



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCA NO.127 OF 2011

N.G.M.....APPELLANT

VERSUS

G.K.R.....RESPONDENT

(An appeal from the judgment of the Principal Magistrate P. Ngare sitting at Chuka

dated 03/10/2001 in Children's Case No. 16/2011)

R U L I N G

This is an application by **N.G.M.** wife to the respondent **G.K.R** under S.42 Rule 6,S3 and 3A, of I believe Civil Procedure Rules and Section 76,81,82,83,84 and 85 of the Children's Act seeking for the following orders:-

- 1. The Hon. Court do issue an order for stay of execution of the judgment and decree of the Principal Magistrate Chuka dated 3/10/2011 in Children Case No.16/2011 until this application is heard and determined or until this appeal is heard and determined or until further orders of this court.***
- 2. That pending the hearing of this application, the respondent be ordered to forthwith return D.W.K (hereinafter referred to as the child) to the applicant and the care and control of the applicant.***
- 3. That this Hon. Court do grant such other alternative orders as this Hon. Court would deem fit or suitable to preserve the interest of the children.***
- 4. Costs of this application be provided for.***

The application is based on the following grounds:-

- 1. The issues of the marriage have been taken away from the applicant and they are suffering immense hardship and damage.***
- 2. One of the issues of the marriage is a girl aged 10years who has been wrenched away from the care of the mother, the applicant herein.***
- 3. The court should consider the best interest of the children and in this case return the children to the applicant.***

The applicant in her Supporting Affidavit averred that she got married to the respondent under Customary Law in 1995 and have been living together as man and wife. That the two were blessed with two issues namely T.M.K born in 1999 and D.W.K born in 2001. That the applicant avers that she has all along taken care of the children until when the respondent chased her from the matrimonial home with threats of violence and injury to her person. That T.M is in boarding primary school while D.W is a day scholar and goes home in the evening. That the applicant and the respondent would take care of D.W whenever she was at home. The applicants aver that at the lower court the respondent got judgment denying her custody of her children save visitation rights once per month. The applicant averred that being aggrieved by court's judgment she has appealed against it on the following grounds:-

- 1. The learned trial Magistrate erred in law in failing to note that the best interests of the children in this case would best be catered fro when the children are in custody of the appellant, not their grandmother.***

2. *The learned trial Magistrate erred in law and fact in failing to award custody of the children to the appellant citing irrelevant matter for that decision.*
3. *The learned trial Magistrate erred in law and fact in failing to note that one of the child was a girl of tender years who would need the care and attention of the mother more than a father.*
4. *The learned trial Magistrate erred in law and fact in failing to note that the respondent who is in employment does not have time for the children unlike the appellant who has always catered for him.*

The applicant has further in her affidavit stated that the respondent though granted custody of the children has no time for them and only dumps them at their paternal grandmother. The applicant averred that she is capable of taking care of her children as their mother and the respondent provide for them while the applicant has their custody.

That though applicant has been unemployed all along, when the respondent chased her from the matrimonial home, she has started a small clothes business and is capable of feeding her children while the respondent takes care of their other needs. The applicant averred that D suffers from chronic malaria and that applicant is always admitted with her. The applicant averred that the respondent is a heavy drinker who is now always going out with ladies and has no time for the children, the latter were have been calling the applicant complaining of the difficulties they are undergoing at their grandmother's residence.

The respondent filed a replying affidavit dated 17th November, 2011 averring that on 9th March, 2011 the applicant packed her belongings and left the matrimonial home leaving the respondent with custody of D.W.K and has been in custody of the child since then. That on 24th June, 2011 the respondent moved to Children's Court for the custody of the minor as the applicant had come back 3months later to take away the child. That children court agreed with the respondent and granted him the custody of the child. He attached court's judgment "GKRI". The respondent further depones that D.W is 10years and is not of tender years having been born in 2001. The respondent aver that he has taken the daughter to school since nursery and she is now in class 4 and doing very well with her studies and annexed copy of Assessment Record Book for 1st and 2nd term of year 2011. The respondent averred that it is in the best interest of the child that he was granted custody of the child. The respondent has in his affidavit stated that the child stays with him in an extended family setup and that the child has time after school to play with other children in compound and even do her homework. That the respondent picks the child from school every evening and takes her to school every morning an habit he claims to have developed since she was in class one. He averred that he does not dump the child with her grandmother but lives with her and that he has all the time for the child.

He averred that sometimes in 2009 the child was indecently assaulted while in custody of her mother the applicant and there is a pending case and has been attending court as the next friend and in the premises he has time for his child. That the child is healthy and does not suffer from any chronic disease and that the applicant cannot take care of the children the way the respondent does as she has no means of income at all. The respondent further averred the applicant's home has no basic necessities like electricity and clean water, her home is far from the school, and she cannot manage literally to take the child to school which is about 35Km away everyday.

He further averred that his daughter will be a boarder from January, 2012 just like her brother at the same school in class 5.

The applicant in her further affidavit has denied the child was defiled in her presence but was defiled at school by a teacher who defiled about 15 other children by the time he was discovered. Applicant has averred that she did not leave the matrimonial home of her own free will but the respondent forced her to leave when he brought another woman to their matrimonial bed and in presence of the children.

The applicant has pointed out that the respondent is a (*profession withheld*) and apart from dropping the child and picking her in the evening he plays no other role for the welfare of the child. That respondent is said to have started taking D to school only last year when he bought a vehicle and before that the applicant avers that she was the one who was dropping the children at the bus stage and school bus would pick the children and she would pick them in the evening.

That applicant has averred that she is the one who took D to hospital when she was defiled for treatment and has been taking her to the hospital whenever she gets sick. That the respondent lives in his mother's house since the one they were constructing is not yet completed and the mother's house is terribly congested.

She has averred that D is too young for boarding school and applicant sees this as an intention of the respondent to get rid of the children. The applicant has averred that she is best suited to take care of her children especially the girl. The applicant has averred taking the child to school is no problem as she can continue taking her to be carried by the school bus.

I have gone through the applicant's and respondent's affidavits and have also heard the submissions of the parties counsel. In granting an application for stay of execution of the judgment and decree of the trial court's judgment pending the hearing and determination of appeal the court has to be satisfied that the appeal is not frivolous one or in other words the appeal intended is arguable and that it would be rendered nugatory in the event it succeeds.

I find that the applicants appeal is arguable and the same would be rendered nugatory by refusal to stay trial court's judgment as the applicant would be denied custody of her children and her appeal raises serious triable issues.

The girl child in issue is said to have been born in 2001and would now be around 10years. The child of tender years is defined under the Children Act as a child under the age of ten (10) years.

Under Section 4(3) (a),(b),(c) and 4(4) of the Children Act provides:-

“S.4. (1) every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.....

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

(4) In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity."

The court in view of the foregoing section is making decision on custody of the child it has to consider the best interest of the child. The court is supposed to safeguard and promote the rights and welfare of the child as well as conserve and promote the welfare of the child.

The court before making decision on custody of a child the child is supposed to be accorded an opportunity to express his or her own opinion and such opinion shall be taken into account as may be appropriate taking into account the child's age and degree of maturity.

Under Section 6(1) of the Children Act it is provided:-

6. (1) A child shall have a right to live with and to be cared for by his parents."

It is clear from the above that it is a parent who can have the best interest of the child. In such case it is either the mother or the father and not grandmother or aunts or other distance relatives. In case of a girl child of tender years or aged at 10 years or thereabouts at vulnerable stage and needs mother's care and guidance especially in adolescence issues and I have no doubt to say the father may not be able to give the much needed guidance at such stage.

The respondent though he claims to have been taking the girl child to school and back home he has not stated what other role he plays to safeguard and promote the rights and welfare of the child.

The girl child is about 10 years old and taking into account of her age and her degree of maturity and having accorded her an opportunity to express her opinion and having taken her opinion into account in which she expressed desire to stay with both parents if possible and having indicated that she would be very confident with her mother on personal issues and taking into account that there is evidence that she had been defiled at one time and that she stays with her aged grandmother. I am of the view that in the best interest of the girl child her mother should have her custody.

Under Section 76(1) of the Children Act it is provided:-

"76. (1) Subject to section 4 where a court is considering whether or not to make one or more orders under this Act with respect to a child it shall not make the order or any other orders unless it considers that doing so would be more beneficial to the welfare of the child than making no order at all."

It is clear as a general principle in regard to proceeding affecting a child any orders made should be beneficial to the welfare of the child. Further under Section 83(1) of the Children Act in determining whether to grant or not to grant custody order the conduct and wishes of the parents and ascertainable issues of the child has got to be considered.

I have considered all the relevant submission, and relevant provisions of the Children Act, and I am in the circumstances making the following orders:-

- 1. That stay of execution of judgment and decree of the trial court dated 3rd October, 2011 in Children's Case No.161 2011 be and is hereby stayed only in respect of orders granting custody of girl child D.W.K and the respondent is hereby ordered to forthwith return D.W.K to the applicant to be under care and control of the applicant pending hearing and determination of the appeal.**
- 2. The respondent shall have visitation rights twice a month, on first and third weekend of every month preferably on Saturdays.**
- 3. The respondent shall continue to have custody, care and control of T.M pending hearing and determination of the appeal and the applicant shall have visitation rights twice a month, on first and third weekend every month preferably on Saturdays.**
- 4. That each party shall bear its own costs of this application.**

DATED AND DELIVERED AT MERU THIS 26TH DAY OF JANUARY, 2012.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

1. Miss Mwangi for applicant (absent)
2. Mr. Mwanzia for the respondent (absent)

J. A. MAKAU

JUDGE