REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 244 OF 2013

S C K... APPELLANT

VERSUS

T A... RESPONDENT

RULING

By an application dated 24th January 2014, the appellant seeks orders of stay of execution of the decree dated 26/1/2013 arising from the judgment in the subordinate court, to the extent that the respondent is allowed unsupervised access to the child herein for half the period of the school holidays, or alternate weekends, pending the hearing and determination of the appeal.

The applicant also seeks that the respondent be allowed access to the child or alternate weekends and in the presence of the mother, at all times.

The grounds are that:-

(a) The appellant has lodged an appeal against the judgment which granted the contested orders, as the effect is disruptive to the child’s welfare.

(b) The child is only 4 years old and has been staying with the appellant with limited access to the respondent. The argument raised is that, it would not be in the best interest of the minor to be separated from his mother for such a long period.

The appellant and respondent are the biological parents of the child referred to as MRS. However the parents have lived separately since the year 2010 and formally obtained divorce on 25th October 2013 in **Divorce Cause No.462 of 2011** (Milimani). The parties have had a string of protracted tussles regarding the custody, access and maintenance of the child resulting in several interim orders which subsisted pending hearing and determination of the cause. The appellant deposes in her supporting affidavit that soon after the High Court issued orders in the year 2011, the respondent left the country, and for over two years the appellant brought up the child single handedly until the year 2013, when the respondent got back to the country. The judgment by the trial court granted the appellant custody of the child, with the respondent having the contested access orders.

The appellant's contention is that, by ordering the child to shuttle between the parents for half of the school vacation, the court did not take into account the fact that the child is only 4 years old, and has always stayed with the appellant, and the changes are likely to disrupt her well- being. This concern is boosted by the fact that during trial, the respondent informed the court that he was yet

to find a permanent place of abode, nor was he in any gainful employment.

The appellant clarifies that she is not opposed to the respondent spending time with the child, but the unsupervised access, given his past conduct when he took the child outside the country, resulting in the court issuing orders for her return, is what causes her to have reservations about unsupervised access.

This fear is further supported by the fact that the respondent retains the child's passport. The respondent is said to have an Angolan fiancee and that he is likely to settle in Angola.

She offers facilitating the respondent's access to the child every alternate weekend pending hearing of the appeal.

In opposing the application, the respondent has deposed in a replying affidavit the court gave him visitation rights, which the appellant has refused to honour, and even when she was summoned to court to show cause why she'd not complied, she never showed up. The respondent views the present application as part and an attempt by the appellant to avoid complying with the court orders. She is accused of having a history of not obeying court orders relating to visitation, prompting the respondent to move to court to seek appropriate orders when he sent to her cheques for the child's upkeep as shown by annextures TA2.

The respondent also laments that all his attempt to visit the minor since the year 2013, have been thwarted by appellant. He avers that he lives in a spacious home in Njoro with his parents. There is a three bed-roomed separate house for his use where the appellant and the child have stayed in the past. The respondent has no wish for the appellant to be present during the visitations saying on several occasions.....

The respondent's objection to supervised visits stems from the fact that in the past visiting, the appellant was accompanied by her advocate and friend Mr. Katwa Kigen with a view to intimidate him and prevent him from enjoying the visitation. On other occasions, she has turned up with her relatives and strange men who she claimed were her security people.

The respondent points out that no harm has even befallen the child whenever she was bee in in his custody, so issues of supervision are totally uncalled for. He denies the claims that he has a girlfriend in Angola or that he intends to relocate to that country, saying no evidence has been presented to confirm that. He further states that he has no plan or desire whatsoever to take the child outside Kenya, and urges the court not to give the appellant a blank cheque which will allow her to behave as she pleases.

In a supplementary affidavit by the appellant, she denies the issues raised by the respondent, terming them falsehoods and claims that the respondent is in contempt of orders which she is already against. She claims that the respondent is out to harass her and is not bothered about the welfare of the child.

She claims that the access order exposes the child to hardship as it means that for every alternate Friday she will travel to Nakuru and be back to the undisclosed residence by Sunday at 4.00 p.m. in preparation for school the next day.

Basically the appellant not only seeks stay of the trial court's orders with regard to unsupervised access to the child, she also wishes the orders to be varied with regard to respondent's access to the child on alternate weekends.

In considering an application for stay, Order 42 Rule 6(2) Civil Procedure Code provides that:-

> **"No order for stay of execution shall be made....... unless:-**

> **(a) The court is satisfied that substantial loss may result to the applicant unless the order is made, and that the application has been made without unreasonable delay, and**
>
> **(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on his has been given by the applicant**

I confirm that this application was brought without undue delay.

The issue which then arises is what substantial loss will the applicant suffer if the trial court's orders are realised? She says the child will suffer hardship and she is likely to be permanently deprived of the child by the respondent as he could easily leave this court's jurisdiction.

I have considered the written submissions by counsel - the applicant's counsel has basically repeated the contents of the appellant's affidavit, in his submissions. The respondent's counsel argues that the applicant has failed to show that execution of the court orders will create a state of affairs that will irreparably affect or negate the very essential core of her successful appeal.

The guiding provision for an application such as this one is Order 42 Rule 6(1) Civil Procedure Rules which provides that:-

> **"No appeal .... shall operate as a stay of execution or proceedings under a decree or order aggrieved from except in so far as the court appealed from may order....... for sufficient cause......... stay of execution.........."**

The principles that a court will take into account were set out by Ringera J (as he then was) in the case of **GLOBAL TOURS TRAVELS LTD**. (Winding Up Cause No.43 of 2000) as being:-

> (1) Whether it is in the interest of justice to order stay.
>
> (2) The need for expeditious disposal of cases.
>
> (3) Whether the application has been made timeously.

My perception of the applicant's grievance, borne by her deposition in the affidavit is that she is extremely angry that the respondent left Kenya for a period of two years, during which time she brought up the child single handedly, and she is offended by the thought that after her single contribution to the child, the respondent can now gleefully have access to the child. This fact is repeated several times in her supporting affidavit, supplementary affidavit and even submissions by her counsel.

Can this substantial loss be extended to the child?

I acknowledge the age of the child vis-a-vis the orders for alternate weekend's access and the fear that she may be spirited out of the country. The most paramount consideration is the best interest of the child. Article 53(1) (e) of the Constitution provides that:-

> **"Every child has the right:-**
>
> **(e) To parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not."**

The Constitutional recognition is echoed in **section 24(1)** of the **Children's Act**, and the basis for this provision is not hard to see.

A child needs the participation of both parents in his/her life so as to enrich the child's quality of life. This is why it is important that unless completing unavoidable, such interaction between parent and child

should not be unnecessarily curtailed.

I find the case of **Mangit Singh Amrit V Rapinder Kaur Atwal** **[2009] eKLR** very useful in this aspect. Onyancha J stated in that case as follows:-

> **"The concern that the child should grow and develop with the help of both his parents, will be taken into account in the issue of access which the Department will be given in respect of the child. ... in the best interest of the child. ..."**

The applicant's fears that the child might be spirited out of Kenya especially because the respondent has her passport - that is the only real fear. Claims of an amorous liaison with some un-named individual from Angola, or an intended relocation to that country are not supported by any evidence. It has not been suggested that the respondent is of violent or perverted character so that it would be risky to leave the child with him without supervision. I think the fear of leaving this court's jurisdiction can easily be addressed by ordering the respondent to deposit the said passport in court. In the absence of any evidence to persuade this court that the presence of the appellant is necessary during the child's visit to the respondent, is with the greatest of respect, patronising and similar of a prefect's conduct, intended to create mistrust in the young mind of the child towards her father.

No psychological assessment report has been presented to this court to confirm that the alternate visits which have a traumatory or physically drawing effect on the child, infact children generally unlike adults enjoy the frequent change of scenes and the appellant as a responsible mother ought to ensure that on Sundays when the child is back from visiting so as to re-energise. That alone would not persuade me to define the child of the necessary interaction she needs with her father. The application has no merit and is dismissed with costs to respondent.

Delivered and dated this 25th day of June, 2014 at Nakuru.

H.A. OMONDI

JUDGE