

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO.100 OF 2014

A N TPLAINTIFF

VERSUS

A M A ADEFENDANT

(An appeal from the Ruling and Order of the children 's Court of Kenya at Nairobi, Millimani Law Court (The Honourable D. K. Kuto delivered on 7th November 2014)

RULING

1. The applicant seeks a stay of execution of the orders issued by the Chief Magistrates by Honorable Court on 7th November 2014 pending the hearing and determination of the appeal. That the interim custody, care and control of the children *U-K* and *MA* be granted to the applicant pending the hearing and determination of the appeal in the alternative the Court orders dated 7th November 2014 be varied substituted, suspended or set aside altogether, and the actual custody of the minor children.
2. The application is based on the following grounds; that the orders of 7th November 2014 are detrimental to the welfare of the children and are not in the best interests of the children as the respondent is not capable of raising the children single handedly without inflicting psychological pain and trauma on the said minors and in the present circumstances the children's interest would be highly prejudiced ; that the applicant has appealed the said ruling and the appeal has overwhelming chances of success. The applicant further listed the grounds raised in the memorandum of appeal adding that the children in issue will incur psychological and emotional loss and confusion which loss they may not eventually recover from and this will render the intended appeal will be rendered nugatory if the stay is not granted; that the children have been in the applicant's custody since their birth except from March 2013 until November 2013 and the appellant would see them every 2 weeks unlike the respondent who has not seen spoken or attempted to see the children since 20th July 2014 until 10th November 2014; that the orders granted were not founded on sound principles on granting interim care and custody of children of tender years' and also that no new evidence gave rise to a review of the order of 17th July 2012; that the balance of convenience lies in favour of the applicant.
3. When the matter came from hearing the applicant argued that the orders dated 7th November 2014 be stayed until the hearing and determination of the application inter partes and the appeal is heard and determined. The applicant seeks the orders as the children are suffering adding that the children whilst in their father's care looked unhealthy. That the children don't take meals in school as it is too spicy and their mother used to prepack lunch for them and that they have nightmares at night. That no reason was given to take away the children; that the respondent lives with the girlfriend and she is asking them about their sexual activities and distressing things about their mother. Before then the applicant was able to see the children every 2 weeks. That the respondent should be compelled to pay maintenance and does not deserve to have custody of the children and asks that the respondent be compelled to avail the children.
4. The respondent in response argued that he has had the custody of the children from March till November when the applicant had no place to take the children. That the applicant has tried to change the children's faith from Islam to Christianity adding that he had medically covered the two minors. He argued that if the stay is granted the children will be exposed to psychological

trauma and the academic performance that had picked up after the father took custody will dwindle. He argued that there was no proof of the children lacking food or of them having nightmares. He added that he was not the author of the newspaper article that depicted the applicant in bad light and denied the applicant's allegation of denying her access to the children. He added that it is in the best interest of the children that they go to a place where that will build development.

5. In reply the applicant argued that there is no evidence to prove absence of the mother and that they did not practice the Islamic faith. That the respondent did not pay school fees for the children, he has failed to do so and that the respondent was seeking to introduce the children to a new mother.
6. The applicant seems to have completely deviated from her application for orders for stay pending appeal and has delved into arguing the appeal. I wish not to make any comments on the same. The applicant seeks stay pending appeal. The order appealed against was given on 7th November 2014 and the applicant subsequently on 24th November 2014 filed this application. I find that the application was filed within reasonable time. On the issue of substantial loss the applicant has explained that the children are suffering in the custody of the respondent and argues that the respondent is unable to look after the children single handed. The children herein have been in the care of the respondent between March and November 2014 (which is admitted by the applicant in ground 5 of her application dated 24th November 2014) no adverse claims have been raised on neglect of the children as such I find the applicant has not proved the alleged psychological harm visited upon the children. I find that it is in the best interest of the minors that the interim orders remain in place pending the inter partes hearing and determination of application in the lower Court. The issues on custody raised on who is to have custody are matters pending before the lower court with an appeal pending before this court on interim orders By Hon. Kuto. I find that the matters raised here are matters to be canvassed before the lower court and if any party is aggrieved by the decision of the said Court ought only to come before this court on appeal. I therefore find that the application as raised by the applicant is premature and lacks merit and refer the parties back to the lower Court for determination of the said matter. The issues raised on appeal can be addressed once the appellants sets down the appeal for hearing. Costs shall be in the cause. It is so ordered.

Dated, signed and delivered this 17th day of *February* 2015.

R. E. OUGO

JUDGE

In the presence of:-

.....**For the Appellant/Applicant**

.....**For the Respondent**

Mr. Makori

Court Clerk