



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURTS - FAMILY DIVISION**  
**CIVIL APPEAL NO. 87 OF 2014**  
**IN THE MATTER OF T M (MINOR)**

**BETWEEN**

**C K.....1<sup>ST</sup> APPELLANT/RESPONDENT**

**T K.....2<sup>ND</sup> APPELLANT/RESPONDENT**

**AND**

**A W F.....RESPONDENT/APPLICANT**

**RULING**

**PLEADINGS**

**APPLICANT'S CASE**

The Applicant filed a Notice of Motion dated 10<sup>th</sup> December, 2015 brought under **Order 42 Rule 6 (1), 2 (A) (3)** of the **Civil Procedure Rules**, and **Section 3A** of the **Civil Procedure Act**, seeking the following orders that;

- 1. This application be certified urgent and be heard exparte in the first instance.***
- 2. The Court be pleased to grant temporary stay of execution of the judgment/decision by the M. W. Muigai Judge made on 1<sup>st</sup> December, 2015 pending the hearing and determination of this application.***
- 3. The Court be pleased to grant temporary stay of execution of the judgment/decision by the M.W Muigai Judge made on 1<sup>st</sup> December, 2015 pending the hearing and determination of the appeal.***

The grounds for the Application are that the Applicant is the surviving biological parent of the minor child, T M, aged 3 years 11 months. According to the Applicant, the minor has been under his custody since 24<sup>th</sup> December, 2012 to date, with access rights to the Respondents.

He stated that the orders of stripping him from the minor are discriminative and prejudicial both to him and the child who have since bonded as a family. It was also his argument that the minor child is already in school at [particulars withheld] Kindergarden, Nairobi and moving her to the rural areas will greatly be prejudicial to minor's academic performance and self-esteem.

It was his contention that he is a man of means, young and energetic to bring up the minor child who is his biological daughter. According to him, the said orders are against the best interest of the child in question as well spelt in **Section 27** of the **Children Act** and also violate the provisions of **Article 53 (1)** of the **Constitution**. He further contended that it would be in the best interest of the child that the orders sought are granted.

The Applicant filed an earlier application on 22<sup>nd</sup> December, 2015 and sought that the child be produced in Court for purposes of ascertaining her welfare and wishes on whom she wants to stay with and where to attend school. The Applicant sought to have custody of the child and the grandparents' visitation rights and the Court reviews its orders to effect this situation.

The grounds were that the child was forcefully retrieved from him, and the Children Officer was not present as ordered by the Court.

He stated that the child is traumatized and undergoing mental anguish stress and mental torture due to the relocation. Further, that the child bonded well with the father and was attending [particulars withheld] Academy and having her in the village will greatly and adversely impact her performance and concentration at school and as such, it is in the best interests of the child that the child remains with the father.

The Applicant filed two separate Further Affidavits on 18<sup>th</sup> February, 2016 and he deposed that prior to the Ruling of the Court he was ready to handover the child and but the Respondents declined and blatantly bragged to him that the Ruling scheduled to be delivered on 1<sup>st</sup> December, 2015 would be in their favour and hence they were going to have custody of the child and therefore they needed no access.

In the Applicant's view, the Respondents are retirees and instead of enjoying their retirement peacefully, they have turned into busy bodies poking their noses in monkey water. Further, that they are holding the minors benefits arising from her late mother's estate amounting to Ksh 20m and that is why they want custody of the child.

In the second Affidavit, the Applicant stated that the child was in his custody from 6<sup>th</sup> October, 2014 and he bonded well with the child. He reiterated that he married the child's mother under Kikuyu customary law and the initial step of formalizing the marriage had commenced.

The Applicant also stated that the judgment of this Court was biased and discriminating on his part as a male parent and that is why he filed an appeal.

Other than the Affidavits, the Applicant also filed written submissions through learned Counsel on 22<sup>nd</sup> March, 2016. He submitted that stay orders are discretionary upon compliance of the requisites. The Applicant sought that the Child Officer should ascertain the welfare of the child in terms of health, education, emotional and psychological state after custody was granted to Respondents and that the minor be interviewed to ascertain whom she wants to stay with and the school she wants to attend.

## **RESPONDENT'S CASE**

The 1<sup>st</sup> Respondent filed a Replying Affidavit on 19<sup>th</sup> January, 2016 and deposed that upon the delivery of the judgment the Applicant could not be reached so as to arrange the peaceful transition and handing over of the child to them.

The 1<sup>st</sup> Respondent sought certification of the Court orders and served OCS Kileleshwa Police Station on

9<sup>th</sup> December, 2015. They later met on 17<sup>th</sup> December, 2015 at the said Police Station and the child was handed over to them. The Child Officer was not present during the handover, as the OCS stated it was ok as there was no problem.

The 1<sup>st</sup> Respondent intimated that the child was not traumatized at the handing over process. She is not withdrawn nor does she have feeding problems. She is not suffering from psychological mental torture or anguish as alleged by the Applicant.

The child is about 31/2 years old, enrolled in [particulars withheld] School in Limuru and has settled well. The 1<sup>st</sup> Respondent paid school fees and school expenses and attached the receipts to the affidavit.

The 1<sup>st</sup> Respondent stated that the child is well settled in the rural area as alleged and that is where her late mother was brought up. The 1<sup>st</sup> Respondent confirmed that initially they had custody of the child who resided with them after their late daughter told them to take care of the child.

At the Children's Court where the Applicant was granted custody, he flouted access terms and when they appealed to the High Court, they were not allowed to see the child from September 2015 until the Judgment of the Court when they took the child.

The Respondent filed written submissions through Learned Counsel and reiterated the same issues above. More particularly the Respondent stated no appeal or notice of appeal is filed as required by **Section 75 (1) and (2)** of Court of Appeal Rules. **Section 77 of the Court of Appeal Rules** on service of the Notice of appeal on all relevant parties has not been complied with. At the time of filing the Application, there was no appeal.

The child is 31/2 years old and no new and special circumstances have been brought forth to this Court to warrant grant of the orders sought. Further, that the Court should take into account the best interests of the Child as required by **Section 76 of the Children Act, 2001** and the orders of the Court can only reviewed or appealed against.

## **DETERMINATION**

### **The law**

**Order 42 Rule 6 of the Civil Procedure Rules** is to the effect that:

*(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

*(2) 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; and*

*(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.*

In **KENYA POWER & LIGHTING COMPANY LIMITED VS ESTHER WANJIRU WOKABI, CIVIL APPEAL NO. 326 OF 2013** it was pointed out that:

***“To my mind, the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;***

***(a) Whether the applicant has established that he/she has a prima facie arguable case;***

***(b) Whether the application was filed expeditiously; and***

***(c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”***

Applying the foregoing to the present case, it should be firstly noted that the matter at hand primarily concerns a minor and in that regard, the Parties should not lose sight of the provisions of **Article 53 (2)** of the **Constitution** which is to the effect that:

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

This Court has considered the evidence on record and the relevant legal provisions to the matter. The child in question is one of tender years and naturally ought to be with the mother as she is under 10 years old. The child's mother is deceased. The Respondents, parents of the child's mother had the child in their custody as instructed by their daughter on her death bed.

The Applicant and Respondent have had an acrimonious relationship over custody and visitation of the child. The Applicant lodged an application for custody of the child and access by the grandparents which was granted. The Respondents' appealed to this Court on the basis that they were denied access to the child and the child was not in good care with the Applicant.

At the risk of repeating the salient features of this Court's judgment; although it is not contested that the Applicant is the biological father of the child, the circumstances that culminated with the child's mother's death based on correspondence, testimony and official reports is such that it vitiated the Applicant's automatic right to physical custody of the child. This is coupled by uncontested testimony, that whilst the mother of the child was hospitalized up to the time of her death, the Applicant did not contact her or visit her. She told her parents to stay with her child. These are the militating factors the Court took into account in determining the best interests of the child. Although the Respondents are advanced in age and are retirees they confirmed that they have family members to help and support the child.

As at the time of filing the application; there is no notice of intended appeal. There are no new circumstances for the Court to consider in terms of likelihood of substantial loss pending hearing and determination of the appeal.

In the absence of new urgent and compelling circumstances, the Court cannot order the child be brought to Court and interviewed and or asking for Child Officers report. It would mean reopening the case again.

With regard to allegations and insinuation that this Court is biased and discriminatory, I cannot comment the matter maybe heard and determined on appeal. With regard to parties bragging in anticipation of the Court judgment of 1<sup>st</sup> December, 2015; it is best that the Applicant pursues this claim through the official channels to its logical conclusion as this Court is not known or contacted any of the parties. They are at liberty to confirm the same in the appropriate forum.

The stay of execution application is overtaken by events as the child is with the Respondents and the Applicant has access and both sides of the family have access to develop family relationship with the child which is better for her growth and development.

## **DISPOSITION**

**(1) The application is therefore dismissed.**

**(2) Each party to bear its own costs**

**DELIVERED SIGNED AND DATED IN OPEN COURT ON 24TH NOVEMBER 2016**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

.....

.....