REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO 8 2013

B N K……APPELLANT

VERSUS

E M M……RESPONDENT

RULING

The appellant (applicant) has brought this application challenging the judgment and decree of the lower court in Mwingi Senior Resident Magistrate's Court Children's' Case Number 9 of 2012. The application is dated 15th May 2013 and is brought under Order 42 Rule (1) and (2) of the Civil Procedure Rules. It seeks the following orders:

a. That this application be certified urgent and heard immediately or as soon as practical.
b. That there be stay of execution of the Judgement and decree in Mwingi Senior Resident Magistrate's Court Children's Case No. 9 of 2012 pending the hearing and determination of this application.
c. That there be stay of execution of the Judgement and decree in Mwingi Senior Resident Magistrate's Court Children's Case No. 9 of 2012 pending the hearing and determination of this appeal.
d. That costs for this application be provided for.

The application was certified urgent on 20th May 2013 but this court declined to grant stay pending hearing and determination of this application. The applicant was directed to serve the application for inter partes hearing on 22nd May 2013. On that date a consent order was filed that parties to file written submissions; the record of appeal be filed within seven days from 22nd May 2012; the matter be mentioned on 5th June 2013 and the status quo be maintained for 14 days. This consent was adopted by the court. As of 5th June 2013, there has been no record of appeal filed and the proceedings from the lower court file have not been forwarded to this court.

The subject matter of this case is a child, namely **N.V.N** (the subject). The applicant and the respondent are the biological parents of the subject. The respondent had sued the applicant in the lower court seeking dissolution of the marriage and custody of the subject; maintenance for the subject and costs of the suit. The respondent however amended her claim by deleting the prayer for dissolution of the marriage. The court granted custody to the respondent and allowed the applicant visitation rights and ordered each party to bear his/her own costs. The judgment does not address the issue of maintenance.

The applicant, in his affidavit of the applicant sworn on 15th May 2013, states that he got married to the

respondent under Kamba customary law in 2006 and a child was born out of that marriage on 23rd August 2007; that the respondent abandoned the child when still breastfeeding and left the matrimonial home in September 2008; that the applicant brought up the child and took the child to school without the respondent's input; that the child does not know the respondent; that the respondent sued the applicant in the lower court and the court gave judgement in favour of the respondent.

The applicant contends that if stay is not granted the subject will suffer irreparably for reasons that her living and social environment will dramatically change; the subject's education will be interrupted because this will involve changing schools; that the decision to grant custody of the subject to the respondent is not in the best interest of the subject; that the trial magistrate did not consider the report of the Children's Officer and that the appeal will be rendered nugatory.

Counsel for the applicant submitted that refusal to grant stay would lead to emotional and substantial loss for the subject; that the spirit of Section 84 of the Children's Act is against removing a child from the custody of a person who has lived with the child for a period of three years and that the order to remove the child will not be beneficial to the child; that the application was filed without unreasonable delay and that the applicant is willing and ready to abide by any conditions the court will give. He cited the case of **Mathew Chepkwony & another v Paul Kemei Kiprono [2006] eKLR** in support of his submissions.

In her replying affidavit, the respondent deposes that it is not true that the subject does not know her as she comes from the same village and she has been interacting with the child outside school and in church; that the subject's school life will not be affected as the respondent will take her to better learning facilities in Nairobi; that she will be living with the subject, taking care and protecting her; that the subject is a girl of tender years who ought to live with her mother; that the subject will not suffer irreparably because she will be living with her biological mother and there can be no trauma and that there was no counterclaim for custody of the subject.

Counsel for the respondent highlighted his submissions to the effect that the applicant has not demonstrated that substantial loss will occur if stay is not granted; that the application is an abuse of this court's process because similar application has been filed in the lower court; that the applicant has not demonstrated that his appeal has overwhelming chances of success; that the respondent was the successful party and this ought to be taken into account; that being a girl of tender years, it will be in the subject's best interests to live with the respondent. Counsel further submitted that there is no arguable appeal and that the case cited is not binding to this court as it is a case of the same jurisdiction. Counsel cited the Kenya **Shell Limited v Kibiru & another [1986] KLR** in support his point the refusal to grant stay in this case would not render the appeal nugatory.

In his response counsel for the applicant stated that **Chepkwony case** cited by the applicant still remains good law and that the **Kenya Shell case** is not relevant to this application since Order 42 Rule 6 (2) of the Civil Procedure Rules lists the criteria to be met by an applicant for stay, to wit, that substantial loss will result; the application has been filed without unreasonable delay and provision for security for costs.

I have considered the application and rival submissions. One issue remains unclear to me. Counsel for the respondent stated that execution has already taken place and that the respondent has taken custody of the child. Counsel has stated that there is nothing to stay. I have compared statement with the affidavit of the respondent where she states that her efforts in company of the police to take custody of the child were met with stiff resistance from the grandparents of the subject. On the other hand counsel for the applicant stated that there is no proof that execution has taken place and that the status quo being maintained is the one pertaining prior to the judgement. Yet it is stated that execution has taken place. To me it means that both counsels did not clearly clarify the position as it exists currently and the status quo referred to in the consent order is not clear. However, it is my understanding that the subject is with the respondent if the statement from the bar by the counsel for the respondent is anything to go by.

My approach on this point, which both counsels appreciate although from their individual perspectives, is the paramount consideration is the best interests of the subject. The law is clear on this. Article 53 (2) of the Constitution states that: **"A child's best interests are of paramount importance in every matter**

concerning the child." Similar provision is found in Section 4 (2) which states: **"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."**

The principles for granting stay of execution are clearly spelt out under Order 42 Rule 6 (2) and there are myriad of cases on this matter including the **Kenya Shell** and **Mathew Chepkwony cases** cited above. Putting this case in that perspective, it is my view that it is the best interests of the subject in this case that this court is concerned with. At the time of determining the intended appeal this court will deal with the issues raised, more so the provisions of Section 84 of the Children's Act. At this stage it is my view that dealing with a minor child whose best interests are the concern of this court is not the same as dealing with any other subject matter in a case. The lower court has given custody to the respondent (mother) and it is stated that she has taken the subject in her custody as per the judgement. To me it would not be proper, is this is the case, to disturb this status because I feel that to shuttle the subject to and fro between the two contesting parties will do the subject more harm than good and this will not be in her best interests. Besides by taking the subject into her custody the respondent acted as per the judgment. For this court to order otherwise would be tantamount to deciding the appeal before it is heard. I am of the view that the substantial loss we are talking about refers to the subject rather than to any of her parents and therefore this court is not able to know the circumstances under which she is living until further enquiry is made.

I wish also to state that without proceedings from the lower court and the entire lower court record, this court is not able to fully comprehend what went on in that court and therefore the issue as to the applicant having an arguable appeal or an appeal with overwhelming chances of success cannot be determined at this stage.

While I find that this application was filed without unreasonable delay, my view is that the other principles for stay are not met. I do not think this is a good case for provision for security for costs. I therefore decline to grant this application. I direct the applicant to move fast and file his record of appeal to pave the way for the hearing and determination of this appeal. I will not comment further on this matter to avoiding prejudicing the appeal. I make orders accordingly.

S. N. MUTUKU

JUDGE

Dated, signed and delivered this 10th day of June 2013.