



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 55 OF 2014**

**B G K.....APPELLANT**

**VERSUS**

**A W W.....RESPONDENT**

**RULING**

1. The appeal herein is against the orders made on 2<sup>nd</sup> July 2014 by Mr. D.K. Kuto, Acting Senior Resident Magistrate, in Nairobi CMC Children’s Case Number 612 ‘A’ of 2013. The ruling is impugned on several grounds that are set out in the Memorandum of Appeal dated 18<sup>th</sup> July 2014.

2. On 13<sup>th</sup> August 2104 the appellant filed an interlocutory application in the appeal seeking stay of the orders made on 2<sup>nd</sup> July 2014 by the Children’s Court pending hearing and determination of the appeal. In his affidavit in support of the application, he attacks the ruling of the Children’s Court on several grounds. He argues that the relocation of the children consequent upon that order would inconvenience them in terms of accessing their current school and his supervision of their homework. He states that the trial court did not take into account the recommendations of the Children’s Officer nor the ascertainable wishes of the children.

3. In reply to that affidavit, the respondent swore an affidavit on 21<sup>st</sup> August 2014. She renounces the statements made in the supporting affidavit, by stating that she is ready to drive her children to the school that they are currently attending and to supervise their homework. She also makes her own statements which are not germane to the application before me.

4. Counsel for both sides addressed me on 28<sup>th</sup> August 2014. Mr. Njenga for the appellant addressed me on the ascertainable wishes of the children, which he argued were not taken into account by the court. He also submitted that changing the children’s abode was not in the best interests of the children. Miss. Wambani on her part founded her submissions on the Children’s Officer’s report, arguing that its recommendations are not binding on the court. She further submitted that the distance between the children’s school and the respondent’s residence should not be a basis for disqualifying her from having custody of the children.

5. I called for the original record in Nairobi CMCC C. No. 612‘A’ of 2013. I have perused the record, particularly the ruling delivered on 2<sup>nd</sup> July 2014. I have noted that the trial court took in to account that the children in question were girls of tender years. Prime in the trial court’s mind was the paramountcy of the best interests of the child when it found that the children were better of with the respondent. It was noted that the children had indicated their being comfortable at the appellant’s residence but there was nothing on record to suggest their discomfort with the respondent’s residence. The custody order was made against that background.

6. The appeal on record seeks to displace the orders of 2<sup>nd</sup> July 2014. It is these orders that I am being asked to stay. Having carefully studied the affidavits filed herein, the submissions made by counsel and the record of the lower court, I am not convinced that the orders sought in the application dated 12<sup>th</sup> August 2014 are for granting. I decline to grant them and dismiss the said application. Costs shall be in the cause. The lower court’s file shall be returned to the said court.

**DATED, SIGNED and DELIVERED at NAIROBI this 19<sup>th</sup> DAY OF September, 2014.**

**W. MUSYOKA**

**JUDGE**

**In the presence of Mr. Njenga advocate for the applicant.**

**In the presence of Miss. Wambani advocate for the respondent.**