



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL 13 OF 2012**

**B.K.....APPLICANT**

**VERSUS**

**E.J.H..... RESPONDENT**

**R U L I N G**

There are two applications before the court. The 1<sup>st</sup> one is by a Chamber Summons dated 23<sup>rd</sup> March, 2012 brought by the Appellant under the provisions of **Sections 101, 3(5) (a) & (c)** of the **Children Act**, and Section 3A of the Civil Procedure Act. The Applicant thereby seeks the following orders-

1. (spent)
2. That there be a stay of the order given on the 16<sup>th</sup> day of March, 2012 pending the hearing and determination of this application
3. That the child junior JH be restored to the custody, care and control of the Applicant (BK) pending the hearing and determination of this application and the Officer-in-charge of Police Station within the jurisdiction where the child will be traced to effect this Order.
4. That there be a stay of the order given on the 16<sup>th</sup> day of March, 2012 pending the hearing and determination of this appeal.
5. That costs be provided for.

The application is supported by the Applicant's affidavit sworn on 23<sup>rd</sup> March, 2012 and is based on the following grounds-

1. That the child herein is a grandson of the Appellant
2. The Respondent is of questionable Nationality and abode
3. That the child's mother was murdered on the 13<sup>th</sup> day of June, 2011 at her house in Ongata Rongai
4. That since the death of the mother, the child has been in the custody of the Appellant until the

**16<sup>th</sup> day of March, 2012 when the court gave the custody to the Respondent.**

**5. That the Respondent was never married to the child's mother in any known form of marriage and is a foreigner who has used forged documents to obtain a Kenya identity card.**

**6. That the Respondent is a long distance truck driver and is never at home.**

**7. That the Respondent has never since the death of the child's mother cared for the child and has never gone back to Ongata Rongai**

**8. That the child could not continue residing at Ongata Rongai where her mother was murdered in the absence of any responsible adult.**

**9. That the child has been residing with the Appellant and attending school**

The second application is brought by the Respondent/Applicant by a Chamber Summons dated 16<sup>th</sup> April, 2012 and taken out under **Sections 101 and 3(5) (a) and (c) of the Children Act, and Sections 3A, 1A & 1B of the Civil Procedure Act.**

The Applicant thereby applies for the following orders-

**(a) (spent)**

**(b) That the orders issued on 26<sup>th</sup> March, 2012 be stayed pending the hearing of this application inter partes and/or until further orders of this court.**

**(c) That there be a stay of the orders issued on 26<sup>th</sup> March, 2012 pending the hearing and determination of this application**

**(d) The orders issued on 26<sup>th</sup> March, 2012 be set aside.**

**(e) The child JJH do remain in the custody of the father EJH until the Appeal herein is heard and determined**

**(f) That costs be provided.**

The application is supported by the annexed affidavit of the Respondent/Applicant and is based on the following grounds-

**(i) That the Applicant/Respondent is the biological father of  
the child JJH**

**(ii) That the Child is a pupil at GTJSand goes to school**

**(iii) That the Applicant is a Kenyan having his permanent residence at Ongata Rongai- Nairobi**

**(iv) That the child is not being taken outside the jurisdiction of this court as alleged**

**(v) That on 26<sup>th</sup> March, 2012 the court was misled by the Appellant by giving false information to the court**

**(vi) That on 26<sup>th</sup> March, 2012 the court was misled by the Appellant by giving false information to the court**

**(vii) That on 26<sup>th</sup> March, the Appellant concealed vital information which caused the court to be**

**misled.**

The court directed that the two applications be heard together and at the hearing, Mr. Mwendu appeared for the Appellant/Respondent and Mr. Nyakiangana appeared for the Respondent/Applicant. Each counsel submitted at length and in summary form, after hearing their submissions, I note that the bottom line is the welfare and best interest of the child. In that regard, **Section 83 (1)** of the **Children Act** is in the following words-

**“83. (1) In determining whether or not a custody order should be made in favour of the applicant, the court shall have regard to-**

- (a) The conduct and wishes of the parent or guardian of the child;**
- (b) The ascertainable wishes of the relatives of the child;**
- (c) the ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;**
- (d) The ascertainable wishes of the child;**
- (e) Whether the child has suffered any harm or is likely to suffer any harm if the order is not made;**
- (f) The customs of the community to which the child belongs;**
- (g) The religious persuasion of the child;**
- (h) Whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;**
- (i) The circumstances of any sibling of the child concerned, and of any other children of the home, if any;**
- (j) The best interest of the child.**

In the affidavit in support of her application, the Appellant states boldly that the Respondent did not contract any known form of marriage with the deceased otherwise the latter would have said so. As if in support of that contention, the Respondent attests in his replying affidavit that he got married to the Appellant's daughter in the year 1999. He does not disclose, however, under what system of marriage their marriage was contracted. If there was any such marriage he would have disclosed under what system. Sadly he did not do so and therefore his contention that he was married to the deceased bears no proof.

Secondly, the Appellant also states that the Respondent is a long distance driver with Multiple Hauliers Ltd and rarely at home and therefore would not have time for the child. Surprisingly, all the Respondent says in answer is that after the death of the child's mother, his employer accepted his request to work at the headquarters in Nairobi so that he can take care of his son. He did not however disclose any details as to how he would do this.

Thirdly, is the issue of the burial of the deceased. After the death, her remains were interred in the Appellant's ancestral home in the Rift Valley. Under normal circumstances, a man would bury his wife at his home and not at the home of his in-laws. No explanation has been offered for the deviation from that practice and one is tempted to conclude that if the Respondent was truly married to the deceased, the latter would not have been buried at her parent's home.

Against the above background, what would one say is the child's best interest? After the hearing in the Children's Court, the child was committed to the custody of the Respondent. One of the reasons which lead the magistrate to committing the child to the Respondent was that it was the child's own wish. In his replying affidavit, the Respondent also attests that ***"it was the minor's wish and demand that he stays with me and not the Respondent, hence the children's Court decided the best interest of the child as guided by the law."***

In my view, the test for the best interest of a child is not subjectively dictated by the selfish whims of a child. There has to be an element of objectivity. You cannot give a child a knife to play with merely because he has cried for it. As an adult, you know very well, but the child does not know, that he could easily injure himself with it. In the same breath, a child's wish to stay with a particular parent might not be in his best interest. In such a situation, his own preference may not be automatically allowed. The wishes and feeling of a child must therefore be treated with a lot of caution. Children are also very impressionable and could easily be misled by something which on the face of it looks attractive but otherwise valueless. In his book on "Family Law, sixth Edition at page 297, P. M. Bromley, says-

***"... But it must be remembered that the child may have been coached by one parent and that sometimes the child's own wishes are so contrary to its long-term interests that the court may feel justified in disregarding them altogether."***

It is on record that the child in this matter told the Resident Magistrate in the lower court that he wished to stay with his father after the demise of his mother. He repeated that wish to this court, and his main reason was that the father buys him chocolates. Quite obviously, this child has not yet reached the age of reason at which he can reason out and decide what is good or not good for himself. He needs a person who can guide him as to what is good and what is not good to him until such a time as he would be able to make his own, well informed judgment. There is a lot more to life than chocolates and a court has to be very cautious before accepting wholesomely a child's views or wishes.

On account of the foregoing, and given the antecedents of the Respondent, I find that at this point in time, the child is too young to know what his best interests are as he can be easily manipulated and influenced. Given that the father has some questionable antecedents, e.g. his statement in the identity card application form in which he stated that the Appellant was his mother which was untrue, it is my considered view that at this stage, the child will be best off in the custody of his grandmother. I accordingly grant prayers 2, 3 and 4 of the Appellant's application by Chamber Summons dated 23<sup>rd</sup> March, 2012. The Respondent's application is dismissed. In the circumstances of this case, however, there will be no order as to costs. The Respondent to have access to the child on such terms and conditions as will be agreed upon by the parties.

Orders accordingly.

Parties be at liberty to apply.

**DATED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of July, 2012.**

**L. NJAGI**  
**JUDGE**