



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

**AT NAIROBI**

**CIVIL APPEAL NO. 48 OF 2010**

**N O B.....APPELLANT**

**VERSUS**

**A A O.....RESPONDENT**

**RULING**

1. The application for determination is dated 23<sup>rd</sup> July 2014. It seeks in the main that the court do order resumption of contact between R A B and the applicant by ordering that the parties revert to the terms of the judgment of Nambuye J of 12<sup>th</sup> July 2011.
2. The grounds upon which the application is premised are set out on the face of the application, as well as in the affidavit sworn by the applicant on 23<sup>rd</sup> July 2014 in support of the application.
3. The applicant states that the court had on 10<sup>th</sup> September 2013 restrained him from accessing the subject child of a period of three months. He avers that the period has since expired. He asserts that he has during the period respected and complied with the order. He has undergone the psychiatric evaluation ordered by the court which confirmed him to be a fit person to parent a child. He would like the parental access and bonding resumed as per the orders made in the judgment of Nambuye J. of 12<sup>th</sup> July 2011.
4. Attached to the affidavit in support are several documents. There is a copy of the formal order extracted from the ruling of Kimaru J on 10<sup>th</sup> September 2013, where the order barring the applicant from accessing the child pending further orders of the court was made. There is also the ruling of Kimaru J. dated 17<sup>th</sup> September 2013, which affirmed the order of 10<sup>th</sup> September 2013. Finally, there is the judgment delivered on 12<sup>th</sup> July 2011 by Nambuye J, where directions were given on access of the child by the applicant.
5. The respondent swore an affidavit on 13<sup>th</sup> August 2014 in reply to the application. She argues that the orders made by Nambuye J. must be read together with the orders and directions given thereafter. The order of 17<sup>th</sup> September 2013 barred the applicant from accessing the child for three years pending further orders of the court. The applicant was granted liberty to apply after the three months lapse for the court to consider whether he is of the appropriate state of mind to be entrusted with the visitation rights. The applicant was evaluated by the Amani Counselling Centre and Training Institute who prepared a report dated 11<sup>th</sup> December 2013, who found him appropriate for access purposes. The respondent argues that the report did not take into account the reasons that were decreed appropriate for the court to make the exclusion order. She also argues that the applicant has lodged appeal against the judgment of Nambuye J.

6. She has attached to her affidavit a copy of the ruling of the Court of Appeal delivered on 2<sup>nd</sup> May 2014 where stay of the orders made by this court on 10<sup>th</sup> and 17<sup>th</sup> September 2013 was declined. There is also the order of this court made on 13<sup>th</sup> February 2014, and extracted on 14<sup>th</sup> February 2014, directing the DCIO Kilimani to stop investigations connected to the child, which had culminated in criminal charges being preferred against a brother of the respondent.

7. The applicant responded to the replying affidavit by his further affidavit sworn on 30<sup>th</sup> September 2014.

8. Counsel for the parties addressed me on 28<sup>th</sup> November 2014, where they made extensive oral submissions on whether or not the applicant ought to be allowed visitation rights. Mrs. Mbanya for the applicant submitted that the court had granted a three months window for the child to bond with the respondent within without any form of influence of the applicant, hence the order barring contact between the child and the applicant for three months. She submitted that the three months are now over, and it was about time that access was allowed. Mr. Ongoya for the respondent submitted that the applicant had not made a case for resumption of visitation rights, as he had not proved that he was yet of the right state of mind to interact with the child.

9. The court on 10<sup>th</sup> September 2013 had barred the applicant from accessing the subject child pending further orders. The order was given in the best interests of the child for the applicant had been adjudged then to be a bad influence to the child. Should I make a further order lifting the ban of 10<sup>th</sup> September 2013?

10. Under Article 53(2) of the Constitution the best interests principle should be applied in all cases concerning a child. The said provision states:-

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

11. The constitutional provision should be read together with Section 4(3) of the Children Act, which provides –

***“All judicial and administrative institutions, and all persons acting in the name of these institutions where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to –***

***a. Safeguard and promote the rights and welfare of the child;***

***b. Conserve and promote the welfare of the child...”***

12. The court in making the orders of 10<sup>th</sup> September 2013 was no doubt guided by the said principle. Indeed, although Section 6(1) of the Children’s Act provides that the child has a right to live with and to be loved by his parents, under Section 6(2) the court does have the power to separate the child from his parents or any of them if that is the best interests of the child. The court in the order of 10<sup>th</sup> September 2013 concluded that the applicant had become a bad influence to the child, and in the best interests of the child decided to separate him from the father in terms of Section 6(2) of the Children Act.

13. The said separation was not intended to be permanent, but for a limited period of three months, following which the court could review of the order.

14. I note that seventeen (17) months have expired since the order was made. For seventeen (17) months the child has not had access to one of the parents. The question I need to ask myself is whether that is in the best interests of the child.

15. The order of 10<sup>th</sup> September 2013 was designed to assist the child adjust to living with the mother and away from the father. It was also intended to allow the bad influence of the applicant wear off. It also afforded the applicant opportunity to go into retrospection regarding his relations with the child *vis-à-vis* the rights of the mother to also have access to the child bearing in mind the terms of the judgment on Nambuye J.

16. The subject is in his formative years. He is a male. It would not be in his best interests to be kept away for too long from his father. The gap period of seventeen (17) months was in my view adequate in terms of the child adjusting to his new environment with his mother away from the corrupting influence of his father. I believe the break has also served the purpose of getting the applicant come to terms with the judgment of Nambuye J. and appreciate how he ought to conduct himself as between the child and the respondent.

17. In view of the above, I believe that there would be merit in allowing resumption of contact between the child and the applicant. There should be caution though to the applicant that the court has already noted that he has been a bad influence to the child, any evidence that the applicant will resume influencing the child negatively will no doubt cause the court restore the order of 10<sup>th</sup> September 2013.

18. In the end I do hereby make the following orders-

(a) That there shall be resumption of contact of the subject child by the applicant and the judgment of 12<sup>th</sup> July 2011 shall apply in terms of clauses 1,2,3,4,5,6,9,10 and 14.

(b) That clauses 7 and 8 of the said judgment are for the meantime suspended and instead the applicant shall access the said child under the following terms:-

(i) the applicant shall access the child on alternate Saturdays from 10.00a.m. to 4.00p.m. with effect from 21<sup>st</sup> February 2015;

(ii) he shall pick the child from the respondent's residence strictly at the time indicated in (b) (i) above and likewise drop him as per the order;

(iii) /the child shall at all times of access be in the company of the respondent or a person nominated by the respondent;

(iv) the applicant shall not remove the child from the presence of the respondent or her nominee; and

(v) the applicant shall not remove the child from urban centre where the respondent currently resides, or shall in future reside, without the prior leave of court.

(c) That the order in (b) above shall remain in force until further order or orders of the court;

(d) That the matter shall be mentioned after three (3) months for compliance and/or review; and

(e) That the applicant shall bear the costs of this application.

**DATED, SIGNED and DELIVERED at NAIROBI this 13<sup>th</sup> DAY OF February 2015.**

**W. MUSYOKA**

**JUDGE**

In the presence of Mrs. Mbanya advocate for appellant.