process, that it violates section 6 of the Civil Procedure Act and that the matter is sub-judice as there is Malindi Children's Case No. 38 of 2015.

The record of the trial court shows that on 3rd February, 2016 Mr. Gicheru held brief for Mr. Obaga. He informed the court that Mr. Obaga was bereaved and that the matter was for the hearing of the plaintiff's application dated 14th January, 2016. Mr. Mouko held Mr. Otara's brief and indicated that that was the position. However, Mr. Mouko stated that they could take a hearing date for the preliminary objection.

Parties appeared before the court again on 24th February, 2016. Miss Ruto held Mr. Obaga's brief. She informed the court that the matter was for the hearing of the respondent's application dated 14th January, 21016. She further told the court that Mr. Obaga and Mr. Otara had agreed to dispose the application by way of written submissions and each required 14 days. The trial court directed each party to file written submissions and listed the case for mention on 23rd March, 2016.

On 23rd March, 2016 Miss Atieno held Mr. Otara's brief. She told the court that Mr. Otara had not filed his submissions. He required one more day to file his submission. The court ordered that Mr. Otara was to file his submissions and fixed ruling for 25th May, 2016. The ruling was delivered on 8th June, 2016.

I have read the submissions by Mr. Obaga before the trial court. They mainly deal with the preliminary objection raised by Mr. Obaga. In the last paragraph, Mr. Obaga prayed that their application be granted as prayed since it was not being opposed. On his part, Mr. Otara simply dwelt on the preliminary objection in his written submissions.

I have read the ruling of the trial court. Contrary to Mr. Otara's contention that the ruling did not deal with section 6 of the CPC. The ruling reproduced section 6 of the CPC at page three. The trial court held that the respondent herein was not a party to Malindi Children Case No. 38 of 2015. At page 4 of the ruling, the court held that Section 6 of the Civil Procedure Code was inapplicable and that the suit was not sub-judice.

The trial court then went on to deal with the respondent's application. The court went at length to explain the issue of custody where minors are involved. That ruling is the subject of appeal. At this moment, mine is to deal with the application of stay of the order of the court issued on 8th June, 2016. It is however clear that the trial court was convinced that the preliminary objection and the respondent's application dated 14th January, 2016 were heard jointly. The ruling clearly indicate at page one that it was for the notice of motion dated 14th January, 2016 and the preliminary objection dated 3rd February, 2016. Unfortunately, Mr. Otara left fellow counsels to hold his brief without counter checking the court record.

Most of the issues being raised in the memorandum of Appel relate to the manner in which the trial court went ahead and made its ruling which gave custody of the minors to the respondent. I have seen the plaint in Malindi Children Case o. 38 of 2015. The respondent herein was not a party to that suit. The suit was filed by the applicant herein as next friend of his two daughters against three people who allegedly took their mother at night. That suit is technically compromised as the mother who was alledged to have been taken forcefully appeared in court. She had the couple's last born child who was a few months old. That is the suit Mr. Otara alledged to be pending.

The pleadings show that the appelland and the respondents were married. They had three children. All daughters aged between 6 years and 4 months by the time suit No. 3 of 2016 was filed in January, 2016. The respondent filed the suit together with an application for interim custody of the children. The respondent is the mother of the children. The current situation is that the first two children are schooling in Malindi and stay with their father. The respondent stays with the last born in Mombasa. The trial court granted interim custody to the respondent. The applicant would like to have the trial court's order stayed.

From the record herein, I find that the application dated 13th June, 2016 seeking stay of the orders of the trial court is not merited. Since the children are in school, the only orders this court can grant is that the children should continue with their studies in Malindi until the end of the current term. Thereafter the order of custody issued by the trial court shall take effect. Since the appeal is pending, I cannot deal in details on the issues being raised in the current application such as interpretation of section 6 of the Civil Procedure Code or affidavit of means. All those issues will be dealt with in the Appeal.

In the end, the application dated 13th June, 2016 lacks merit and is hereby dismissed. The two minors shall be under the custody of their mother, the respondent, upon closing school and shall continue to be with the respondent as per the orders of the trial court of 8th June, 2016. Costs shall follow the outcome of the main appeal.

Dated and delivered in Malindi this 20th day of September, 2016.

S.J. CHITEMBWE

JUDGE