IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.40 OF 2014

JKN.....APPELLANT

VERSUS

HWN.....RESPONDENT

RULING

The appellant, JKN, filed a suit in the lower court, being Nakuru Children's Court Civil Case No.145 of 2013, against his estranged wife, HWN.

Upon trial, the trial magistrate, M.A. Otindo, in a decree issued on 25th March 2014, granted the following orders:-

"1. that the legal and actual custody of the minors be and is hereby given to the defendant;

2. **that the plaintiff (read appellant) shall have unlimited access to the minors during days which they are not in school;**

3. **that parties are at liberty to agree on maintenance, if they fail each party shall be at liberty to apply;**

4. **that 30 days stay of execution is granted to the plaintiff."**

Aggrieved by the decree of the trial magistrate, the appellant filed the appeal herein seeking to quash or set aside the decree of the lower court and subsequently, filed the notice of motion dated 31st March, 2013 seeking to stay the execution of the decree pending the hearing and determination of the appeal.

The motion is supported by the affidavit of the appellant and is premised on the grounds that the appellant has single handedly raised the subjects for seven years; that the respondent, who has been married to another man, is a stranger to the subjects. The appellant argues that the respondent, who has not been with the respondents for about 2 years will suffer no prejudice if the application is allowed. On the other hand, the subjects who will inevitably face a change of environment will be greatly affected. Further, that the appeal, which has high chances of success, will be rendered nugatory if the order sought is not granted.

In reply, the respondent filed the affidavit sworn on 16th April, 2014 in which she has deposed that for one and half year, she has been in court pursuing the custody of the children; that after being frustrated

by the appellant in her pursuit to get the custody of the children, her prayers were answered on 19th March, 2014 when the trial court granted her the custody of the children; that the appellant requested for stay of execution for one month to preclude interference of the children's school calendar was granted.

Explaining that she has been suffering owing to the denial of the opportunity to be with the children, who are of tender age, to give them motherly care and love, the respondent contends that the application herein is meant to deny her the right to bring up the children.

Terming the appellant's allegation that she has married another man to be a lie, the respondent explains that owing to the appellant's nature of job (a tour operator), the children are most of the time left in the care of house girls who the appellant hires and fires at will. She argues that the personality of the children is likely to be affected by the exposure to the many negative traits from the house girls, some of whom, have never been mothers before or have no personal attachment to the children. Besides, the appellant has other children (is polygamous) and is not taking proper care of those children.

The respondent has denied the appellant's contention that she neglected the children and explained that she left the appellant's house after he badly assaulted her and denied her a chance to go with the children. Her attempts to get the custody through her parents and elders were all in vain.

Concerning her alleged bad character, she argues that the trial court was satisfied that she is stable, capable and committed to the children.

In a rejoinder, the appellant filed the further affidavit sworn on 26th May, 2014 in which he contends that the order sought to be appealed from is illegal and/or irregular as it terminated a suit that was never challenged (defended); that it is not a mandatory requirement of law that children must be with their mother and that the law does not allow an immoral or persons who have confessed to be of unstable mind to take care of children.

The appellant alleges that the respondent plucked the teeth of one of the children, P, when she took them in August 2013 and as a result the child has lost self esteem and confidence. Further that when this court gave the children to the respondent during the Easter school holidays, the respondent neglected them and as a result they returned when they were completely beaten, sickly, with deep chest congestion, heavy running noses, dark pale skin, dirt and with bad mannerisms.

The appellant argues that the trial court was biased and as a result, it did not consider the wishes of the children and their welfare. In this regard, he argues that unless those orders are stayed the children will be exposed to hostility by the family of their mother's new found husband and their foster father.

With regard to the respondent's allegation that he has been sued by one of his other wives for failing to take proper care of his other children, terming reference to that suit an attempt to tarnish his good refutation, the appellant explains that those orders were obtained *ex parte* and he has ever since filed an appeal.

Before me, the parties reiterated their respective positions on the issue of the custody of the minors herein. The sole issue for determination is whether the appellant has made up a case for issuance of the stay order.

The instant application herein is in *pari materia* with that in **G V.G Civil Appeal No.30 of 1978** where the trial judge had granted the custody of children of tender years to their father. Law J.A (as he then was) said as follows:-

> **"....it is with reluctance that I have come to the conclusion that his decision was wrong and should not be supported, for reasons which I shall endeavour to set out. Basically, these reasons are that the custody of very young female children should be granted to their mother, <u>in the absence of exceptional circumstances</u> which do not in my opinion exist in this case. The learned judge correctly directed himself that in cases of this nature, the paramount**

consideration was the welfare of the children. He rejected the proposition, advanced before him by the mother's advocate, that there was a 'rule' in favour of the mother.

With respect, this was a misdirection. When dealing with the paramount consideration of welfare, especially where young female children are concerned, there is a rule that the mother is normally the person who should have custody. As Roxburgh J said in Re S (an infant)

"I only say this; the *prima facie* rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule."

In Re L (infants) [1962] 3 All ER 1, Lord Denning MR said:-

"I realise that as a general rule it is better for little girls to be brought up by their mother."

There are also authorities to the like effect to be found nearer home. In Wambwa v Okumu [1970] EA 578, a Kenya case, Mosdell J had this to say:-

"I do not think it can be controverted that in the absence of exceptional circumstances, the welfare of a female infant aged four years ... demands that the infant be looked after by its mother rather than its putative father.'"

In Karanu v Karanu [1975] EA 18, also a Kenya case, the then Court of Appeal approved the dictum of Mosdell J in Wambwa's case (supra) and stated as follows:

"At the time the application was heard, the daughter of the parties was just over seven years of age, and the son was six years old. The judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children, but he did not specifically refer to the generally accepted rule that in the absence of exceptional circumstances, the custody of young children be given to the mother."

I would add that both Re S (an infant) and Wambwa were cases dealing with applications for custody made under the Guardianship of Infants Acts of England and Kenya respectively. In the instant case, the learned judge gave the husband the custody of the two little girls because, in his words:-

"I do feel that he is in a better position and is generally a more suitable person to look after and to have custody of them."

He did not say that the mother was an unsuitable person, or that she was unfit to have the care and custody of her little daughters. In my view, there are no 'exceptional circumstances' shown in this case to justify depriving the mother of her natural right to have her children with her, so as to exclude the *prima facie*, or generally accepted rule or principle recognised in the cases to which I have referred in this judgment. This is not a case of a mother abandoning her children. Although she left the matrimonial home after a quarrel, she came back to fetch her little daughters the following morning, but was prevented from taking them away."

This court is guided by all the above decisions. No doubt the children are of tender age – about 6 and 7 years old. One is a girl and the other a boy. This court had the opportunity to see both the minors in court and even at this interim stage the court takes into account the paramount consideration which is the welfare of the children. The appellant has not demonstrated that there are any exceptional circumstances that would make this court suspend the trial court's order to deny the respondent the custody of the minor children. The allegations made by the appellant against the respondent are the same ones which the trial

court considered before the court made the orders, the subject of this appeal. The appellant has not demonstrated or adduced any new facts that the subjects will be prejudiced if the order of stay is not granted. For example the plaintiff alleges that the respondent is not a person of good morals and lives with another man. However, he did not name the said person in the trial court and neither has he named the said person with whom the respondent is cohabiting with in this court. There is no evidence that the respondent is insane or a drunkard or of other unbecoming behavior to warrant her to be denied the care o f these children of tender age.

For the above reasons, I find no merit in the application and hereby decline to grant the order of stay. I direct that the subject minors be handed over to the respondent forthwith and the orders of the trial court be complied with pending the appeal.

DATED and DELIVERED this 31st day of July, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Kabita for the appellant

The respondent in person

Kennedy – Court Assistant