



REPUBLIC OF KENYA
HIGH COURT AT GARISSA
CIVIL APPEAL NO. 29 OF 2012

A M.....APPELLANT

VERSUS

M A MRESPONDENT

RULING

Background

1. This matter originates from the Wajir Children's Court. There is an appeal filed in this court by the applicant challenging the orders of the lower court. The background of this case is that M. A. M. alias M. M. B. presented an application before the Children's Court Wajir on 30th August 2012 together with a plaint. In the application she was seeking the following orders:

- a) That the application be certified urgent and be heard ex parte in the first instance.
- b) That the application be set down for hearing inter partes on a priority basis.
- c) That the custody of the child (**M.S**) be vested with the plaintiff/applicant in the interim.
- d) That the defendant/respondent be compelled to pay maintenance for the minor to a tune of Kshs 10,000 per month pending the full hearing of the matter.
- e) That the defendant/respondent be compelled to pay school fees and school related expenses for the minor.
- f) That the defendant/respondent pays costs of the application.
- g) Such other order or further orders as the court may deem fit to grant in the interest of justice and best interest of the child.

2. The trial court granted interim ex-parte orders certifying the application as urgent in the first instance and granting custody of the child to the applicant. The court also ordered the applicant to pay Kshs. 10,000 per month pending full hearing of the matter and gave 19th September 2012 as the date for the inter partes hearing. It is these orders, specifically the order for payment of the maintenance that has aggrieved the applicant to the extent of preferring this appeal and bringing this application for stay of proceedings in the lower court. This court has not been informed when the inter partes hearing is scheduled after the lower extended the orders.

The application

3. Contemporaneously with the memorandum of appeal, the applicant filed an application under certificate of urgency on 12th November 2012 seeking orders that:

- a) This application be certified as urgent and it be heard *ex parte* in the first instance.
- b) The proceedings in the subordinate court in **Wajir Children's Case No. 6 of 2012 (M. A. M. vs. A. M.)** be stayed pending the hearing and determination of this application *inter partes*.
- c) At the *inter partes* hearing of this application the order of stay be issued/confirmed pending the hearing and determination of the appeal filed herein.
- d) The proceedings before the subordinate court be nullified and this Honourable court be pleased to order fresh proceedings to commence before a Children's Court presided over by a magistrate other than Hon. Linus Kassan.
- e) Costs of this application be provided for.

4. The grounds in support of the application are found on the face of the application, in the supporting affidavit dated 26th September 2012 and further affidavit dated 19th October 2012 as well as oral submissions presented during the hearing of this application. The applicant deposes that his advocate sought to have the *ex-parte* order for maintenance suspended because it was made *ex parte* without evidential basis and proof of the applicant's responsibility over the minor especially when there was evidence on record by way of a birth certificate showing the father of the child was not the applicant; that the respondent had misled the court in regard to how much the applicant earned; that the trial magistrate's order to extend the *ex parte* orders is proof of his bias against the applicant and this has prejudiced him. By further affidavit sworn by the counsel for the applicant it is deposed that the applicant has complied with the consent order to have DNA taken to prove paternity but the respondent breached the consent order by failing to turn up for the test.

5. Counsel for the applicant submitted that there are two guiding principles for the consideration by the court in applications for stay of proceedings pending appeal: (a) that the applicant must demonstrate an arguable appeal and (b) that if stay is not granted the applicant will suffer loss. On the issue of an arguable appeal, counsel referred this court to the proceedings in the lower court. He submitted that the trial magistrate granted what appears to be final orders on an interim application and therefore the court was in error; that the trial court based that decision on information that the applicant earns Kshs 50,000 per month without satisfying itself that the applicant is the father of the minor and that he has the means to maintain the minor; that there was no evidence to support the information on how much the applicant earns from the bar by the counsel for the respondent; that the birth certificate indicated the father of the minor as one P. K. who was the respondent's husband; that counsel for the applicant presented documentary evidence on how much the applicant earned but the court failed to consider the same; that this makes the appeal meritorious. Counsel quoted from his list of authorities in support of the prayer for stay of proceedings (**see Francis Njakwe Githiari & another v. Hon. Daniel Toroitich Arap Moi T/A Moi Educational Centre HCC No. 596 of 2004 unreported and Bishop Allan Njeru & 3 Others v. Samuel M'obuya & 5 Others HCC No.510 of 2011 unreported**)

6. The application has been opposed by the respondent. The grounds in support of the opposition are contained in the replying affidavit she swore on 1st of December 2012 and the submissions by her counsel. She deposes that the child in issue was sired by the applicant and not P. K.; that she met the said P. K. when she was already pregnant and he only assisted her during the time of need by providing her with food and paying for her caesarean section bills; that he later ejected her from his place and sought transfer from Wajir; that she took the child to the applicants house but the child was ejected to the streets; that the police rescued the child and arrested the respondent who was charged with child neglect; that police referred the child to a child protection agency CESVI in Wajir who engaged *pro bono* legal services for her.

7. The respondent further deposes that the orders of the lower court were based on facts presented to that court and are in the interim pending a DNA test; that the trial magistrate acted lawfully; that the applicant is unwilling to undergo DNA testing to prove paternity; that the intended appeal is baseless, misguided and an abuse of the court's process; that this application is a sham and is intended to delay and derail the course of justice.

8. In her submissions, counsel for the respondent told the court that it is true the orders being contested were made ex parte following her application under certificate of urgency; that the respondent has no means to take care of the child; that the trial court did not err in granting those orders because the orders were in the interim; that the respondent was not able to travel to Nairobi for DNA testing without money and was waiting for the payment of maintenance money by the applicant in order to travel; that this payment delayed making it impossible for the respondent to travel for DNA as agreed and this necessitated taking an alternative date for the test; that the respondent sought another date DNA test from the court but the court declined to give another date ex parte. Counsel asked the court to dismiss the application and take into account the best interest of the child in making its orders.

9. I have given this case due consideration. To my mind I single out paternity of the child subject of these proceedings as the central issue in this case. If paternity had been established, the parties would not be before me, at least not on the issues that have been presented to this court. The applicant denies paternity while the respondent alleges that the applicant is the father of the child.

10. In determining issues on child welfare the paramount consideration for the courts has always been the best interest of the child. This consideration is backed by international instruments dealing with children's issues and our laws. Just for emphasis **Article 53 (2) of the Constitution** provides thus: "**A child's best interests are of paramount importance in every matter concerning a child**" and **Section 83 (1) (j) of the Children's Act** as follows: "**Where a person, not having legal custody of a child, has actual custody he shall be deemed to have care and charge of the child and shall be under a duty to take all reasonable steps to safeguard the interests and welfare of that child**".

11. This point is amplified by our courts through judicial pronouncements and judgements. There is a plethora of authorities on the issues touching on the best interest of the child. Simply put, the **best interest of the child** means considering the child before a decision affecting his/her life is made. This principle has established itself through all matters and legislation affecting the well-being of the child. The principle has been used to assist primarily the courts and other institutions in the decision-making process (see **M.W vs. K.C in Misc. Application No. 105 of 2004 and Civil Appeal No. 15 of 2008 F.M vs. H.G [2012] eKLR.**

12. In deciding children's matters it is incumbent upon the courts to bear in mind that children are vulnerable members of society and are therefore susceptible to physical, psychological and other types of abuses. The courts remain the upper guardians of children's rights and interests, and where necessary, have a final say in determining the overall welfare of the child. This they do through a relatively delicate balancing of sensitive interests that relate to family status and touch on private lives of individuals.

13. In the case presented before the lower court, the plaintiff is seeking maintenance among other prayers aimed at providing basic needs including education for the child. There is no problem with seeking such orders where a party demonstrates that the rights of the child are breached. Our law places the responsibility of a child on the parents of the child or a guardian (**Children's Act, CAP. 141**). This automatically means that where parenthood is contested, the courts must determine this issue in the first instance so that it is clarified where the court should place parental responsibility. Where both parents are not alive, again the court can intervene in the best interest of the child to protect the child's welfare.

14. What is not disputed here is the mother of the child but she claims inability to take care of the child. She went to court to ask the court to compel the applicant to take care of the child claiming that he is the father of the child but paternity is contested. It is still an issued pending in the lower court. The orders issued by the lower court for maintenance are in the interim and were issued ex parte. It is because of these orders that this application and the appeal have been filed before this court. This, in my view, is one

of those cases that presents dilemma to the court. The dilemma of this court is how to decide this case without touching on the matters that may be prejudicial to the case in the lower court and to the appeal before this court. This court also faces dilemma in that whichever way it decides the issues before it, there will be a party that will be negatively affected by that decision.

15. I have looked at the options open to the applicant. He has an option to do any of the following: to urgently submit for a DNA test to settle the issue of paternity once and for all; to pursue inter partes hearing to fully determine the issues; to seek review of the lower court orders; to challenge the orders of the lower court; to go on appeal; to negotiate with the respondent for a solution. The option that would deal with the issues conclusively would be DNA test to settle the paternity issue. This would guide the lower court in determining the case and inform the orders it will make.

16. Dilemma or no dilemma, parties expect this court to determine the issues presented to it. This is a legal duty placed on this court. I have restrained myself from discussing the merits or demerits of the appeal or the case in the lower court and this leaves me with very few options. I want to look at the options available to this court given the circumstances I find this court in. What would be the impact of this court's orders in allowing this application and what would be the impact if this court were to decline to grant the orders? This becomes a bit complicated because paternity is denied and the lower court granted orders ex parte. A decision of this court not to grant the orders being sought would mean the applicant continues to pay maintenance until the lower court hears the matter inter partes or until the appeal is determined. This ensures the child's interests as regards provision of basic needs are catered for. The result of such an order, in the long run after the case has been fully determined and the applicant found not to be the father of the child would be miscarriage of justice and prejudice to the applicant. On the other side of scales is an order allowing the application and granting the orders sought. The impact of this would be to deny the child maintenance and provision of his basic needs. This court is not privy to the details regarding the social and economic standing of the child's mother and whether she is able to take care of the child save what is deponed in the replying affidavit. Going by the contents of the affidavit, the respondent is not able to take care of the child hence the reason the child was rescued from the streets and handed over to CESVI Wajir.

17. Courts have in the past considered which of the two risks of injustice is greater than the other and opted, in making decision, for the lesser risk of injustice. In the case of **Films Rover International Ltd and Others versus Canon Film Sales Ltd 1987 1 WLR**, a case not related to children's matters but dealing with injunctions, this fundamental issue was discussed. It has been quoted with approval by our courts (see **Suleiman vs. Amboseli Resort Ltd [2004] 2 KLR 589**). I want to point out that I am alive to the fact that the cited case deals with a totally different issue from the one before me. I want to be understood that my citing this authority is purely to discuss the issue that seems relevant to this case because whichever order this court makes will be seen as unjust by whichever party is affected. I have carefully considered and weighed the decision to decline to grant the prayers sought in this application against granting the same and in my view it would be a lesser risk of injustice to decline to grant the prayers sought in this application. In the best interest of the child it would be a greater risk of injustice, in my view, to allow the application because this would deny the child basic needs and would be tantamount to 'snatching' food from the mouth of the child. While making this decision I am alive to the fact that it has not been established that the applicant is the father of the child.

18. In conclusion, it is my view that to deny the child basic needs through maintenance by ordering stay of proceedings in the lower court would not be in advancement of the best interest of the child. In view of my reasoning above, I hereby decline to grant the prayers sought in the application dated 19th October 2012. Instead I will and do hereby invoke the supervisory jurisdiction of this court over Wajir Children's Court and direct that the court proceeds with speed to hear the parties inter partes in order to determine the issue of paternity. The determination of this issue will inform the subsequent appropriate decisions that the court may make. Each party is ordered to bear its own costs of this application. Orders accordingly.

Stella N. Mutuku, Judge

Dated, signed and delivered on this 13th day of December 2012.