



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO.54 OF 2010**

**D.K.....APPELLANT**

**VERSUS**

**J.K.N.....RESPONDENT**

**R U L I N G**

The appellant was dissatisfied with the ruling rendered by S.A. Okato, Principal Magistrate on 7<sup>th</sup> October 2010 in Divorce Cause No.[.....]at Milimani Commercial Courts. The said ruling was delivered in respect of an application that the appellant had made in the divorce cause to be, *inter alia*, granted the custody of a child that was the subject of the application. The court declined to grant the appellant's said application which she had sought to be granted custody of the child. The appellant filed an appeal to this court on 12<sup>th</sup> October 2010. Contemporaneous with filing the appeal, the appellant filed a notice of motion pursuant to the provisions of the then **Order XLI Rule 4** (now **Order 42 Rule 6**) of the **Civil Procedure Rules** and **Sections 4, 24, 83 and 84** of the **Children Act** seeking to be granted orders stay of the ruling of the subordinate court which declined to grant custody of the child to the appellant. The appellant further sought to be granted interim custody, care and control of the child pending the hearing and determination of the appeal. The appellant sought other prayers in the application which in the view of this court more or less relate to the determination of the question whether or not the appellant is entitled to have custody of the child. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the appellant. The application is opposed. The respondent swore a replying affidavit in opposition to the application. He further filed notice of preliminary objection to the entire application.

Prior to the hearing of the application, counsel for the parties to the application agreed by consent to file written submissions in support of their respective clients' opposing positions. The written submissions were duly filed. This court further heard oral submissions made by Mrs. Thongori for the appellant and Mr. K'opere for the respondent. This court has carefully considered the said submissions. It has also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the appellant laid sufficient basis for this court to grant stay of the order of the subordinate court and further grant interim custody of the child to the appellant. This court is aware that the issue in dispute between the appellant and the respondent is the welfare of the child. The Subordinate Court was dealing with an issue regarding the custody of the child in a divorce cause. Under **Section 4 (3)** of the **Children Act** this court is required, in exercise of its powers, to treat the interest of the child as of first and paramount consideration. This court is further required to take into consideration the legal requirement that the appellant must fulfill conditions as provided under **Order 42 Rule 6(2)** of the **Civil Procedure Rules** that mandates an applicant to satisfy the court that she would suffer substantial loss if the order granted by the subordinate court is not stayed. Further the applicant will be required to provide such security as the court may order for the due performance of the order.

In the present application, the facts are more or less not in dispute. The appellant and the respondent are estranged. Their marriage was blessed with one child, S K born on 1<sup>st</sup> March 2002. Before the appellant and the respondent relocated to Nairobi, both were resident in Meru County. During the said relocation to Nairobi in 2010, the appellant temporarily left the custody of the child with the respondent. When the appellant and the respondent were separated, the respondent retained the custody of the child. From the appellant's affidavit, it is apparent that the respondent is unwilling to grant the appellant the custody of the child. There are divorce proceedings pending before the subordinate court. In granting custody of the child to the respondent, the father, it was apparent that the trial magistrate failed to take into consideration the provisions of **Section 83** of the **Children Act**. The said **Section** requires certain considerations to be taken into account when determining custody of a child. It includes the requirement that custody order should always be made in the best interest of the child.

The general rule is that, where custody of a child of tender years as defined by **Section 2** of the **Children Act** is in issue, the mother of the child should have the custody unless with special circumstances are established to disqualify the mother from having the custody of such a child. The child that is the subject of these proceedings is a child of young and tender age. She is a girl of nine (9) years of age. In **Midwa vs. Midwa [2002] 2EA 453 at page 455** the Court of Appeal had this to say:

*“It is trite law that, prima facie, other things being equal, children of tender age should be with their mother, and where a court gives the custody of a child of tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima*

*facie rule, See Re S (an infant) [1958] 1 All ER 783 at 786 and 787 and Karanu vs. Karanu [1975] EA 18. The learned judge, in our view, did not correctly direct herself on the principle that in cases of custody of the children the paramount consideration is their welfare. Moreover, as the record shows, there were no exceptional circumstances shown to justify depriving the mother of her natural right to have her children with her”.*

In the present application, it was evident from the facts of the case that the subordinate court failed to take into consideration the applicable law in regard to custody of children before he reached the determination granting custody of the child to the respondent. The respondent did not place before the trial court any special circumstances that would deny the appellant the prima facie right to have custody of a girl child of young and tender age.

In the premises therefore, this court is of the considered opinion that the appellant established that she would suffer substantial loss if the order of the subordinate court granting custody of the child to the father (the respondent) is not stayed. The subordinate court did not take into consideration the best interest of the child when it reached the decision denying custody of a girl child of young and tender years to the mother. That decision of the subordinate court is stayed pending the hearing and determination of the appeal.

This court in exercise of its jurisdiction to always act in the best interest of the child, hereby grants joint custody of the child to the appellant and the respondent. Both parties shall exercise equal parental responsibility over the child. This shall include providing maintenance for the education and the upkeep of the child. However, the appellant shall have actual custody of the child. In that regard, the respondent is hereby ordered to forthwith surrender the custody of child to the appellant. The respondent shall be entitled to structured visitation rights. The schedule shall be agreed between the appellant and the respondent or in default thereof, either party shall be at liberty to apply. There shall be no orders as to costs.

**DATED AT NAIROBI THIS 8<sup>TH</sup> DAY OF APRIL, 2011**

**L. KIMARU**  
**JUDGE**