



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MILIMANI**  
**CIVIL APPEAL 15 OF 2013**  
**MERCY WANJIRU.....APPELLANT**

**VERSUS**

**DANIEL KAMAU MBUTHIA.....RESPONDENT**

**RULING**

The appellant has moved this court on appeal from a decision of Hon.A.K. Mwicigi, Ag. Principal Magistrate, made on 14th February 2013 in Milimani Principal Magistrate's **Court Children's Case No. 1254 of 2012**. The decision arose from an application by the appellant dated 25th September 2012 in which she sought three principal orders:-

- (a) temporary order of custody care and control of the two issues of the marriage between her and the respondent.
- (b) temporary order of maintenance of the said children by the respondent at the monthly rate of Kshs.200,000.00.
- (c) temporary injunction to restrain the respondent or his agents from removing the issues of the marriage from the custody, care and control of the appellant.

The trial court after hearing both sides, made the following orders:-

- (a) granted joint legal and actual custody of the children to both parties as that was in the best interests of the children;
- (b) granted alternative weekend access of the children to safeguard the right of the child to live with and be catered for by either parent, with liberty to reverse this by consent in writing;
- (c) appellant to have both children during first half of the holiday in the year 2013 and respondent to have both children during the second half, to alternate in 2014 if matter will not have been heard and determined by then;
- (d) the respondent to cater for the education and medical care of the children; and
- (e) each party to provide a shelter, food, clothing, entertainment and grooming whenever they have the children.

Against these orders the appellant has lodged the Memorandum of Appeal dated 19th March 2013. Several grounds have been enumerated in the memorandum. Three of them are relevant to the application before me: grounds 9,10 and 11, which can be summarised as follows:

(a) that custody of the children should have been given to the appellant;

(b) that the respondent has another family and the environment at his home is not conducive to the children; and

(c) that the appellant has always treated the children with love, care and attention.

Contemporaneously with the Memorandum of Appeal dated 19th March 2013 the appellant filed the summons dated 19th March 2013 under cover of a certificate of urgency of even date. Except for prayers 1, 2 and 3, the Chamber Summons dated 19th March 2013 is word for word the Chamber Summons dated 25th September 2012 and filed in the suit before the Children's Court. The only two new prayers seek stay of the order of 27th February 2013 and a review of the said order.

I propose to deal first with the aspect of review. I am asked to vary, alter and/or set aside the decision of Hon. Mwicigi made on 27th February 2013. The presumption is that I will vary or alter the order with respect to custody and maintenance along the lines proposed by the appellants. Alternatively, if I do set aside the said decision, I should make custody and maintenance orders in line with the appellant's wishes.

It should be common knowledge that in non-criminal cases, the decision of a lower court can only be reversed by a higher court on appeal. That would explain why the appellant has filed the Memorandum of Appeal dated 19th March 2013. The heading of the document titled "**Memorandum of Appeal**" reads "**Being an Appeal from the Ruling and Orders of Honorable Mwicigi delivered on 27th February 2013**". The decision that I am being asked in the summons dated 19th March 2013 to review is the same decision which is the subject of the appeal as encapsulated in the Memorandum of Appeal dated 19th March 2013. The closing paragraph of the Memorandum of Appeal reads:

***“REASONS WHEREOF the Appellant prays that the Ruling and Order issued on the 27th February, 2013 by the Honorable Mwicigi and delivered by the Honorable Ocharo be vacated, varied and or set aside and be substituted with an Order allowing the Appellant's application dated.”***

Quite evidently the summons dated 19th March 2013 by its prayer 3 seeks exactly the same orders as the Memorandum of Appeal dated 19th March 2013. To my mind determining prayer 3 of the summons would effectively dispose of the entire appeal. I doubt whether I have the jurisdiction to do that – to finally and completely determine an appeal on the basis of an interlocutory application. I doubt too whether there is competence in an application which asks me to do that. I can only do what the appellant is asking me to do in this application after hearing all the parties exhaustively on the appeal itself.

On the issue of stay of the orders of 27th February 2013, no arguments have been advanced before me to justify the same. The affidavit sworn by the appellant in support of the summons of 19th March 2013 is word for word that sworn on 25th September 2012 in support of the summons dated 25th September 2012 and filed at the Children's Court, from paragraph 1 to paragraph 21. She has not sought to explain why stay ought to be granted. When counsel for the appellant addressed me on 2nd May 2013 on the application, she did not utter a single word about stay. I find no basis at all for grant of stay.

The application before me dated 19th March 2013 is for dismissal and I hereby dismiss it with costs. The appellant is advised to vigorously pursue her appeal, or, in the alternative, prosecute the suit pending before the Children's Court since the orders made on 27th September 2012 were interlocutory.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12th DAY OF July, 2013.**

**W. MUSYOKA**

**JUDGE**