



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
CIVIL APPEAL NO. 8 OF 2015

J S N APPELLANT/APPLICANT

VERSUS

R A N RESPONDENT

RULING

1. By a Chamber Summons Application dated 26.6.15 and filed under Certificate of Urgency, the Appellant/Applicant sought the following orders that:
 - a) Spent
 - b) This Court is pleased to order the mother of the named child to release him to attend school at Ukunda Catholic Nursery School at Diani, under the care and physical custody of the Appellant;
 - c) In the interim, the proceedings before the Children's Court with the exception of the application for leave to appeal, are stayed to prevent a miscarriage of justice and further or continued contravention of the child's right to a comfortable holistic life, good education and upright upbringing;
 - d) Directions on service and *interpartes* hearing are given;
 - e) There are no order as to costs.
2. The background of the matter herein is that the Appellant/Appellant, filed a suit in the lower court, Tononoka Children's Court Civil Case No. 432 of 2014, against the Respondent. The trial Magistrate, B. Koech granted orders on 19.1.15 *inter alia* that interim custody care and control of V S N the child herein, be with the Appellant/Applicant and that the Children's Officer Kwale, facilitate the physical transfer of the child from the Respondent to the Plaintiff's home. The Respondent defied the Order and refused to release the child to the Appellant/Applicant or the Children's Officer. This prompted the Appellant/Applicant to file an application dated 17.2.15 under certificate of urgency seeking orders *inter alia* that:
 - a) the Respondent be deprive an opportunity to be heard until she purges her contempt.

- b) the OCS, Changamwe Police Station assist in the transfer of the child from the Respondent to the Plaintiff, so that he may attend school without further delay.
3. In a Ruling delivered on 20.4.15, the trial Magistrate ordered that status quo be maintained. The Appellant/Applicant was ordered to pay school fees directly to the school while the Respondent was to cater for school related expenses. Aggrieved by the Ruling of the trial Magistrate, the Appellant/Applicant filed the Appeal herein seeking the orders:
- a) that the physical custody care and physical control of the ward of the Court be decreed to the Appellant/Applicant;
 - b) that the case is remitted to the learned Magistrate in charge of the Children's Court, Tononoka for re-hearing of the Application dated 17.2.15 and any other issues pending before Court.

The Appellant/Applicant's Case

4. The Appellant/Applicant subsequently filed the Application herein seeking the orders enumerated above. The Application is supported by the Affidavit of the Appellant/Applicant and is premised on the grounds the trial Magistrate reviewed her own order *suo moto* as the Application before her was not for review but in the nature of contempt proceedings. Further that the child in the custody of the Respondent has been subjected to physical and psychological abuse, has suffered severe burns, is neglected and has been out of school for over one year as the Respondent is unable to keep him in school; that the child's life is at risk having been threatened by the Respondent who is depressed and sick and unable to make reasonable and wise decisions. The Appellant/Applicant further avers that the child is better off with him and his newly married wife as he is able to provide him with better accommodation and shield him from further abuse.

The Respondent's Case

5. In reply, the Respondent filed the affidavit sworn on 17.8.15 denied all the allegations of neglect alleged by the Appellant/Applicant. She deponed that the order of 19.1.15 granting custody to the Appellant/Applicant on an interim basis did not exclude/vitiate her rights as the mother of the child; that the orders of the Court of 20.4.15 upheld the best interests of the child who is of tender years by keeping him with his mother. She further denied that the child has not been in school and stated that the child has indeed been in school; that to stay the proceedings of the Children's Court will only serve to compromise the best interests of the child; that the burns and injuries occurred as a result of a motorcycle and domestic accidents and in the ordinary course of play; that the Appellant/Applicant is determined to portray her as an unfit mother so as to deprive her of the actual and physical custody of the child and have him raised by a step mother.

Determination

6. I have considered the Application and the Supporting Affidavit as well as the Replying Affidavit. I have also considered the written submissions filed by the parties. I have further perused the record herein.
7. The Applicant argues that by a ruling on 20.4.15, the trial Magistrate reviewed her own orders of 19.1.15 without affording the parties a hearing and yet there was no application before her for review. Whether the trial Magistrate misdirected herself or not, is a matter that I cannot delve into at this interlocutory stage. This is clearly a matter that is subject of the Appeal herein. To address this issue now would be tantamount to determining the Appeal before the parties have had occasion to address me exhaustively on its merits.
8. The Appellant/Applicant averred in the affidavit and submitted extensively on why the Respondent should not have custody of the child and gave reasons which have been vehemently

denied by the Respondent in both her Affidavit and written Submissions. This question of fact as to whether the Respondent is a fit person to be granted the custody of the minor child is a matter which ought not to be finally determined on the basis of the disputed facts set out in affidavits filed by the parties at this interlocutory stage. This is a matter for determination by this Court in the Appeal or by the trial Court.

9. The issue of grant of custody of the child to the mother being one of exercise of discretion to make custody orders under the Children Act, the trial court's decision may only be interfered with by an appellate court upon the principles set out in **Mbogo v. Shah (1968) EA 93, 96 (per Sir Charles Newbold, P)** that –

“[A] Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in the matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

10. The trial Magistrate in her Ruling observed that the child was of tender years and required stability and moving him from parent to parent was not in his best interest. In making her Ruling the learned trial Magistrate was guided by Section 4 of the Children Act which enjoins the Court to give the interest of the child first and paramount consideration and ruled that the best interest of the child shall be served if status quo is maintained.

11. The issues raised in the Application herein are weighty. I am however reluctant to interfere with interim orders of the trial Magistrate as this would destabilize the child and would not be in his best interests. The justice of the case will be met by expediting the disposal of the case in the Children's Court which has original jurisdiction in matters relating to children in the first instance.

12. In the result I grant the following orders:

- a) The case be and is hereby remitted to the learned Magistrate in charge of the Children's Court, Tononoka for re-hearing of the Application dated 17.2.15 and any other issues pending before Court.
- b) Status quo to be maintained;
- c) The Appellant/Applicant shall pay school fees directly to the school while the Respondent shall cater for all school related expenses for the child as ordered by the trial Court;
- d) In accordance with the general principle for expedition in children matters under section 76 (2) of the Children Act, I direct that the matter be heard expeditiously on a date to fixed on priority basis.
- e) Costs shall be in the cause.

DATED, SIGNED and DELIVERED in MOMBASA this 30th day of November, 2015.

M. THANDE

JUDGE

In the presence of: -

..... for the Appellant/Applicant

..... for the Respondent

..... Court Assistant