



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL CASE NO. 30 OF 2014

S G N..... 1ST APPELLANT/APPLICANT

S N M.....2ND APPELLANT/APPLICANT

VERSUS

S N N (MOTHER AND NEXT FRIEND OF

S E M – MINOR)..... RESPONDENT

(An Appeal arising from the judgment/decree of MR. M.O. OBIRO Ag. Principal Magistrate dated 6th October 2014 in Runyenjes PM CHILDREN CASE NO. 8 OF 2014)

RULING

The Applicants/Appellants in their application dated 13th October 2014 seeks two main prayers:-

1. *That there be a stay of execution of the judgment/decree issued on 6/10/2014 in Children's Case No. 8 of 2014 in the Principal Magistrate's Court Runyenjes pending the hearing and determination of this appeal.*
2. *That the minor S E M be restored and/or do remain in the custody of the 2nd appellant/applicant pending the hearing and determination of the appeal.*
3. *That costs be provided for.*

The application is grounded on the affidavit of the 1st applicant/1st appellant and on the grounds on the face of the application. The facts leading to this application may be briefly stated. The respondent in this appeal is the mother of the minor while the 1st appellant is the father . The 2nd applicant is the grandfather of the minor and father of the father 1st appellant. The respondent in Runyenjes PMCC No. 8 of 2014 obtained orders for custody of the minor who was previously staying with the 2nd applicant at his home in Runyenjes. The appellants were also ordered to pay monthly maintenance of Shs.5,000/= The respondent is working in Nairobi while her parents reside in Gikuuri village in Embu County.

The applicants were represented by Duncan Muyodi & Co. with their Mr. Okwaro arguing the application. It was argued that the minor has been in custody of the 2nd appellant cumulatively for three years and removing him and placing him in the hands of the respondent was likely to cause him emotional and psychological torture. The applicants depone that the respondent is not fit to have the custody of the minor. Due to the respondent's work engagement in a hotel in Nairobi, she will be forced to leave the child with a house help most of the times or to leave the minor with her parents in Embu which is prejudicial to the minor. The respondent's conduct of taking away the minor and bringing it back after a short while does not demonstrate suitability for custody. Instead it portrays instability in the respondent's life.

The appellant further argued that the order for payment of maintenance by the applicants to the respondent had no legal basis. The court was urged to stay the order for maintenance and restore the minor to the custody of the applicants pending hearing and determination of the appeal.

In her replying affidavit, the respondent vehemently opposed the application. She was represented by Mr. Musungu of Eric Ntabo & Co. Advocates. The Respondent based her opposition on the fact that she is the mother of the child and the 1st applicant the father while the 2nd applicant is a stranger to the child. Now that the 1st applicant is a student far away from home, he is not best placed to have the custody of the minor. Being a child of tender years, the respondent argued that she was best suited to look after her child. It was also argued that the appeal has no chances of success and the orders sought should not be allowed.

This court was referred by the parties to the legal provisions on custody in the Children's Act and also to authorities on the subject. I have perused the said provisions and the authorities together with the proceedings and judgment of the Ag. Principal Magistrate Runyenjes. The issue in this appeal and in this application is whether the orders granted by the magistrate were based on cogent evidence and correct legal principles and whether the appeal has high chances of success. In order to lay a sound basis for granting stay of the order for maintenance and for restoring the custody of the minor to the 2nd appellant.

The magistrate considered the law and the fact that the respondent is the mother of the minor when granting her orders of custody or not. It appears he did not find existence of any exceptional circumstances against the respondent in order to deny custody to the respondent.

It is the case of the applicant that such exceptional circumstances existed and were not fully considered. The order for maintenance was made against the two respondents one of whom is not a parent as defined by the law. The magistrate's reasoning was that the 2nd applicant supports the 1st applicant financially for he is not employed. It was established that the respondent is currently employed in Nairobi.

All considered and without purporting to decide the appeal, I find that the applicant's appeal is backed by sound legal issues which require to be determined by this court on custody and maintenance.

For this reason I partly allow the application by making the following orders:-

- 1. That the order for payment of maintenance by the applicants to the respondent be and are hereby stayed pending the hearing and determination of the appeal.*
- 2. That the custody of the minor remains with the respondent pending hearing and determination of the appeal.*
- 3. That costs of this application be in the cause*

DELIVERED, SIGNED AND DATED AT EMBU THIS 11TH DAY OF DECEMBER, 2014.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Okwaro for Applicants/Appellants

F. MUCHEMI

JUDGE