



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 143 of 2009

A.F.F..... PLAINTIFF/RESPONDENT

VERSUS

H.S.A..... DEFENDANT/APPELLANT

RULING

Before court is the Notice of Motion dated 3rd August 2009 by which the Applicant seeks inter alia the following orders:-

“3. That this honourable court be pleased to order a stay of the orders above-mentioned pending the hearing and determination of the appeal preferred in the High Court of Kenya at Mombasa”

The orders which are the subject matter of this application were those issued regarding the custody and education of the minor child F. M issued on 29th July 2009 in CCT No. 145 of 2009. In that matter the learned Senior Resident Magistrate sitting at Tononoka Children’s Court gave orders as follows:-

- “1. Legal and actual custody of the child F.M vests upon the father.*
- 2. Defendant to have unlimited access to the child*
- 3. The Defendant to have custody during weekends and during school holidays*
- 4. The child be enrolled at St K.H School, Voi”*

Being aggrieved by these orders the Applicant who is the subject child’s mother filed this application seeking a stay of those orders pending the hearing and determination of the appeal she has filed in the

High Court of Mombasa.

The present application came up for hearing on 23rd September 2009 where Ms. Kayata Advocate appeared for the Applicant whilst Mr. Mwakisha appeared for the Respondent. By consent the parties agreed to rely on written submissions to be filed in court. This was duly done by 22nd October 2009 and the matter was set down for ruling.

I have had the advantage of perusing the written submissions of both counsel and I have carefully considered the same. I do note that the Applicant has indeed filed an appeal against the learned trial magistrate as evidenced by the “*Memorandum of Appeal*” dated 3rd August 2009 and marked “HSA’2”. This appeal is yet to be heard and far be it from me to pre-empt the said appeal. Be that as it may I have perused the grounds raised for the proposed appeal and I am satisfied that they raise pertinent and triable issues. From the submissions on record I do note that the subject child has at all times been in the custody of the Applicant (mother). Any orders made by this or indeed any other court must as a priority give consideration to the best interests of the child. The Respondent (father) to whom the trial court accorded full custody works and resides in Saudi Arabia and has had limited interaction with the child. The orders given by the lower court envisage the removal of the child from a day school to a boarding school. This is a major transition in the life of any child and in my view should only be undertaken if the best interests of the child so dictate. If these decisions are not stayed pending the appeal then the appeal itself may be rendered nugatory, not to mention that the effect the decree of the lower court may be to subject the child to irreparable harm. I am convinced that the decree from the lower court raises contentious issues. In order to prevent any unnecessary trauma being visited upon the subject child I am of the view that the status quo ought to be maintained in the meantime. For the reasons above I do allow this present application in terms of prayer (3). For the avoidance of doubt I do hereby order a stay of the orders of the learned Senior Resident Magistrate with regard to the child F.M issued in CCT No. 145 of 2009 pending the hearing and determination of the appeal filed thereto. I further order that each party will meet their own costs for this application.

Dated and Delivered at Mombasa this 19th day of November 2009.

M. ODERO

JUDGE

Read in open court in the presence of:-

Ms. Kayata for Applicant

No appearance for Respondent

M. ODERO

JUDGE

19/11/2009