



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL APPEAL NO.83 OF 2014**

**BETWEEN**

**M E W.....APPELLANT**

**VERSUS**

**R .....1<sup>ST</sup> RESPONDENT**

**J L L.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the Ruling and consequential orders issued by the Resident Magistrate's Court sitting in Maralal, Children's Case Number 14 of 2014 dated 25<sup>th</sup> day of June 2014.)*

**RULING**

1. The application dated 30<sup>th</sup> June, 2014 is brought by the Appellant under the provisions of Orders 22, 43(1), (i) (ii), Order 51 of the Civil Procedure Rules and Section 1A, 1B and Section 63(E) of the Civil Procedure Act and Section 4(8) of the Children's Act as read with Article 53 of the Constitution.

The applicant seeks *inter alia* the following orders;

1. That pending the hearing and determination of the appeal filed herewith, this court be pleased to stay and/or set aside the proceedings and all consequential orders issued in **Maralal Children's case No. 14 of 2014** dated the 25<sup>th</sup> June, 2014.
- 2 That pending the hearing and determination of the appeal, this court be pleased to restore exclusive custody care and control of the minor **VLL** to the Appellant/Applicant herein in accordance with the decision in **Nakuru Children's Case No.148 of 2013** or upon such terms and conditions as the Honourable court shall deem fit in the circumstances.
3. That this Honourable Court be pleased to call for the entire file in **Maralal Children's case No. 14 of 2014** for its full import and for the purposes of the Appeal hereof.

The application is supported by an affidavit sworn by the applicant MEW on the 30<sup>th</sup> June, 2014 and grounds appearing on the face of the application.

2. The application is vehemently opposed. Two affidavits have been filed, one sworn by the 1<sup>st</sup>

respondent R L on the 23<sup>rd</sup> September, 2014 and the other by her Advocate Philip Wambugu on same day. Grounds of opposition have also been filed by the firm of Philip Henry Associates representing the 1<sup>st</sup> Respondent.

The 2<sup>nd</sup> Respondent in opposing the application associates himself with the 1<sup>st</sup> Respondent's grounds of objection, affidavits filed thereof and the affidavits sworn by and on behalf of the appellant. Parties filed written submissions on the application.

3. The 1<sup>st</sup> ground in opposition is that the application as filed is defective as it is undated and not commissioned. I have looked at the application. It is dated the 30<sup>th</sup> June, 2014 and the supporting affidavit sworn on even date. It is therefore properly before the court.

4. The two rival orders, subject of this appeal and application were issued by the two courts as follows:

In

(a) **Maralal Childrens' Case No. 14 of 2014**

**In the matter of VLL (Minor)**

between

**RL -vs- JLL 1<sup>st</sup> Defendant**

and

**MEW**, the following orders were issued on the **25<sup>th</sup> June, 2014** by the Honourable Senior Resident Magistrate B.S. Khapoya:

1. That interim custody of the minor XY is given to the biological mother, the plaintiff herein.
2. The O.C.S. Maralal Police Station to assist in execution of these orders.

(b) **In Nakuru Childrens' Case No.148 of 2013,**

**In the matter of VLL(minor) between**

**MEW as plaintiff**

-vs-

**JLL 1<sup>st</sup> Defendant**

and

**RL – 2<sup>nd</sup> Defendant.**

The Honourable R. Amwayi, Resident Magistrate, after hearing the case, delivered judgment on the **3<sup>rd</sup> October, 2013** in the following terms:

***“Accordingly, it would be in the best interest of the Children herein namely NL, NL, NL and V LL to grant the plaintiff custody, care and control of the Children as prayed.***

**2. That 1<sup>st</sup> Defendant shall nevertheless have right of access to the 4<sup>th</sup> subject (VLL) which shall be reasonable.**

5. A brief background leading to the appeal and application is important. The minor **VLL** a three(3) years old boy, is the biological son of JLL, 2<sup>nd</sup> Respondent in this appeal. The Appellant MEW is a Dutch national who came to Kenya in the year 2003, and in 2007 she entered into a union, referred to as a marriage with the 2<sup>nd</sup> Respondent. During their union, they recognised the three children above as their children. They lived together with the children at Maralal but the children were never officially adopted. The Appellant could not get her own child so it is stated that the two agreed to take in a boy, the subject herein, then at six(6) months old, which they did, and have since lived with him. The 1<sup>st</sup> Respondent, RL is the biological mother of the minor, and not officially adopted by the appellant. It is not clear whether she gave away her son voluntarily or by an arrangement.

6. Up to 2013, the Appellant and the 2<sup>nd</sup> Respondent lived together with the children including the minor boy but separated, leaving the children with the Appellant. Since then, the Appellant has lived, taken care and has had physical custody of the minor together with the other three children who are also under the physical care and control of the Appellant. The Biological mother of the minor herein, the 1<sup>st</sup> Respondent separated with the minor at six(6) months of his life and she has never taken any active part in his upbringing.

7. In 2013, after the 2<sup>nd</sup> Respondent and the Appellant separated, the appellant filed a Children's Case in Nakuru being **Childrens' Case No. 148 of 2013**, seeking to be granted custody, care and control of the four children including the minor boy. The court granted her prayers in a judgment dated the **3<sup>rd</sup> October, 2013**. The biological father of the children (2<sup>nd</sup> Respondent) due to his busy political engagements(he was agreed to the appellant's prayers but was granted orders of access to the minor child.

8. In May, 2014, the 1<sup>st</sup> Respondent (in the appeal) the biological mother of the minor filed a Childrens' Case in the Resident Magistrates Court at Maralal No. 14 of 2014 seeking custody of the minor. By a Notice of Motion dated 29<sup>th</sup> May, 2014 she sought and was granted interim custody orders dated 25<sup>th</sup> June, 2014 giving her the biological mother of the child, interim custody with a further order that the OCS Maralal Police station assist in execution of the orders. The minor child was then in the custody of the Appellant in this Appeal.

9. These two conflicting orders from the two different courts are the subject of the appeal filed herein, and the Notice of Motion dated the 30<sup>th</sup> June, 2014.

10. I have considered the Memorandum of Appeal as filed on the 2<sup>nd</sup> July, 2014 and the grounds upon which the appeal is based. In summary, and in my view the nine(9) grounds may be summarised as into four, as follows:

(1) Issue of jurisdiction by the Childrens' court at Maralal to entertain the children case filed as No. 14 of 2014, there having been a similar case at the Nakuru Childrens' Case No.148 of 2013 having been heard and determined on the same issues, thus the case being *Res Judicata*.

(2). Maralal Childrens' court having sat on appeal over the Nakuru Children's Case No. 148 of 2013 that is not only unlawful but also unprocedural – and an abuse of court process.

(3) That the best interests of the child not having been considered in the Maralal case when orders of custody of the minor were given to the applicant who never had any parental relationship with the minor since he was six(6) months old.

11. The application at hand and filed on the 2<sup>nd</sup> July, 2014 raises the same issues as would be

determined in the appeal, and seeks to stay the orders of the Malalal Childrens' Court and set aside the proceedings and all consequential orders, including an order to have the minor child who has been in custody of his biological mother since June, 2014, taken away and placed back in the custody of the Appellant.

12. **Section 4(3)** of the Childrens' Act No. 8 of 2001 mandates all persons to have the interests of the child as the paramount consideration to the extent that it is consistent with adoption 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.

**Section 6(1)** states:

***“ A child shall have a right to live with and to be cared for by his parents.”***

***(2) Subject to subsection (1) where the court or Director determines in accordance with the law that it is in the best interests of the child to separate him from his parents, the best alternative care available shall be provided for the child.”***

13. This court is guided by the above legal provisions to have the best interest of the child in mind-while adjudicating on children matters as is in this application and the pending appeal. As I have already stated, the issues for the determination of this court in the interim application pending the hearing of the appeal are the same issues that the court will be called upon to determine at the hearing of the appeal. To the extent that, interrogation and scrutiny of the matters raised in the Notice of Motion hereof would result into the final determination of the appeal.

14. I have considered the submissions by counsel in these proceedings. It is clear that to determine the application would be to determine the appeal. Needless to state that the appeal is not ready for hearing. The Record of appeal is yet to be filed, the Maralal Childrens Court file is not yet availed to this court hence to do so would be premature and prejudicial to the parties, and more so to the child whose interest and welfare must be jealously guarded. To that end, and to safeguard the child from being tossed from one family to another, or as the court may determine, and therefore add confusion and misery to the innocent child, it is my finding that the best interest of the child's welfare would be best served by an order to direct that the appeal be prepared and listed down for hearing on priority basis, and within the shortest time available.

15. This court notes that the Maralal Childrens' Case File No. 14 of 2014 is yet to be forwarded to this court. An order to have the proceedings typed and forwarded to this court was issued on the 5<sup>th</sup> March 2015. It has not been explained why the Childrens' Court file from Maralal court has not been availed, three months down the line.

16. In the meantime, this court makes an *ORDER OF STATUS QUO* to be maintained in respect of the custody of the minor child pending the hearing and determination of the Appeal. The child shall remain in the custody of his biological mother, the 1<sup>st</sup> respondent.

17. In furtherance of the child's best interest and welfare and pursuant to provisions of Sections 4, 24 and 25 of the Childrens Act No. 8 of 2001, this court *suo moto* makes an order that pending the hearing and determination of the appeal the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent shall jointly take parental responsibility over the financial and educational needs of the minor child.

18. The court directs that this Ruling be placed before the Deputy Registrar of this court forthwith for necessary action as specified in Paragraph 15 of this Ruling.

There shall be no orders as to costs.

**Dated, signed and delivered in open court this 25<sup>th</sup> day of June 2015**

**JANET MULWA**

**JUDGE**

**In the presence of:**

Wambugu for 1<sup>st</sup> Respondent

Prof. Kiama Wangai holding brief for Malemba for Appellant

Wambugu holding brief for 2<sup>nd</sup> Respondent