



REPUBLIC OF KENYA

High Court at Mombasa

Civil Appeal 3 of 2013

P. B.....APPELLANT

VERSUS

S.M.....RESPONDENT

RULING

Before court is the notice of motion application dated 16th January, 2013 brought under certificate of urgency seeking as follows:

“(b) THAT this Honourable court be pleased to order stay of ruling of 9th January, 2012 and the entire proceedings in Tononoka Children Case No. 758 of 2012 S.W. M –vs. P.B.

(c) THAT this Honourable court be pleased to order that the actual custody of the minor child C.E be granted to the appellant.”

The genesis of the present application and appeal are the orders made by Hon. B. Koech at the Tononoka Childrens Court dated 9th January, 2012. In that ruling the learned trial magistrate held *inter alia*, as follows:

Having heard the parties herein the parties will have joint custody of the children. [There is only one child], the plaintiff the [respondent herein] will have actual physical custody while the defendant [the applicant herein] will have unlimited access to the child. The defendant to contribute an interim maintenance of Kshs. 8,000/= per month payable on or before the 5th day of each month.]

The applicant being aggrieved by this ruling of the Children Court filed an appeal against the same and at the same time the applicant filed this present application seeking a stay of the ruling of the Children Court.

I have perused this present application, the affidavit in support as well as the replying affidavit. I note that this is a very contentious matter. Even before I could prepare this ruling the applicant filed another notice of motion dated 28th March, 2013. The parties herein are a couple who met and got married on 21st June, 2010. They cohabited as man and wife in Diani and their union bore one child a daughter **C.E.B** who is now the subject minor and who was born on 7th January, 2012. The couple later disagreed and the respondent moved out of the matrimonial home with the child.

They perusal of this file reveals that the crucial question of custody has not been fully determined. A hearing to determine custody is yet to take place. What has existed are a multiplicity of applications

resulting in the innocent child being moved from one place to the other. The respondent has no residence in Mombasa and appears to rely on the goodwill of friends to secure accommodation. She told the court that due to this lack of accommodation she at times has to take the child to live with her mother up-country. Likewise the respondent appears not to have a stable income. She indicated on one occasion in the Children Court that she would sell oranges in order to raise income to provide for her child.

On the other hand the applicant has the apartment where the child has always lived and he seems able to provide financially for all the needs of the child. As a court I am fully mindful of the fact that financial advantage does not make one a better parent. However, at this interim stage there must be some stability in the life of this child even as the issue of full custody awaits determination. Section 4(a) of the Children Act obliges a court to consider the **best interest** of a child in making any decision concerning a minor. The subject child is a mere baby. She has many requirements which include shelter, food, clothing and medical care. At the moment and pending any decision on maintenance the applicant has demonstrated ability to cater for these needs. I am also fully aware that the child is a girl-child. However, in my view the best interest of this child are best served by maintaining the current status quo. As such I do hereby stay the ruling of the Children Court made on 9th January, 2013. I direct that pending a full hearing to determine custody and maintenance the following shall prevail:

- (1) **Interim** legal custody of the child is to be vested jointly in the applicant and the respondent.
- (2) The appellant to have **interim** physical custody of the child who is to be housed in his apartment in Diani.
- (3) The respondent is to be allowed **unlimited access** to visit and spend time with the child in the said apartment but not to remove the child from the compound unless for medical treatment.
- (4) The full hearing on custody and maintenance to be given dates within sixty (60) days in the Children Court in Tononoka.
- (5) The applicant is not to remove the child from the jurisdiction of this court until the question of custody has been heard and determined.
- (6) No orders on costs.

It is so ordered.

Dated and delivered in Mombasa this 12th day of April, 2013.

M. ODERO

JUDGE

In the presence of:

Mrs. Kipsang for Applicant

Mr. Odhiambo for Respondent

Court Clerk Mutisya