



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO.76 OF 2009

EUNICE KIBUGI.....1ST APPELLANT

BEATRICE KIBUGI.....2ND APPELLANT

VERSUS

BERNARD MABONGA WALIUBA.....RESPONDENT

RULING

The appellants were aggrieved by the decision of the Children’s Court made on 7th May 2009 and subsequent orders that were issued on 29th September 2009 in Nairobi Children’s Court Case No.304 of 2009 between the respondent and the appellants. In the said decision, the Children’s Court ordered the 1st appellant to hand over the custody of the child that was the subject of the custody dispute to the respondent. Contemporaneous with filing appeal, the appellant moved this court by notice of motion under the provisions of the then **Order XLI Rule 4(1) and 6 (now Order 42 Rule 6(1))** of the **Civil Procedure Rules** seeking this court’s orders to stay the execution of the said decision of the Children’s Court pending the hearing and determination of the appeal. The application is supported by the annexed affidavit of the 1st appellant. 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, the respective counsel for the appellants and for the respondent filed written submissions in support of their respective opposing positions. At the hearing of the application, Miss Machio for the appellant and Mr. Omondi for the respondent agreed by consent that the court delivers its ruling on the basis of the written submissions. This court has carefully considered the said written submissions. The facts of this application are rather unique. The 1st appellant is the mother to the 2nd appellant. Prior to the 2nd appellant and the respondent cohabiting together as husband and wife, the 2nd respondent had already had a child, DWN, (that is the subject of these proceedings) on 8th December 2002. The cohabitation between the 2nd appellant and the respondent resulted in the birth of a baby boy, J. born on 15th April 2006. Soon thereafter, the 2nd appellant and the respondent were estranged. The cause of their estrangement appears to have been triggered by the 2nd appellant’s decision to leave the country against the respondent’s wishes to work in Denmark. The 2nd appellant left the two children with the respondent.

Sometime in 2009, the 2nd appellant returned to the country and took away DWN from the custody of the

respondent. The custody of J was left with respondent. DWN's custody was handed over to the 1st appellant. Since then, the appellants and the respondents have been in court disputing over the custody of the child. What is unique about this case is that even though the respondent is not the biological father of DWN, he insists that since he is still married to the 2nd appellant, he had adopted DWN as his child. Although the respondent did not file formal proceedings in court to adopt the child, it is his case that by virtue of having lived with the said child for a period of five years, he had grown attached to the child and considers the child as his own. On the other hand, it is the appellants' case that since DWN was not the biological child of the respondent, and since the 2nd appellant and the respondent are estranged, it is only right that the 2nd appellant remains with the custody of DWN. Two conflicting reports were filed in respect of the psychological state of the child. One report was prepared by the Machakos District Children's Officer while the other report was prepared by the District Children's Officer, Kasarani. One report recommends that the child remains in the custody of the appellants, and particularly the 2nd appellant, while the other report recommends that the respondent be handed over the custody of the child. The Children's Court ordered the appellants to surrender the custody of the child to the respondent. It is this order that the appellants have sought to stay pending the hearing and determination of the appeal.

The issue for determination by this court is whether the appellants made a case for this court to grant the orders sought in the application. Under **Order 42 Rule 6 (2)** of the **Civil Procedure Rules**, the appellants must satisfy several conditions before the order staying execution craved for can be granted. The appellants must satisfy the court that they would suffer substantial loss if stay is not granted. They must make the application for stay without undue delay. They 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 them. In the present application, apart from the above principles, the court is required to take into consideration 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 render in regard to the welfare of the child. In the present application, it is clear that the dispute regarding the custody of the child cannot be resolved unless and until this court is in a position to determine with certainty where the best interest of the child lies. To do so, this court will require a report to be prepared by a neutral person who is not beholden to either the appellants or the respondent. Further, in making its decision, the court will take into account the best place that the child would be provided his education. In the premises therefore, this court hereby directs the director of Children Services to appoint an officer who shall visit both the residences of the appellants and the respondents, interview the appellants and the respondent, and the child to determine where the best interest of the child will be served pending the hearing and determination of the appeal. The director of Children Services will be required to hand in his report on or before the 25th February 2011.

Meanwhile, the status quo in respect of the custody of the child shall remain pending further orders of this court on 25th February 2011.

DATED AT NAIROBI THIS 11TH DAY OF FEBRUARY, 2011

L KIMARU
JUDGE