



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 74 of 2010

ABDALLA BORI.....APPELLANT/APPLICANT

-A?ND-

SHEILA ANYANGO..... RESPONDENT

RULING

Coming up before the Court is the appellant's application by Notice of Motion dated **10th June, 2010** and brought under Orders **XLI** (rule 4(1),(2)), **XLII** (rule (1)(w)) and **L** (rule 1) and sections 1A, 1B,3A and 63(e) of the Civil Procedure Act (Cap. 21, Laws of Kenya), and 80 of the Children Act, 2001 (Act No. 8 of 2001).

The appellant's substantive prayers were as follows:

- (i) that the Court do stay the proceedings in Tononoka Children's Court Cause No. 78 of 2010, Sheila Anyango v. Abdalla Bori, pending the hearing and determination of this appeal;**
- (ii) that the Court do grant the appellant unconditional access to the child, A.A,**
- (iii) that the Court do vest the legal custody of A.A in the appellant.**

In the supporting grounds for the application, it is stated that the appellant has appealed against an order made in respect of interim maintenance; that since obtaining the orders of interim maintenance the respondent has lost interest in prosecuting her case but is keen on executing the interim orders and, unless stay of execution issues, the appellant's appeal will be rendered nugatory; that the respondent is openly harassing the appellant's wife; that the respondent has denied the appellant access to **A.A**; that the trial Court has dismissed the appellant's application for stay and setting aside of that Court's orders; that the appellant has offered to make a payment under the maintenance orders commensurate with his means, but the respondent has declined the offer.

In the applicant's supporting affidavit he avers that the respondent has obtained (on **29th March, 2010**) interim maintenance orders for the sum of Kshs. 5,000/= per month against him; he is aggrieved by those orders and he has lodged an appeal; the appeal has a high probability of success; the respondent obtained the said orders without having served him with any Court process; the respondent had deserted the matrimonial home and taken with her all the household effects, and he got married to a different woman in the meantime; the applicant has offered a monthly maintenance sum of Kshs. 3,000/=, but the respondent has declined to collect the same from his advocates; execution of the Children's Court's maintenance orders would lead to loss of one-third of the applicant's income; the applicant remains committed to the maintenance of his child with the respondent and his offer to pay Kshs. 3000/= per month still stands.

At an earlier stage, on **14th June, 2010** the applicant obtained interim orders before **Mr. Justice Azangalala**, pending the hearing and determination of this application, the main orders in that regard being that there be a stay of execution of the orders of the Children's Court made on **29th March, 2010**.

The respondent thereafter swore a replying affidavit: she deposes that the sum of Kshs. 3,000/= per month which the applicant is offering "is not enough to cater for the needs of the child"; that the appellant has not been providing for the maintenance of his daughter; that the items she took from the matrimonial home when she left, were only for the maintenance of the child; that she has not denied the appellant access to the child, but it is the appellant who has not shown any interest in seeing the child since he has even changed his phone number and he cannot be reached.

When this matter came up for *inter partes* hearing on **28th June, 2010** the applicant was represented by counsel, **Ms. Mwanaisha S. Shariff** while the respondent was in person.

Learned counsel asked that the orders made by the Children's Court be stayed, pending the hearing and determination of an appeal filed on **19th April, 2010**. Counsel submitted that the respondent, who had filed a suit in the Children's Court on **9th April, 2010** had, after obtaining the *ex parte* orders which are the subject of a pending appeal, lost interest in her case and is now using those orders against the applicant. The applicant was seeking custody for his daughter with the respondent; and he was asking for costs.

Counsel submitted that if the Children's Court's interim orders are not stayed, then the appeal pending against those orders will be rendered nugatory.

Counsel submitted that whereas the applicant had offered to pay Kshs. 3000/= per month for the child's maintenance, the respondent has refused the offer and is not collecting the money from his advocate.

The respondent's answer did not limit itself to the points set out in the application and its related papers; she spoke in a less-focussed manner, and on evidentiary matters not belonging in these interlocutory proceedings. Of the offer by the applicant to pay a monthly sum of Kshs. 3000/= for the child's maintenance, the respondent said that sum was too low to satisfy the intended purpose, particularly as she was unemployed.

This Court has taken note of the applicant's memorandum of appeal, which was filed on **19th April, 2010**; and certainly, the appeal raises quite significant issues in relation to the Children's Court's orders of **29th March, 2010**: those issues are clearly *triable*, and this means there exists a well-based appeal. And that being the case, this Court's obligation is to hold in place a *status quo* which would not render any outcome of the appeal nugatory. Some of the orders which were made by the Children's Court, were far-reaching enough to be capable of rendering the pending appeal inconsequential, and, therefore, certain prayers by the applicant should be allowed pending the hearing and determination of the appeal.

I will make orders as follows:

- (1) *There shall be a stay of the proceedings in respect of Tononoka Children's Court Case No. 78 of 2010, Sheila Anyango v. Abdalla Bori pending the hearing and determination of the applicant's appeal.***
- (2) *The applicant is hereby granted unconditional access to the child, A.A.***
- (3) *Pending the hearing and determination of the suit in Civil Suit No. 78 of 2010, Sheila Anyango v. Abdalla Bori and/or of the applicant's appeal, the applicant shall make and the respondent shall receive an allowance of Kshs. Three Thousand (Kshs. 3,000/=) each month, in respect of the maintenance of the child, A.A.***
- (4) *Parties shall bear their respective costs for the instant application.***

DATED and DELIVERED at

MOMBASA this 25th day of August, 2010.

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J. B. OJWANG

JUDGE