



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 146 of 2012

LINET NYANSIOBOKA JUMA APPELLANT/APPLICANT

VERSUS

STANLEY ABSALOM MOKUA CHUMA RESPONDENT

(Being an appeal from the judgment of Kamau C. M., Resident Magistrate

dated 14th November 2012 in Ogembo Children's case No.7 of 2012)

RULING

1. The dispute in this case revolves around the custody of two minor children who belong to the parties herein, being the mother and father respectively. By the judgment dated 14th November 2012, the trial court, Hon. C.M. Kamau, Resident Magistrate, granted custody of the two children to the respondent herein, Stanley Absalom Mokuja Juma. The trial court made the orders after hearing evidence from both parties and after considering written submissions.

2. The appellant was dissatisfied with the trial court's findings and has brought this appeal on grounds set out in the Memorandum of Appeal dated 21st November 2012 and filed in court on the same date. The detailed grounds of appeal are not the subject of this ruling, but in a nutshell the appellant complains that the trial court fell into error when it granted custody of the children to the respondent contrary to the provisions of the Children's Act No.8 of 2001 and the various Articles of the Constitution of Kenya recognizing the principle of the best interests of the child.

3. On the 14th December 2012, the appellant moved the court by the Notice of Motion dated 14th December 2012 and filed in court on the same day. The application, which was filed under certificate of urgency seeks orders that:-

1. *This application be certified urgent and be heard exparte on priority basis.*

2. *Pending the hearing and determination of this application interpartes the custody of the minor children, namely –*

i) Sandy Bradley Juma

ii) Promise Campel Mokuja

be granted to the appellant together with 30,000/= as reasonable maintenance

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i) Sandy Bradley Juma

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be granted to the appellant together with 30,000/= as reasonable maintenance

4. Costs of this application be provided for.

4. The application is supported by the appellant's affidavit sworn on 14th

December 2012 and on grounds that:-

a) *The children are living in an environment which is not conducive to their well being.*

b) *The children are living with strangers particularly the maid and the co-wife of the respondent (sic) and are subjected to cruelty contrary to **Article 53** of the **Constitution**. The aforesaid persons cannot definitely cater for the best interest of the children.*

5. The application is opposed vide a Statement of Grounds of Opposition dated 17th December 2012. The grounds, which are filed pursuant to **Order 51 Rules 15 and 16** of the **Civil Procedure Rules, 2010** are to the effect that:-

1. *The instant Notice of Motion Application is pre-mature, mischievous, misconceived and otherwise bad in law.*

2. *The Order granting custody over and in respect of the suit Minors, was granted by the Honourable Court, after plenary hearing. Consequently, the Orders sought vide the instant application, are misplaced and incapable of being granted, in the manner sought or at all.*

3. *The instant application is calculated to circumvent, defeat and/or otherwise upset the judgment of the Trial Court, before the hearing and determination of the Appeal, filed and/or mounted by the Appellant/Applicant.*

4. *The instant application does not capture and/or disclose any reasonable cause of action, whatsoever and/or howsoever.*

5. *The Honourable Court is devoid of Jurisdiction to entertain the instant Application and/or grant the Orders sought.*

6. *The Appellant/Applicant is non-suited.*

7. *The instant application has been made and/or mounted with Unreasonable delay, which has not been explained. Consequently, the Appellant/Applicant is guilty of laches.*

8. *The instant application constitutes and/or amounts to an abuse of the due process of Court.*

9. *In the circumstances, the instant application is otherwise devoid of merits, whatsoever.*

The Respondent thus contends that the instant application is devoid of merits whatsoever, and should be dismissed.

6. When the application came up before me for inter partes hearing on 18th December 2012, I heard submissions from Mr. Kerosi Ondieki, advocate on behalf of the appellant and Mr. Ochwangi advocate

for the respondent. Mr. Kerosi Ondieki was duly instructed by the firm of Kerosi Ondieki & Company Advocates while Mr. Ochwangi was instructed by the firm of M/s Oguttu-Mboya and Company Advocates.

7. Briefly, Mr. Kerosi submitted that the learned trial magistrate flouted the provisions of the Constitution by awarding custody of the children to the Respondent in this case. He also argued that the best interests of the child demand that the custody of the minor children in this case should be with the appellant who is the children's biological mother. Counsel submitted that for the minor children to be committed to the care of a maid was a travesty of justice. He urged this court to grant custody of the children to the appellant.

8. In his response, Mr. Ochwangi submitted that the application has no merit and urged the court to dismiss the same. He submitted that the appellant cannot seek to have the orders sought and at the same time pursue the appeal. Counsel was of the view that the best option for the appellant was to apply for stay of execution of the judgment of the lower court pending hearing and determination of the appeal.

9. Mr. Ochwangi also submitted that this application would be sustainable if there was an original suit pending in court and not an appeal, and that since the application does not have a prayer to set aside the lower court judgment, the application should not be granted as granting the prayers sought would amount to allowing the appeal without hearing it.

10. It was also counsel's contention that the application was brought after undue delay which has not been explained. That any arguments touching on whether the children should be with the appellant or the respondent are matters that should be ventilated during the hearing of the appeal.

11. In reply, Mr. Kerosi submitted that there was no justification for making an application for stay since there are no orders to be executed as the children are already with the respondent. Counsel urged the court to carefully consider the constitutional provisions on the rights of the child and the provisions of the Children's Act No.8 of 2001 and to reach the conclusion that the instant application has merit and to grant the same.

12. I have now carefully considered the application as filed, the grounds and affidavit in support and the submissions by appellant's counsel. I have also carefully considered the Statement of Grounds of opposition and the submissions made in support of the respondent's case. I have also read through the entire lower court record and the fairly detailed judgment of the trial court. The issue that arises for determination is whether the applicant is entitled to the order sought.

13. After analyzing all the above, I am of the considered view that the appellant is not entitled to the orders sought. To my mind, granting the orders sought would amount to a summary determination of the appeal. As there is no intention on my part to determine the appeal summarily, it is only fair and just that during the pendency of the appeal, the status quo as 14th November 2012 be maintained. In any event, may be by now the children are already in school, and it would not be in their best interests to disrupt their schooling by granting the application now before me.

14. For the above reasons, I decline the application and order that the appellant should proceed to move this appeal to the next level so that the issues can be resolved quickly for the benefit of the children.

15. Each party shall bear their own costs for the application.

16. It is so ordered.

Dated and delivered at Kisii this 31st day of January, 2013.

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Nyagwencha h/b for Kerosi for Appellant/Applicant

M/s Oguttu Mboya (absent) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.