



REPUBLIC OF KENYA

High Court at Mombasa

Civil Appeal 3 of 2012

B.M. APPELLANT

VERSUS

S.M.M. RESPONDENT

RULING

(1) By a Notice of Motion dated 27th September 2012, the Applicant sought the two principal orders as follows: -

***“3. That this Honourable Court be pleased to order that the children MN – 8 years, AM – 6 years old, to be produced in court at the earliest opportunity possible and to return to Busy Bee Private School and actual custody be granted to the Appellant.*”**

4. That this Honourable Court be pleased to order stay of ruling 6th September 2012 and the entire proceedings in Tononoka Children Case no. 652 of 2012 of 2012 BM versus SMM pending hearing and final determination of this appeal.”

(2) The Respondent opposed the application and raised a Preliminary Objection on the grounds of sub-judice. He also filed an application for setting aside an order issued by the court ex parte on 28th September 2012 and extension thereof on 1st October 2012. The two proceedings – the Preliminary Objection and the application for review dated 1st October 2012 are the subject of two rulings by the court of, respectively, the 16th October 2012 and the 9th October 2012, herein.

(3) Pursuant to section 4 (4) of the Children Act, the court sought to obtain the opinion of the children on the matter in dispute being the **“return to Busy Bee Private School and out of actual custody to the Applicant.”** The children were produced before the court and examined by both the court and counsel for the Respondent, counsel for the Applicant declining opportunity to do so granted by the court.

(4) In response to the questions **“Which of the two schools do you prefer?”**, the children were categorical that they wished to remain at Busy Bee School where they had friends who were generous and kind to them. The children also preferred to live with their mother in response to a question **“Who would you like to live with if you had to attend school as day-scholar?”** The children acknowledged, in response to a query by the counsel for the Respondent, that the facilities at the Lukenya Academy were superior to those of Busy Bee School but they nevertheless wished to go back to Busy Bee, when asked by the court **“What would you say if you continued at Lukenya Academy?”** The interview of the children was conducted in Chambers in the presence only of the both parents and their lawyers and with interpretation English/Kiswahili by the Court Clerk as necessary. The children made their answers in both English and Kiswahili in a relaxed atmosphere.

(5) I commend both parents for seeking what in their respective views is the best for the children, for the mother the psychological and social support of the children and for the father an international standard of education at a neutral location from the feuding parents. In accordance with the principle of the best interests of the children, and having heard the parents' cases as presented by their lawyers and having heard the opinions of the children and taking into account the established principle that children of tender age such as M and A, at 8 and 6 respectively, should stay with their mother [AN V. MN (2007) 1 KLR G & F 65], I consider that the best interests of the children will be served by granting the physical custody of the children to the mother to facilitate psychological and social support of the children. As regards the school, the parents who have joint custody of the children may by agreement determine which school including Busy Bee and Lukenya Academy that the children ought to attend. The Respondent will have all reasonable access to the children while at school and at home with their mother.

(6) Accordingly; for the reasons set out above, I make the following orders on the Appellant's Notice of Motion dated 27th September 2012: -

(1) The physical custody of the children is granted to the Appellant

(2) Pending determination of the appeal, there shall be a stay of the ruling of the Tononoka Children Court in Case No. 652 of 2012.

(3) The children will therefore return to Busy Bee Private School, Mombasa pending the hearing and determination of the appeal, unless the parties in the meantime agree to enroll the children in any other school including the Lukenya Academy.

(4) Costs in the appeal.

Dated and delivered this 23rd day of October 2012.

EDWARD M. MURIITHI
JUDGE

In the presence of:

Mrs. Kipsang for the Appellant

Mr. Kioko for the Respondent

Miss Linda Osundwa - Court Clerk