



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CIVIL APPEAL NO. 25 OF 2013

L K

(on behalf of the minor child

M M MAPPELLANT

VERSUS

H M K.....RESPONDENT

R U L I N G

The applicant/appellant through an application brought pursuant to Article 159(2) of the Constitution of Kenya, Rule 3 of the High Court (Practice and Procedure Rules), Order 51 and Order 40 Rule 7 of the Civil Procedure Rules prays that the interlocutory orders issued by this honourable court on 18th March, 2013 be set aside and the custody of the child M M M be placed in the custody of the respondent. The application is premised on the grounds on the face of the application inter alia:-that the welfare, upbringing, and health of the child is suffering as the child is in the custody of his grandmother who is unable to take care of the minor; that the appellant is not able to take care of the child and that she has refused to fix the appeal for hearing at an early date. The application is further supported by an affidavit by the applicant dated 23rd August, 2013 in which the applicant averred that the child lives with the mother of the respondent whereas the respondent lives in Nairobi, who is senile and old and unable to take care of the child. That the child is not medically fit and suffers from skin disease and amoeba infection. That he is never taken to the hospital. That the child is malnourished. That his education progress is not monitored constantly. That the respondent is always in Nairobi and has no time to see and care for the child whereof the applicant prayed that the application be granted as he has also been denied access to the child by the grandmother of the child. The applicant in his further affidavit dated 16th October, 2013 averred that the child has never been treated at [particulars withheld]. That the respondent has admitted she cannot provide for the minor and that it is in the best interest of the minor if he stays with his mother and father.

The respondent on the other hand in her replying affidavit dated 19th September, 2013 deponed that the child is in good health. That the applicant has not shown justifiable cause to warrant the setting aside of the order of 18th March, 2013. The respondent denied that her mother is senile and old and unable to take care of the child and averred that the child has been given good care by his grandmother. She averred that the child is not malnourished as alleged by the applicant. That his education needs are taken into consideration. The respondent deponed that though she works in Nairobi she visits her child. She averred that the applicant is married to another woman and that he is not in good terms with the other

woman and the applicant only tries to be close to the respondent whenever he has quarrels with the other woman and upon the respondent declining his advances he petitions court for the custody of the child. She avers the applicant with such problems cannot be trusted with the custody of the child in question. The respondent further avers the applicant has not been supporting the child and as such prayed for the applicant's application to be dismissed.

I have carefully considered the application before me. The pleadings in this matter, the respective affidavits for and against the application. The oral submissions by both the parties and the opposing positions as well as the order of 18th March, 2013. The issue for determination is whether the applicant has met conditions to warrant setting aside the interlocutory orders issued on 18th March, 2013.

In this application the orders sought to be set aside were interim orders under prayer(b) of the application dated 14th March, 2013. The order granted by court was dated 18th March, 2013 as follows:-

(a). I am satisfied the application is urgent.

(b). I grant prayers Nos(b)

(d). Application be served for interpartes hearing.

The above-mentioned order was to lapse upon interpartes hearing and determination of the application dated 14th March, 2013. The said application was heard by this court on 25th March, 2013 and ruling delivered on 4th April, 2013. That upon delivery of the ruling on 4th April, 2013 the order of 18th March, 2013 ceased to be in force or lapsed. That by the time the applicant filed his application on 23rd August, 2013 the order of 18th March, 2013 was not in force but the order of 4th April, 2013. This court is being asked to set aside an order of 18th March, 2013 which ceased to be in force more than 4 months since the same ceased to be in force. The court cannot set aside what does not exist. The applicant should have moved this court before hearing and determination of the application interpartes. On the grounds raised in the application the same were raised during the hearing of the application dated 14th March, 2013 and all considered and a final ruling delivered in presence of both parties.

In view of the foregoing I find no merits of the application. The same is misconceived and bad in law.

The upshot is that the application is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 9TH DAY OF APRIL, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN PRESENCE

1. Applicant in person – present
2. Respondent in person

J. A. MAKAU

JUDGE