



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 35 of 2009

JOHN NGUGI KABOGO APPLICANT

VERSUS

JANE WAITHERA RESPONDENT

RULING

This matter revolves around a seven years old minor, whom I shall refer to as 'RW' whose mother is **JANE WAITHERA**, who also happens to be the respondent herein.

Following a dispute as to who between the respondent and **JOHN NGUGI KABOGO**, who claims to be the father, the Hon. Ole Tanchu, a Senior Resident Magistrate, in the Children's court at Nairobi initially granted the interim custody of the minor pending the hearing and determination of the suit, to Kabogo on 2/4/2009 in cause no. 230 of 2009 had been initiated by Kabogo.

However on 8/5/2009, in cause no. 207 of 2009, which Jane had filed, Hon. Mbugua initially withdrew the minor from Kabogo's custody and granted it to Jane, and she also ordered both parties to avail samples for the purposes of having the paternity of the minor determined by way of DNA test. She varied the first limb of her decision later that day, when she instead ordered that the minor be placed in Nairobi Children's Home.

Being aggrieved by that decision, Kabogo has now preferred an appeal. He has simultaneously moved this court by way of an application in which he originally sought two orders, namely, to stay the decision to place the minor in the aforesaid Children's Home, which order I initially granted him as an interim measure pending the hearing of this application, as I felt that it was in the best interest of the minor that he continues living with Kabogo, who had had his custody prior thereto.

The second prayer, which is the one before me now is for an order to stay the proceedings in the subordinate court pending the hearing and determination of his appeal. He also prays for costs.

He relies on several grounds, but mainly that not only is he the minor's father, but that he had been granted the custody of the minor initially in cause number 230 of 2009, but that Mbugua E.W. (SRM), reviewed the said orders, to his detriment, in causes which had not even been consolidated.

The respondent opposes the application, and it is her ground that the applicant is not the minor's father. It is also her ground that he forcefully took him away from school without her knowledge, which prompted her to file a report at the Police Station; after which he was advised by the police officers to return the minor to her, which he failed to do.

I must point out that at this stage all that should concern me is the best interest of the minor, for it is his

interest that is paramount. I dare not delve into the other issues for fear of prejudicing the appeal.

It is clear from the proceedings in the subordinate court that Kabogo had taken custody of the minor on Saturday the 21st of March 2009. It would be very safe to assume that it having been on a Saturday, he was not attending classes and that he was handed over by his mother. The fact that she released the minor would be further supported by the fact that when she reported the fact that Kabogo had taken him away, the police did not press any charges against him, but they just advised him to take him back to the respondent.

It is also evident that four days after releasing him to the applicant, she instituted the aforementioned cause in the Children's court against this applicant, seeking an order for the maintenance of the minor.

I must say that there is more than meets the eye in this whole saga.

In my humble opinion, having handed him over to the applicant, it is best that my earlier order is confirmed and that he remains with the applicant until the appeal is heard and determined for to order otherwise would be tantamount to causing the minor unnecessary anguish and trauma.

I also grant the applicant an order to stay the proceedings in the aforementioned causes in the subordinate courts, until the appeal filed herein is heard and determined.

Costs be in the cause.

Dated and delivered at Nairobi this 30th day of June 2009.

JEANNE GACHECHE

Judge

Delivered in the presence of: