

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

SUCCESSION CAUSE NO. 77 OF 2011

DAVID WAKABA MOCHE APPELLANT

VERSUS

GRACE GATHONI WAMBUI RESPONDENT

REASONS FOR DECISION

On 20.1.2012, this court granted orders in terms of prayers (c) and (d) of the Application by Notice of Motion dated 20.12.2011 and ordered that each parent would have access and custody of the minor for half of the holiday period. The effect of granting orders in terms of prayers (c) and (d) is that the further proceedings and/or execution in Nairobi Senior Resident Magistrate Court Case No.747 of 2011 was stayed pending the outcome of the Appeal in this court.

The trial court dismissed the entire suit with costs to be borne by the husband, David Wakaba Moche. The husband had sought actual custody of the minor and reasonable access to the defendant, Grace Gathoni Wambui or equal access by the parties to the child. The husband acknowledged in his averments in the plaint in the trial court

that the wife had actual custody and he averred that he feared the wife might deny him access to the child.

The child is aged 13 years. He is said to be attending School at Imani School, Thika. He is a boarder. The parties are estranged. The husband is unemployed. The wife is in gainful employment. The child is at a very critical age and needs emotional stability so as to do well in school. It would not auger well to allow him to be pulled this way and that like a rag doll. The wife has actual custody and it is she who has placed the child in a boarding school. At a time when the couple are living apart and are wrangling, the decision by the wife to place the child in boarding school was wise as it served to insulate the child from exposure to marital friction and possible trauma. That decision was in the best interest of the child. The husband's desire to keep the child in day school in the circumstances where the spouses did not see eye to eye nor were they ready to live under one roof was certainly ill-conceived. It is for this reason that I ordered on 20.1.2012 that the parties shall each have custody of the child for half of the school holidays.

In the meantime, the husband shall proceed to prosecute the appeal. I make no order as to costs.

Dated at Milimani Law Courts, Nairobi, this 8th day Of March 2012.

G.B.M. KARIUKI, SC
JUDGE

COUNSEL APPEARING

Mrs. Wambugu of W. G. Wambugu & Co. advocates, for the Appellant/Applicant

Mr. Mbuthia of B. N. Mbuthia & Co. advocates, for the Respondent

Mr. Kugwa – Court Clerk