



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 99 OF 2016**

N N M N.....APPLICANT/APPELLANT

VERSUS

S N O.....RESPONDENT

**RULING**

**Introduction**

1. In a ruling dated 3<sup>rd</sup> October 2016 the Children Court at Nairobi in case No. 621 of 2016 made orders granting joint legal custody of a 2½ years old child to the Applicant/Appellant father (hereinafter called the Applicant) and the Respondent mother. The actual custody of the child was granted to the Respondent mother with unlimited access by the Applicant father. There were no orders as to maintenance and the parties were to negotiate the mode of access.

2. The above orders provoked the filing of an appeal and contemporaneously, with that appeal the application now under consideration was also filed. This application is dated 7<sup>th</sup> October 2016 and was filed on even date under certificate of urgency. It is brought by way of Notice of Motion under **Order 51 Rules 1 to 3, Order 42, Rule 6** of the **Civil Procedure Rules, 2010** and **Section 3A** of the **Civil Procedure Act Laws of Kenya** and **Article 48** of the **Constitution**.

3. In the main, the Applicant seeks stay of Execution of the orders issued by Hon. Gitonga Resident Magistrate given on 3<sup>rd</sup> of October 2016, pending the hearing and determination of this application and the subsequent appeal. The Applicant prays that the Respondent be restrained by herself, her servants or agents from removing the subject minor L M N from the jurisdiction of this court until further orders, or pending the hearing and determination of the application and appeal in this matter.

**Applicant's Case:**

4. The application is premised on grounds that on 3<sup>rd</sup> October, 2016, the Children's court granted the Respondent orders for the actual custody of the minor L M N in the full knowledge that the Respondent intends to take the child to reside outside the court's jurisdiction. That the Applicant being dissatisfied with the said decision, immediately preferred an appeal against the judgment and orders of the Children's Court.

5. The Applicant alleged that the said orders are not in the best interests of the subject minor as they will destabilize and disorient the child from the familiar environment that he is already accustomed to; that the

said orders amount to allowing the Respondent to take the child to Denmark which is outside the court's jurisdiction, with no measures to ensure compliance with the court orders since there is no Embassy and the Kenyan courts will not be able to supervise or enforce those orders.

6. The Applicant stated that if the execution of the said Order is not stayed, the Respondent is likely to execute the judgment and orders of the court by taking the subject minor herein namely L M N into her actual custody, care and control and thereby removing him from the jurisdiction of this court.

7. The Applicant contended that he will suffer substantial loss if the stay is not granted and the appeal is successful. That any court orders issued for compliance by the Respondent, are likely to be reduced to an academic exercise and the court may be portrayed as having acted in vain, contrary to the overriding objective of the court proceedings.

8. The Applicant further stated that the efficiency and practicability of the enforcement of the orders of this court is likely to be hampered by legal hurdles and technicalities of jurisdiction. That the Applicant is ready and willing to comply with such orders, or conditions as the court shall issue with respect to security, for the due performance of the Applicant of orders as may ultimately be binding on him; that by virtue of the Respondent's nature and lifestyle, the Respondent barely has sufficient time to provide quality care for the subject minor.

9. The Applicant asserted that although the orders issued on 3<sup>rd</sup> October 2016 by the Children's court vest the legal custody of the minor in both the Applicant and the Respondent, the orders take away that very right from the Applicant when they deny him the right and participation in deciding the place of residence of the minor and the manner in which the minor's time is to be spent.

10. The Applicant appealed against the said orders for reasons that the court failed to take into account the factors provided for under **section 76(3) and section 83(i)** of the **Children Act 2001**. The Applicant filed a supporting affidavit sworn on 7<sup>th</sup> October, 2016 and averred to the matters set out in the grounds of the application.

### **Respondent's case**

11. In reply to the Applicant's affidavit, the Respondent swore a replying affidavit on 12<sup>th</sup> October, 2016 in which she deposed that the trial magistrate complied with the law by granting her the minor's custody as he is a child of tender age. That the Children's court made a verdict after it had perused all the pleadings and evidence produced before it and found no merit to discredit her parental capabilities.

12. The Respondent contended that the Applicant can get a visa if he wishes. That she is willing to bring the minor during the long holidays of June to August and two weeks in December during which the Applicant can have time to bond with the minor. She asserts that the Applicant made the decision to come back to Kenya from Denmark where he lived with the Respondent and the minor. That she is willing to comply with orders of the court issued on 3<sup>rd</sup> October 2016.

13. The Respondent averred that she had filed a Warrant of Arrest against the Applicant for failure to comply with the orders dated 4<sup>th</sup> October 2016 made by the Children's Court. That under section 83(1) of the Children Act, a child should not be removed from a place he has known as home for a period of more than 3 years. Further that she has had custody of the minor since he was born.

### **Applicant's Submissions:**

14. Dr. Kamau Kuria, learned counsel for the Applicant submitted that the child has been in the actual custody of the Applicant since May 2016 when they returned from Denmark. That the child stays in a very good environment and the Respondent had been granted access. Counsel argued that the orders of the court have now granted custody of the child to the Respondent to take him back to Denmark and if the orders sought are not granted, the pending appeal will be rendered nugatory. That there is a possibility of

the Respondent gaining Danish Citizenship along with the child.

15. Learned counsel submitted that should the appeal succeed and custody is given to the Applicant, this court will have no jurisdiction over that child if he goes to Denmark. That once an application is made in the courts of Kenya this child becomes a ward of the court.

16. Learned counsel contended that the two principles that the Applicant needed to satisfy in this application were first, to file the application without delay, which was done on 7<sup>th</sup> October, 2016, the orders of the lower court having been made on 3<sup>rd</sup> October, 2016, and second, to demonstrate that he would suffer substantial loss if the application was not granted. That in this case, the main issue was the custody of the minor which is a constitutional right of the Applicant and is subject to the best interest of the child.

17. Counsel urged that the child who currently lives with the Applicant at his grandparent's house in Karen, has been living away from the Respondent for five months. That while in Denmark there were instances when the Respondent left the child with the Applicant to go away for sleep overs. That the child being 2½ years old is not in school.

18. Counsel contended that the child should not be taken to Denmark where the Respondent wants to return to get married. That the child would be exposed to an environment of immorality to live with his mother and the lover with whom she started a relationship online while she was married to the Applicant.

#### **Respondent's Submissions:**

19. Opposing the application Mr. Omari learned counsel for the Respondent, submitted that the court has been selectively served with the Applicant's authorities. That all the authorities brought to court apart from the decision of Mugai J, are all documents of 1984. That the Applicant was not providing for the child even when he worked in various institutions. That the Applicant has been and is still housed by his parents and the reasons why the Respondent went to Denmark was because the Applicant left several jobs here in Kenya.

20. Mr. Omari contended that the emails of the Applicant's parents they were unanimous that the Applicant is a drunkard and a person of irresponsible character and his parents were appealing to the Respondent to be in charge of their son and the child when they left for Denmark.

21. Learned counsel further submitted that while in Denmark, the Applicant's behavior of drunkenness, violence, absenteeism from the child's life, and bringing women more than four times to the matrimonial home where the child was living, led to the breakdown of the marriage.

22. Counsel urged that upon being confronted about his behavior, the Applicant beat the Respondent and the matter was reported to the Danish authorities. That subsequently the Applicant abducted the child and returned to Kenya after which, the Respondent was served with papers from the courts in Kenya to the effect that interim custody had been placed with the Applicant.

#### **Issues:**

23. The court assessed the pleadings and the rival arguments tendered in the oral submissions and found that the issue for determination is whether or not it is in the best interest of the minor in the circumstances of this case, for the court to grant stay of execution, of the orders of the trial court granted on 3<sup>rd</sup> October, 2016.

#### **Analysis**

24. The matter was argued exhaustively as if the appeal itself were under consideration, but this being an interlocutory application the court will not delve deeply into the grounds of appeal. That exercise will be reserved for consideration during the hearing of the appeal itself.

25. The interlocutory application is for stay of execution of the orders granted on 3<sup>rd</sup> October, 2016 by the lower court. Ordinarily the Court shall not issue any stay orders unless the grounds set out in Order 42 Rule 6(2) (a) and (b) of the Civil Procedure Rule are satisfied.

26. Dr. Kuria referred the court to the case of **BWM vs SKKJ High Court Appeal No. 74 of 2015** which restated the law. Mr. Omari on the other hand referred to **Civil App No. 13 of 2013** which stated that grant of stay under Order 42 is discretionary and not automatic even upon filing appeal and should be made in very rare cases.

27. The said Order 42 Rule 6(2) (a) and (b) of the Civil Procedure Rule provides as follows:

**“No order for stay of execution shall be made under sub rule (1) unless –**

**(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay:”**

**(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.**

The provisions of the law are therefore, very clear and couched in mandatory terms on when the court may grant stay of execution orders.

28. In the current application the court finds that the Applicant has satisfied the second limb under **Order 42 Rule 6(2) (a)**, as the application was made without undue delay from the time the lower court orders were issued 3<sup>rd</sup> October, 2016 to the time this application was brought on 7<sup>th</sup> October, 2016.

29. The more irksome question is on the first limb of **rule 6(2) (a)** which requires that substantial loss, be demonstrated. The decisions which lend themselves to this question are to be found in the cases of **Adah Nyabok -vs- Uganda Holding Properties Limited (2012)**, in which Mwera J (as he then was) stated that:

***“Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal”***

and of **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001**, in which **Musinga, J** (as he then was) explained substantial loss in the following terms:

***‘...substantial loss’ is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.’***

30. The Applicant deposed that he was aware that execution is imminent and unless interim orders for stay of the execution are granted, the application and the Appeal filed herein shall be rendered nugatory. That once the subject minor is within the foreign jurisdiction of Denmark, the modalities of any unlimited and reasonable access are likely to be burdensome, oppressive and harsh upon the Applicant.

31. The dispute before Court is one of custody of a child of tender years. Dr. Kamau Kuria argued that **Article 45 (3) of the Constitution** gives parties in a marriage equal rights and this includes custody of the children, and to say that a woman has prima facie right to a child is no longer good law.

32. Counsel also referring to the decision in **Joyce Muthoni Githunguri v Stanley Muguna Githunguri Misc. Civil Case No. 58 of 1985 (OS)** stated that the prima facie rule is that other things being equal, children of this tender age should be with their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure there really is sufficient reasons to exclude the prima facie rule.

33. In the case of **Mehrunnissa vs Parvez (1981) KLR 547** referred to by the Applicant, the court held that custody of a child of tender years should always be a mother's right except where she has through her own misconduct divested herself of such right.

34. According to Counsel there are exceptional circumstances in this case which would entitle the father and not the mother to have custody of the child.

35. Mr. Omari on the other hand referred the Court to the decision of **JKW V MAN Civil Appeal No. 68 of 2015** which stated that where custody of a child of tender years is in issue the mother should have custody unless there are extraordinary circumstances to preclude her.

36. Indeed parenting is gender neutral. In the case of **Atwal v Amrit [2011] E.A. 20** the Court of Appeal held that **Article 53(1)(e)** and **section 24(1) Children Act** allow both parties to have equal parental responsibility for the child. Neither has a superior right to the other. The court held that the rights and wishes of parents and fact of parenthood although relevant and important are subordinate to the best interest of the child.

37. The fundamental and guiding principle concerning custody disputes and all matters involving children is that a child's best interest is of paramount importance. Determining what custody arrangement will serve the best interests of the child in any particular case involves the making, by the Court, of a value judgment, based on its findings of fact, in the exercise of its inherent jurisdiction as the upper guardian of minor children.

38. The Court has considered the grounds of appeal, the various authorities referred to by both counsels on record, together with their rival arguments. The Court has also considered the general principles applicable with regard to proceedings pertaining to children as provided under **Section 76(3)** of the **Children Act** such as the child's physical, emotional and education needs; the likely effect on the child of any change; the child's age, sex and religious persuasion and cultural background; any harm the child may have suffered, and the ability of the Applicant to provide for the child.

39. It is however, important to note that the orders sought by the Applicant relate to a child. In law, in any matter concerning a child, the best interests of the child are paramount. **Article 53(2)** of the **Constitution** provides the guiding principle on this question as follows:

**“A child's best interests are of paramount importance in every matter concerning the child.”**

The other pertinent law is the **Children Act No. 8 of 2001** and in particular **Section 4(3)** thereof.

40. The court has further also considered the specific principles to be applied in making custody orders as provided under **Section 83(1)** of the **Children Act**, in deciding whom to grant custody orders, such as the conduct and wishes of the parents of the child; the ascertainable wishes of the relatives of the child and the Applicant; whether the child has suffered or is likely to suffer any harm.

41. After careful analysis of the foregoing the Court finds that each party has accused the other of misconduct. The Applicant on his part has not demonstrated that there are exceptional circumstances in this case which preclude the mother of a 2<sup>1/2</sup> years old infant to have custody of the child.

42. In the premise the application dated 7<sup>th</sup> October, 2016 is denied. The Applicant is ordered to comply with the orders of Court issued on 3<sup>rd</sup> October, 2016 in the interim pending the hearing and determination of the appeal.

43. It is so ordered.

**SIGNED DATED and DELIVERED** in open court this **28<sup>th</sup> day of October, 2016.**

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**L. A. ACHODE**

**JUDGE**