



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL PETITION NO. 71 OF 2014
(FORMERLY CONSTITUTIONAL APPLICATION NO. 546 OF 2014 AT NAIROBI)

K M N APPLICANT/PETITIONER

VERSUS

CHILDREN'S COURT, TONONOKA RESPONDENT

AND

E GINTERESTED PARTY

RULING

1. The only issue for determination in this ruling is whether the Petitioner, who has already been granted a seven-out-of-thirty-day access to the child, may take the child, who lives with the mother at Mombasa, to his home at Nairobi.

2. It is made further to directions given by the Court in its Judgment delivered on 26th January 2015 herein, that:-

5. The Children Officer, Children Department Mombasa is requested to visit the homes of the Petitioner and the Interested Party in Nairobi and Mombasa respectively and to file, within the next fourteen (14) days, a report with respect to the circumstances of each in relation to the best interest of the child the subject of these proceedings.

6. For final orders as to the petitioner's access to the child pending hearing and determination of the Interested Party's Appeal, Mombasa HCCA NO. 42 of 2014, this Petition will be mentioned on the 6th February 2015 at 10.00am.

3. The directions given by the Court in this ruling are for interim relief only, because the issue of custody and access has not finally been determined by the Court. There is a pending appeal on the jurisdiction of the Kadhi's Court to make custody and access orders. The question of the appropriate court as between the Kadhi's Court and the Children's Court will be determined in the appeal so that further proceedings may be taken before the court with necessary jurisdiction. The findings in this ruling are, therefore, made for purposes only of the application before this Court, without prejudice to the final verdict of the Court

which ultimately deals with the final orders on custody and access.

4. The Court respectfully declines the subtle invitation by Counsel for the Petitioner and the Interested Party to enter into an assessment of comparative suitability of the environments available to the child at the two respective homesteads of the petitioner and the Interested Party. That is a matter for the Court that makes final orders on custody and access to the child.

5. The Children Officers' reports on the environment at the Petitioner's Nairobi home and the Interested Party's Mombasa home have been filed and the parties were given opportunity to file affidavits in response thereto and, subsequently, to make submissions thereon before the Court considered the matter.

6. I have considered the affidavits and the reports by the Children Officers, which are generally positive for both environments at the Petitioner's and Interested Party's homes. It means that the child's best interests are not adversely affected by being brought up, temporarily or on permanent basis, at either of the two environments. As shown below, the Children Officer, Mombasa sub-County, however, counseled against taking the child to Nairobi.

7. With regard, particularly, to the present enquiry whether the Petitioner's Nairobi home is suitable, the Children Officer's Report dated the 3rd February 2015 concludes that –

“RE: A CHILDREN OFFICER'S REPORT PURSUANT OF A COURT ORDER
DATED 26TH JANUARY 2015

OBSERVATIONS

1. *The matrimonial home is in a clean and secure environment*
2. *The home has spacious rooms and a large compound for the child to live*
3. *The petitioner and Interested Party are the subject's parents.*
4. *The petitioner loves his child so much.*
5. *The petitioner is psychologically affected.*
6. *From the video clips I saw, the child loves the father and his close family.*
7. *The N family loves the child so much.*
8. *There are enough toys for the child to use with the other children in the family.*
9. *There was a swing at the back of the house*
10. *There are three more children in the family aged between 4 and 6 years.*
11. *The applicant upholds the best interest of the child.*

RECOMMENDATIONS

Your Honour, in the best interest of the child, I wish to request Your Honourable Court to: -

1. *Grant the petitioner unhindered access of the child for a period of 14 (fourteen) days every 30 (thirty) days of every month.*
2. *Order the applicant and interested party to take equal parental responsibility towards the child.*

However this is subject to the court's final ruling.

Eunice Moraa

Sub-County Children's Officer

LANGATA”

As shown above, the Report gratuitously made recommendation on the period of access for the petitioner at 14 days but that was outside the brief of the Court and, therefore of no consequence.

8. The Children Officer's Report dated 5th February 2015 by Rahab Wambui, Mombasa Sub-County Children Officer, on the Interested Party's circumstances was similarly favourable but the officer recommended that "the father should be given access to the child within Mombasa" on the basis of her observations that:

"The mother of the child agrees that the child needs parental love and more so the love of the father. She agrees that the father should get access to the child. However, there is need to have some organized days of access. The mother also feels the child is of tender age and is always affected by change of weather. Hence access should be within Mombasa. During access the father goes to stay in a hotel with the child. The hotel is not the best for a growing child. There is need for homely environment for the child."

9. The Court felt that the respective reports were mainly based on, and consequently nuanced by, the perspectives, wishes and historical information given by the respective parties. However, upon considering the evidence as regards the circumstances of the petitioner's Nairobi home - which was really the subject of the inquiry - the positive finding thereof by the expert Children Officer and taking the interests of the child as paramount, the Court determines that the child may be taken to the petitioner's Nairobi home.

10. The Mombasa sub-County Children Officer's Report that the petitioner "[d]uring access the father goes to stay in a hotel with the child [and]...hotel is not the best for a growing child" actually supports the Petitioner's case for leave to take the child to his Nairobi home. It must be because of the restriction from taking the child outside Mombasa that the Petitioner may be compelled to put up in a hotel as his residence is in Nairobi. For the right of access to be meaningful, the petitioner father must be able to take the child to his home in Nairobi where a real life setting of a "homely environment" is availed. It is in the child's best interest that she has a real companionship with her father and other relations in the natural and broad surroundings of a home rather than the restricted and artificial setting of a hotel, as pointed out by the Mombasa sub-County Children Officer.

11. From the conclusions of the Reports no harm to her growth and development is likely to be occasioned on the child living in an environment such as described of the petitioner's home at Nairobi by the Children Officer's Report. There is, indeed, opportunity availed by the setting at the petitioner's home for favourable socialization in the community of other children and members of her extended family on the father's side as she does with the mother's side. Such environment, in my view, is suitable for character formation in the formative period of the two year old child. I am unable to take benefit of interested Party's concern as to effect on the child of change of weather without medical opinion thereon.

12. Accordingly, the Court makes the following orders and directions in the best interest of the child and for the smooth implementation of the access to the child granted to the Petitioner herein:

1. The Petitioner shall have access to the child and for that purpose have care and control of the child for a period of SEVEN (7) days out of every THIRTY (30) days at NAIROBI or MOMBASA as may be determined by the Petitioner, until further orders of the Court.
2. The petitioner shall NOT take the child the subject of these proceedings outside the Republic of Kenya without leave of the Court.
3. The Petitioner and the Interested Party will agree on suitable times of the day between the hours 6.00 am to 6.00 pm for the taking and return of the child.
4. The seven days of access may, but need not, be consecutive days and they need not coincide with the days of the calendar Week.

13. There shall be no order as to Costs.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 20TH DAY OF FEBRUARY 2015.

A. OMOLLO

JUDGE

In the presence of: -

Chigaldine for the Petitioner

Namahya for the Respondent

Cheruiyot for the Interested Party

Kiarie - Court Assistant.