



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO.47 OF 2010**

**ANNE BITOK.....APPLICANT**

**VERSUS**

**MARK YATOR.....**  
**.....RESPONDENT**

**R U L I N G**

SJ, the child who is the subject of these proceedings is a girl aged about twelve (12) years. Her biological mother, Edna Cheronno Lagat (the deceased) died in January 2010. From the pleadings filed, it was apparent that prior to her death, the deceased had the sole custody of the child. According to the applicant (the sister of the deceased), due to the deceased's financial circumstances, she took over the custody of the child with a view to providing her with education. The child is now a student at a boarding school in Nairobi. The respondent, the biological father of the child, wishes to participate in the life of the child. The applicant however appears to be reluctant to allow the respondent to participate in the bringing up of the child in light of the fact that prior to the death of the deceased, the respondent had refused or declined to support the child, both financially and emotionally.

The respondent filed a case before the Children's Court seeking several orders in regard to the custody of the child. After hearing an application that was placed before it, the Children's Court did on 31<sup>st</sup> August 2010 direct that a counselor interview the parties to this case separately and thereafter interview the child separately with a view to assessing the child's psychological condition in regard to the issue of custody. He further ordered the counselor to have the control of the schedule on how he will perform the counseling. He directed that the counseling schedule be filed in court before 3<sup>rd</sup> September 2010. The court finally ordered the parties to comply with the counselor's schedule without fail, the counselor having been given full authority by the court. The applicant was aggrieved by the decision of the Children's Court and duly filed an appeal to this court.

Contemporaneous with filing an appeal, the applicant moved the court by notice of motion pursuant to the provisions of the then **Order XLI Rule 4** (now **Order 42 Rule 6**) of the **Civil Procedure Rules** seeking orders of this court to stay the execution of the order of the Children's Court pending the hearing and determination of the appeal. The application is supported by the grounds stated on the face of the application and by the annexed affidavit of the applicant. She swore an affidavit in further support of the application. The application is opposed. The respondent swore a replying affidavit in opposition to the application.

Prior to the hearing of the application, counsel for the parties herein filed written submissions in support of their respective opposing positions. At the hearing of the application, this court heard oral submissions made by Mr. Matheka for the applicant and by Mr. Mugambi for the respondent. I have carefully considered the said submissions. I have read the pleadings filed by the parties herein in support of their respective opposing positions. The principles to be considered by this court in determining whether or not to stay the execution of the orders of the Children's Court are well settled. Under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**, the appellant must satisfy several conditions before the order staying execution craved for can be granted. The appellant must satisfy the court that she would suffer substantial loss if stay is not granted. She must have made the application for stay without undue delay. She must also be prepared to provide security for the due performance of such order as the court may issue that may ultimately be binding on her. In the present application, apart from the above principles, the court is required to take into account the provisions of **Article 53(2)** of the **Constitution** and **Section 4(3)** of the **Children Act** that mandates this court to take into account the best interest of the child in whatever decision that it will make in regard to the welfare of the child.

In the present application certain facts are not in dispute. It is not disputed that it is the applicant, the aunt of the child, who currently has the custody of the child. The respondent concedes this fact. It appears that the respondent is anxious to establish a relationship with the child. It is apparent that prior to the death of the mother of the child, the respondent had not, in a significant way, participated in the life of the child. Indeed there is anecdotal evidence that the applicant stepped in to provide for the education of the child when it became apparent that the deceased was unable to provide for the educational needs of the child. **Article 53(1) (e)** of the **Constitution** provides as follows:

*“Every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married or not”.*

Although the respondent had not earlier expressed interest to participate in the life of the child, being the only living parent, it is this court's considered view that pursuant to the above Article of the **Constitution**, the respondent cannot be denied the right to exercise his parental duty of care and protection of the child. However, since the respondent had not previously shown interest in the welfare of the child, the Children's Court, correctly in this court's view, directed all the concerned parties, including the child, should be counseled before the respondent can be eased into the child's life. The counseling sessions should however be undertaken at the convenience of the child and not at the convenience of the parties herein. This court is cognizant of the fact that the best interest of the child in the circumstances of this case requires that the education of the child should not be disrupted at the behest of either the applicant or the respondent.

In that regard, it is this court's holding that the counseling of either the applicant or the respondent in the presence of the child should be undertaken when the child shall be on vacation from school (*in this case the April 2011 vacation*). The applicant and the respondent are hereby ordered to make all the necessary arrangements, now that they have the necessary notice, to avail themselves for the counseling session with the counselor. The applicant and the respondent are hereby ordered to consult with the counselor with a view to reaching an amicable schedule in regard to when the counseling sessions shall take place. For the above reasons, the order issued by the Children's Court directing the counselor to have control of the schedule of counseling, and the further order that required that the schedule be presented to court by 3<sup>rd</sup> September 2010 is hereby stayed pending the hearing and determination of the appeal.

The other orders of the Children's Court, subject to this court's ruling, shall be complied with by both the applicant and the respondent. For the avoidance of doubt, upon the report being prepared by the counselor, the parties shall appear before the Children's Court for further appropriate orders. There shall be no orders as to costs.

**DATED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2011**

**L. KIMARU**

**JUDGE**