

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO.59 OF 2013

S M M.....APPELLANT

VERSUS

L W C.....RESPONDENT

RULING

The Appellant was dissatisfied with the decision rendered by the Children’s Court which, *inter alia*, granted custody of the child that is the subject of the proceedings to the Respondent. The Appellant has appealed to this court. Contemporaneous with filing the appeal, the Appellant filed a notice of motion under certificate of urgency seeking orders from this court to stay the order of the trial court pending the hearing and determination of the appeal. The application is opposed. The Respondent, who is acting in person, filed a replying affidavit in opposition to the application.

This court has read the pleadings filed by the parties herein either in support or in opposition to the application. It has also considered the oral rival submission made by Mr. Mare for the Appellant and by the Respondent. The issue for determination by this court is, who, as between the Appellant and the Respondent should have custody of the child pending the hearing and determination of the appeal. **Section 4(3)** of the **Children Act** requires this court to treat the interest of the child as of first and paramount consideration to the extent that it is consistent with a course of action that is calculated to safeguard and to promote the best interest and welfare of the child. The child that is the subject of these proceedings is aged four (4) years. Under **Section 2** of the **Children Act**, such a child is described as a child of tender years. The Appellant and the Respondents are estranged. The general principle regarding custody of such children is that their custody shall be with their mothers, because of, *inter alia*, their nurturing instinct unless it is established that they are not capable of providing such love and care. In **F.M. –Vs- H.G. [2012] eKLR** Makau J held as follows:

“Further to the above, the general rule is that, where custody of a child of tender years is in issue, the mother should have the custody unless special circumstances are established to disqualify the mother from having of such in a child.

Under Section 2 of the Children Act the “child of tender years” means a child under the age of ten (10) years. The child that was subject of proceedings before trial Magistrate was by then 4?2 years and today he is around 9 years. The child subject of these proceedings is a child of tender years. He is a boy aged 9 years. In case of K –V- K (1975) E.A. 18 Court of Appeal:

“The substantial question in this appeal is whether or not the Judge was right in giving custody of the children to the father. At the time the application was heard, the daughter of the parties was just over seven years of age, and the son was six years old. The Judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children, but he did not specifically refer to the generally accepted rule that, in the absence of exceptional circumstances, the custody of young children should be given to the mother”.

Besides the above, in the case of Z M N –V- G S G Court of Appeal (Mombasa) C.A.

No.1234 of 1997, The Court of Appeal stated; that there was no arising evidence for review and that the physical custody, care and control of the children should be with the mother unless there was compelling circumstances to disqualify her from being awarded the custody.

In addition to the above, in the case of D.K. -V- J.K.N. CIVIAL APPEAL NO.54 OF 2010 Hon. Justice L. Kimaru in dealing with a similar case involving custody of a child aged 9 years granted custody of the child to the mother and ordered the father to surrender the child into the custody of the mother”.

In the present application, it is clear that the best interest of the child will be served by the child being the custody of the mother. The Appellant did not adduce any evidence before this court to establish the unsuitability of the mother to have actual custody of the child. This court notes that the Children’s Court gave joint custody of the child the Appellant and the Respondent. It also directed that both the Appellant and the Respondent to participate in the education and welfare of the child. That is as it should be. It is for the parties herein to agree on how best to raise their child, taking into consideration their current circumstances.

In the premises therefore, this court declines to stay the orders issued by the Children’s Court pending the hearing and determination of the appeal. The Appellant is ordered to comply with the order issued by the Children’s Court, first, by handing custody of the child to the Respondent, and secondly, by paying the monthly maintenance for the upkeep of the child. It is so ordered.

DATED AT NAIROBI THIS 27th DAY OF SEPTEMBER, 2013

L. KIMARU

JUDGE