



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 48 OF 2010

A A O.....APPELLANT

VERSUS

1. N O B.....1ST RESPONDENT

2. C O 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Hon. Mr. Kassan, RM delivered on the 16th August, 2010 in Nairobi Children's Case No. 565 of 2009)

RULING

1. The application dated 1st July 2015 was brought at the instance of the applicant. He seeks that the orders made herein on 19th February 2015 be reviewed so that there is a full resumption of the terms of the judgment of Nambuye J. of 12th July 2011, particularly by reinstating clauses 7 and 8 thereof. He also prays that he be allowed to spend time with the child during school holidays which commence on 13th July 2015.
2. In his affidavit sworn on 1st July 2015, the applicant has detailed how the child spent quality time with him during the periods allowed in the order of 19th February 2015, and how in the circumstances he would like access allowed in terms of the judgment of Nambuye J.
3. I have not had the benefit of perusing through the respondent's reply to the application for a copy thereof is not on the record, even though during oral argument Mr. Oluoch, counsel for the respondent, alluded to an affidavit of reply having been filed.
4. The application was argued orally before me on 14th July 2015. The gist of the submissions by Mrs. Mbanya for the applicant was that after resumption of contact matters were progressing to the point where there was need for going back to the full terms of the judgment of Nambuye J.
5. On his part Mr. Oluoch opposed the application. He took the position that the conditions imposed by the order of 19th February 2015 were not complied with fully. It was alleged that the child was taken outside the urban area where the mother resides, was at times treated in a hostile manner and that there were often confrontations between the applicant and the respondent or her nominee. He particularly stressed that the applicant was engaging in unnecessary fights that did not augur well for the welfare of the child.

6. From what the parties placed before me, I got the impression that the resumption of contact took off on a positive note, although there were some mishaps caused by attitude on the part of the applicant. Overall, however, it would appear that things are progressing well.

7. The concerns raised by the respondent though are valid. Parties should not continue to display hostility in the presence of the child. It is not in his best interests. It does not confer well for his future.

8. It is understandable that marital relations broke down, and tensions remain palpable. However, the parents must learn to suppress whatever hard feelings they may have towards each other for the benefit of the child. Let them confine their fights to themselves, and keep them away from the child.

9. Nambuye J. was alive to this and that should explain order No. 9 of the decree on appeal extracted on 28th July 2011. It reads as follows:-

“That both parents are enjoined not to engage the child in negative talk about each other. But to do all that is within their reach to cultivate the child’s strong bonds with both of them.”

10. The matter of negative influence is embedded in the final orders of the judgment dated 12th July 2011. The effect of it is that the court may make orders unfavourable to either party should the said order No. 9 not be adhered to.

11. I am, however, alive to the fact that the child is entitled to have access to both parents, and that the parents are entitled to equal access to the child at all times. Given the recent history of the matter there is need to proceed with some measure of caution.

12. School holidays are here with us and children are going to be at home for long spells of time. It is a good occasion for them to interact and socialize with their parents. The child, the applicant and the respondent no doubt should be looking forward to such times. The applicant is, like any parent entitled to such interaction. However, in view of the past experience the interaction should be measured.

13. I am satisfied overall that there is a compelling case for full implementation of the judgment of Nambuye J. so that the parties can go back the normalcy possible in the prevailing circumstances. This, however, being a children’s matter care has to be taken to ensure that the process is as smooth as possible taking into account the welfare of the child.

14. In the end, I am moved to make the following orders:-

(a) That the terms of paragraphs (a) and (b) of the order of 13th February 2015 are to remain in force pending review which shall be made after a report has been filed by a Children’s Officer;

(b) That the Children’s Officer responsible for Kisumu County is hereby ordered to do an evaluation of the child the subject of these proceedings in terms of the child’s interaction with both his parents and the impact of the said interaction on his overall wellness;

(c) That the Children’s Officer referred to in (b) above shall compile and file their report in court within thirty-five (35) days of the date of this order;

(d) That in the meantime, the applicant shall have access to the child during the current school holiday-

(i) From 8th August 2015 to 15th August 2015 and 22nd August 2015 to 29th August 2015 respectively,

(ii) He shall pick the child on the dates indicated at 10.00am from the respondent's residence and shall take him back to the said residence at 4.00pm on the last day of access on both occasions;

(iii) The holidays access shall be unsupervised;

(iv) The child may be removed during the holiday access period from the urban centre where the respondent currently resides; and

(v) There is liberty to apply in line with order No. 9 of the decree on appeal dated 28th July 2011;

(e) That the matter shall be mentioned early in the new term on a date to be given at the delivery of the ruling; and

(f) That each party shall bear their own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 31ST DAY OF JULY, 2015.

W. MUSYOKA

JUDGE

In the presence of Mr. Oluoch advocate for the appellant

In the presence of Mrs. Mbanya advocate for the respondent