



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 73 OF 2013**

**E W K.....APPELLANT**

**VERSUS**

**J K K.....RESPONDENT**

**RULING**

1. The matter herein is a Children's matter putting the biological father of the child against the material grandmother of the child.
2. A judgement was entered in **Nairobi Children's Case No. 1211 of 2012** on 25<sup>th</sup> October 2013 in favour of the father as against the grandmother and the mother of the child. Custody, care and control of the minor was granted to the father. The mother was restrained from taking the child out of the jurisdiction, but the grandmother was granted unlimited but reasonable supervised access to the child.
3. The child was born when father and mother living together was husband wife. She came into this world on 31<sup>st</sup> October 2011 during her parent's cohabitation. The mother left the father in March 2012, taking the child with her. She was later to leave for Switzerland the same year, 2012, leaving the child with the grandmother. It was the abandonment of the infant by the mother that prompted the father to move the children's court for custody, care and control.
4. The grandmother of the child was dissatisfied with decision of the lower court, and filed the present appeal on 5<sup>th</sup> November 2013.
5. She simultaneously filed a Motion dated 4<sup>th</sup> November 2013 seeking stay of execution of the judgement of 25<sup>th</sup> October 2013. She argues that the respondent father had abandoned the child at the age of 6 months.
6. The respondent father replied to the application vide an affidavit sworn on 14<sup>th</sup> November 2013. He denies have abandoned the child, stating instead that it was the applicant who left the matrimonial home with the child and later abandoned her with the aging applicant. He asserts that she kept visiting the child at the applicant's residence, but was subsequently locked out after the applicant grandmother became hostile.
7. I have noted from the record that it is the mother of the child who left the matrimonial home with the child, effectively taking her away from her father. She subsequently abandoned the infant, then days than one year old with the applicant grandmother. It is therefore not accurate to say that the respondent abandoned the child. If anything it is the mother of the child, and the daughter of the applicant who is guilty of abandonment.
8. I note to that the suit in the lower court was against the applicant grandmother and the mother of the child. The appeal herein is by the grandmother. It would appear that the mother of the child is not party to these proceedings, and is not contesting the orders made by the Children's court. It is noteworthy to that both the applicant and mother of the child did not testify at hearing at the lower court, apparently even after being properly served.
9. I do not wish to say much on the substance given that the appeal is yet to be heard. A cheaper analysis

may preempt the appeal and possible prejudice it.

10. In view of everything that I have said above, and especially in paragraphs 7 and 8, my conclusion is to disallow the application dated 4<sup>th</sup> November 2013. I am not persuaded that the applicant has established a case for grant of the orders that she seeks. The said application is therefore hereby dismissed. The applicant shall have the costs of the application.

11. The effect of the ruling is that the applicant grandmother shall make arrangements to handover the child to the respondent father in terms of the judgement of 23<sup>rd</sup> October 2013. The temporary orders made herein on 5<sup>th</sup> November 2013 are hereby discharged.

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>TH</sup> DAY OF MAY, 2015.**

**W. MUSYOKA**

**JUDGE**

In the presence of ..... advocate for the applicant.

In the presence of ..... advocate for the respondents.