



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Case 29 of 2010

TIMOTHY MURIITHI APPELLANT

VERSUS

MONICAH KATHURE RESPONDENT

RULING

The appellant is appealing against the ruling of Meru Children's Case No. 71 of 2008 which was made on 26th March 2010. By that ruling, the court awarded custody of the issues of marriage to the respondent, ordered the appellant to cater for school fees of those issues and ordered the appellant to pay Kshs. 8,000/= per month for their maintenance. The appellant has filed a Notice of Motion dated 14th April 2010 seeking stay of execution of the orders of the Children's Court. The application is brought under Order XLI Rule 4 (1) of the Civil Procedure Rules. Regulation 20 of the Children (Practice and Procedure Parental Responsibility) Regulation 2002 provides that any person aggrieved by the decision of the children's court has a right of appeal to the High Court within 30 days from the date of the decision. Regulation 21 further provides as follows:-

“All appeals under Regulation 20 shall be governed by the provisions of the Civil Procedure Rules.”

It therefore follows that the appellant was correct to have brought the present application under Order XLI Rule 4 (1). Prior to the 22nd February 2010, the issues of the marriage, that is, M.K. aged 8 years and R.K. aged 4 years were in the custody of the appellant. The controversy which is the subject of the children's court ruling surrounds the circumstances under which the custody of those children transferred from the appellant to the respondent. The respondent alleged that the appellant took the children on that day at a school where she was undertaking teaching practice and left or abandoned them there to the embarrassment of the respondent in the presence of the students. The respondent is a student teacher. The appellant alleges that on that day, he took the children to see the

respondent at that school but the respondent forcibly took the children away from him. It is accepted by the parties that the respondent is unemployed and resides with her grandparents. She now resides there with the issues of the marriage. The appellant in his affidavit sworn in support of his application deponed as follows:-

14. ***That the respondent is a full time student at Kigali teachers college and will not therefore properly take care of the issue of marriage.***
15. ***That the applicant's grand parents are elderly and will therefore not properly take care of the issues of marriage.***
16. ***That the court in the aforesaid ruling did limit my right to visit the children thus prejudicing the interest and welfare of the children.***
17. ***That the issues of marriage needs fatherly love and care.***
18. ***That I sued to properly take care and maintain the issue of marriage when I was residing with them.***

Although Order XLI Rule 4 (1) has specific conditions which an applicant has to satisfy in seeking stay pending appeal, I hardly think that those conditions can strictly be applied when one is considering an application relating to children. Otherwise, how can an applicant seeking stay orders relating to children show that he will suffer substantial loss as per Order XLI Rule 4 (2) (a) when in cases of children the emphasis is on the welfare of the children being paramount? The best guide in considering the application such as this one is section 76 of the Children's Act. Section 76 provides the general principles to guide in proceedings relating to children. Section 76 (1) provides as follows:-

“76 (1) Subject to Section 4 where a court is considering whether or not to make one or more orders under this Act with respect to a child it shall not make the order or any other orders unless it considers that doing so would be more beneficial to the welfare of the child than making no order at all.”

The issue to determine is how would granting an order of stay be beneficial to the welfare of the children M.K. and R.K.? The burden was upon the appellant to show the benefit of the children if stay is granted. As can be seen, from his affidavit, the appellant first concern is that the children are left by the respondent in the care of their grandparents who are elderly. The appellant did not say the exact or approximate age of those grandparents. If those grandparents are able to move from place to place, in other words they are not bedridden, then there is no basis for saying that they cannot take care of the children. In any case, the respondent deponed and it was not contradicted by the appellant that M.K. is presently attending a boarding school and is only at home during the school holidays. R.K. is only 4 years old and although it was not stated probably attends a pre-unit school. The respondent stated that she manages to see the children every week and from the college she is attending. The other issue raised is that the appellant's right of visitation of the children was limited by the children's court's ruling. The learned magistrate in

his considered ruling provided that the appellant had a right to visit the children once a month from 9 to 5 pm with prior arrangement and away from the grandparent's home. The appellant was also granted the right to visit the children at the school without limit. It should be appreciated that when the learned magistrate made that order, it was after considering the evidence produced before him. At this stage, and on a *prima facie* basis, after considering the children's court ruling, I do not find that the welfare of the children will be adversely affected by the limited contact with the appellant. It is also to be noted that the respondent deponed that the first child M.K. is attending boarding school and therefore the appellant can visit her at school. The disclosure by the respondent that the appellant has not complied with the children's court order for provision of maintenance of Kshs. 8,000/= per month, does not endear the appellant to the court. Such default is detrimental to the children. For one who seeks to advance the welfare of the children, according to his deposition, that failure only goes to show that the appellant's orders cannot be granted. In the end, considering that the only principle that should guide this court as it considers the matters relating to children is the welfare of those children, I find that the Notice of Motion dated 14th April 2010 is not merited. It is dismissed and the costs thereof shall abide with the pending appeal.

Dated and delivered at Meru this 25th day of June 2010.

MARY KASANGO
JUDGE