



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.66 OF 2010

JIMMY MABANGO AMBONDO.....APPLICANT

VERSUS

BETTY IHAVI AMBUNDO.....RESPONDENT

R U L I N G

1. On 21st April 2011 Nambuye J. delivered a Ruling on the basis of a Notice of Motion dated 8th December 2010 principally seeking orders of stay of execution of the orders made on 15th November 2010 in Nairobi Children’s Case No. 34 of 2010.
2. Today, both Mrs. Esonga and Mrs. Guserwa appeared before me and what is in issue is the interpretation or clarification on the issue of custody of the children of the estranged couple, party to these proceedings. There is no contestation of the fact that the learned Judge in her Ruling aforesaid had made orders that the Applicant will have the children for one weekend a month while the Respondent will have them for three weekends a month.
3. I have taken time to read the Motion dated 8th December 2010. In it, the Applicant was seeking inter alia, “*stay of execution of the orders made on 15th November 2010 made in the Children’s Case No. 34 of 2010 and all consequential orders arising there from or subsequent there to pending the hearing and determination of [the] Appeal*” i.e. prayer 5 of the Motion.
4. I have also read the orders made on 15th November 2010 and of specific interest is that the Plaintiff (*now the Respondent*) was to have actual custody of the children of the marriage in the following terms;
 - (a) ***“Custody of the children from the first week of school opening from Monday to Friday.***
 - (b) ***That the Defendant (now Applicant would pick the children from school on Friday and return***

them to school on Monday morning alternating from the first week of school opening.

(c) That both parties do share public holidays and school holidays equally with the Defendant having the first half of school holidays.”

5. Nambuye J. was alive to the issue of custody of the children and at pages 23 and 24 of her Ruling, the learned Judge went to great lengths to give her impressions of the children of the marriage; that they wanted to live with their father and *“have no objection to their mother having access to them with occasional stays at the mother’s house on condition that she finds time for them and she does not abandon them to the care of the house help. Further, that it is on record that the need to accommodate the wishes of the children is what lead (sic) to the consent of 16th December 2010.”*

6. On the basis of the above and other findings, Nambuye J. then ordered *“stay of further proceedings in Nairobi Children’s Case No. 34 of 2010 pending the hearing and determination of the Appeal”* which was prayer 4 of the Motion dated 8th December 2010 as well as prayer 3 thereof which sought similar orders but on an interim basis.

7. The learned Judge did not say anything specific about prayer 5 (reproduced above) and prayer 6 which were in similar terms but went on to make specific orders regarding access to the children by the parties. She ordered as follows;

“The Respondent will have three weekends in each month to stay with the children attending day school. While the father will have one weekend during the pendency of the hearing and disposal of the appeal.”

8. Regarding any child attending boarding school, equal access during school term was granted and during holidays, the Respondent was granted access in the first half of the holiday.

9. What then is my interpretation of the issue of actual custody during the pendency of the appeal? I have no doubt that reading the body of the Ruling of Nambuye J. together with the specific orders of access during the school term and during the holidays, and reading the Ruling wholistically, Nambuye J. meant only one thing; that the orders issued on 15th November 2010, *inter alia* granting custody of the children to the Respondent, be stayed and that the children would remain in the custody of the Applicant during the pendency of the Appeal with greater access being given to the Respondent on weekends only (*three out of four in a month*) with equal access during holidays.

10. I have held as above because from a reading of the Ruling, the learned Judge’s mind was clearly swayed by the statements given by the children hence her statement, ***“... the wishes of the children which have already been made known to the parties and their counsels and only to the extend (sic) that the law permits the same to be disclosed is to the effect that they have been with the father since the mother left the matrimonial home. They appreciate the fact that they should be accessed by both parents equally with the exception of the small boy who because of the tender age of 8 years did not follow the conversation attentively as he was akin with grinning, fidgeting (sic), scripling (sic) and flipping through the news papers on the table Otherwise they have no objection to their mother having access to them with occasional stays at the mother’s house ...”***

11. I am convinced that my interpretation above is the correct one as any other would have no basis from a concise reading of the Ruling and having said so, let the actual custody of the children be with the Applicant subject to access as ordered by Nambuye J.

12. I so direct and each party is at liberty to apply.

13. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 3RD DAY OF JUNE, 2011.

I. LENAOLA

JUDGE

In the Presence of:

I. LENAOLA – JUDGE

David – Court Clerk

Miss Rasanga h/b for Ms. Guserwa for Respondent

I. LENAOLA

JUDGE