



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Civil Appeal 97 of 2007

T M O APPELLANT/APPLICANT

V E R S U S

S A O RESPONDENT

RULING

The application before me was brought pursuant to sections 86 and 87 of the Children Act. It seeks the following 6 substantive reliefs:

“(b) THAT the court may be pleased to revoke the order of sole custody issued on 10th June 2008 by the Principal Magistrate, Mrs. Ong’ingo, sitting in a lower court at Kisumu in Divorce Cause No. 3 of 2006.

(c) THAT the court do issue an order directing the

Respondent herein to release to the Applicant the said minors, R J O and R P K to be returned to school in Kakamega.

(d) THAT the court bestow custody of the minors back

to the Applicant pending the final determination of the Divorce Cause.

(e) THAT the court do issue an order stopping further

orders which causes the removal of the said minors

from school where the Applicant has enrolled them

till final determination of the matter.

(f) THAT the Respondent stops going to the offices of

the employer of the Applicant and also to stop

writing letters to the said offices pending final

determination of the case.

(g) THAT the Divorce Cause be dealt with first as the

children have not been in any situation of

deprivation.”

The Applicant, **T M O**, is the husband to the Respondent, **S A O**.

It is common ground that the Respondent herein has instituted Divorce Cause No. 3 of 2006, at Kisumu. That case is still pending. However, as a result of some orders which the Divorce Court issued on 10th June 2008, the Applicant felt aggrieved and he therefore lodged an appeal to the High Court.

It is the applicant's contention that the two children, R J O and R P Ki, who were the products of the marital relationship between the parties herein, had been hounded out of school on 18th June 2008.

The applicant alleged that the respondent had severally cheated the court, and that the orders for the removal of the children were made on the basis of such lies.

In his view, the school from which the children were removed, was undoubtedly better than the school they had been in previously. Therefore, the applicant says that the level of schooling had been improved for the children. He attributes the upgrading of the children's schooling to his sole efforts.

In contrast, the respondent is painted as a person whose conduct was wanting. As a demonstration of the alleged poor conduct, the applicant pointed at the fact that the respondent had been sacked from her jobs at Marie Stoppes Clinics and St. Joseph's Hospital, Nyabondo.

According to the Applicant, the children had not been given anything by their mother, to assist them with their schoolwork. She is said not to have paid fees or to have bought any of the items needed for use in school.

It is for that reason that the Applicant criticized the Respondent for having brought the children to court, when they were dressed in "**fancy clothes**", as opposed to school uniform.

The Applicant also pointed out the children's educational standards were above those of St. Anthony's Little Angels Education Centre, Homa Bay, where the children were attending school, during the hearing of the application before me.

He went further to criticize the school for not having letter-heads. He also said that the school could not have good standards because it was the headmaster who admitted students to the school, and also because the said headmaster had mis-spelt the name of one of the children.

It was the Applicant's case that the Respondent had previously not been involved in taking the children to school. If anything, as far as the Applicant was concerned, the Respondent only went to visit the children at school, because she was compelled to do so, by an order issued by the court.

Finally, the Applicant said that he had not ever been served with any court orders which the Respondent had persuaded the court to issue. The Applicant said that he came to court simply because of his good faith.

In answer to the application, Mr. Charles Onyango, learned advocate for the Respondent submitted that the jurisdiction to determine the issue of custody rests with the Children's court.

As the application before me was within the appeal, the Respondent submitted that it would be improper for this court to determine the issue of custody.

If, as the Applicant suggests in his Petition of Appeal, the trial court erred in arriving at the decision made on 10th June 2008, the Respondent contends that the Applicant can only seek to reverse the said order by way of appeal.

In principle, the Respondent is right to have submitted that it is upon the determination of the substantive appeal that the appellate court could either uphold or reverse the decision which is the subject matter of the appeal.

However, it is equally true that, ordinarily, there is no bar against any person who is a party to a pending appeal, moving the court for interim reliefs, in appropriate circumstances.

In order to persuade the appellate court to issue interim orders, pending the hearing and determination of the substantive appeal, the applicant would have to satisfy the court that unless the orders sought were granted, the appeal would be rendered nugatory. Secondly, the applicant would have to satisfy the court that his appeal was not just arguable, but that it had a better than even chance of success.

Obviously, if the appeal had very little chance of success it would be unlikely that the court would intervene, by issuing

interim orders which would put on hold or reverse the orders being challenged through the appeal.

In this case, the applicant has made a host of allegations against the Respondent. However, he has not gone on to demonstrate how the alleged shortcomings of the Respondent would eventually persuade the appellate court to reverse the orders made on 10th June 2008.

To my mind, the issues raised by the Applicant may be relevant in persuading the trial court in determining the Divorce Cause, and possibly also in determining the issue as to the custody of the children.

I say so because if I were to give consideration to those issues, and determine the same, I would have placed the trial court in an awkward position, yet I would have done so without having had the benefit of receiving all the relevant evidence on the issue.

Such evidence is best left to be adduced before the trial court, so that the evidence may also be tested, through cross-examination.

The Respondent submitted that the application herein ought to be struck out because the same had been brought in an appeal within another appeal. In order to understand that contention it is important to first take note of the fact that this is **KAKAMEGA CIVIL APPEAL NO. 97 OF 2007.** That implies that the appeal was instituted in the year 2007. Therefore, it cannot have been instituted with a view to challenging a decision made in June 2008.

A perusal of the record herein reveals that the Petition of Appeal was filed on 30th July 2007.

On the face of the said petition of appeal, it is expressly stated that it was an appeal arising from the decision made on **10th July, 2007.**

The court records show that on 19th June 2008, the Appellant herein filed yet another Petition of Appeal, within Civil Appeal No. 97 of 2007. On that particular petition of appeal, the Appellant indicated that he was challenging the decision made by the trial court on **10th June 2008.**

If this court were to accept, as valid, the two petitions of appeal, that would imply that one appeal was being utilized to challenge two different decisions, which were delivered eleven months apart.

At this stage, I wish to only state that I have never before come across such a scenario. But, in my understanding, it does appear that the petition of Appeal dated 19th June 2008 was wrongly instituted within an already existing appeal.

That being the position, as I understand it, I doubt that the interlocutory application founded upon the said petition of appeal will have any legal efficacy.

In any event, it is common ground that on 20th July 2007, the parties herein executed an Agreement on the welfare of their children. The said Agreement was executed before Ms Josephine Oguye, the Provincial Children's Officer, Western Province.

It was a term of the Agreement that the Respondent would collect the children from the offices of the Provincial Children's Officer's office at Kakamega, on 31st July 2007. The Respondent was supposed to stay with the children in Homa Bay, until 10th August 2007, when she was to return them to the Applicant, in time for the children to return to Hill School, Kakamega.

It is common ground that notwithstanding that Agreement, the Applicant failed to take the children to the agreed place, on the agreed date.

First, given the fact that the Applicant appears to have willingly consented to have the children stay with their mother, it does appear somewhat odd that the Applicant should now be vilifying and demonizing the Respondent.

Secondly, it is noted that the terms of the Agreement dated 31st July 2007 were actually a restatement of the orders made by the trial court on 10th July 2007.

It would therefore follow that when the Applicant failed to honour the terms of the Agreement, he was simultaneously acting in breach of the court orders.

In the circumstances, on a prima facie basis, I find that it is improbable that the trial court will be faulted for taking the children away from the Applicant, after he had failed to comply with the orders which had been issued earlier.

My decision is on a prima facie basis for two reasons. First because this is an interlocutory application, within the appeal. Secondly, the proceedings before the trial court have not been made available to me, so as to enable me make a more informed decision.

One thing that is very clear, in the Applicant's mind, is that the issue before me is not about him, but about the children. In the same vein, the issue cannot therefore be about the Respondent.

The trial court is accused of making an order which, if given effect, would constitute punishment of the children. The Applicant said so because the distance between Kakamega and Homa Bay was said to be about 150 kilometres. Therefore, if the children had to travel to and from Homa Bay, over a weekend, that would mean that they would have traveled some 300 kilometres, in two days.

Of course, the distance to be covered is significant. However, that may have been a good basis for seeking an order for review of the orders made on 10th July 2007. However, it cannot have been a good ground for disregarding or disobeying that said order.

Finally, the Applicant explained that on 31st July 2007, the High Court at Kisumu did order that the case should proceed at Kakamega.

Having perused the record I found that on 31st July 2007, Hon. M. G. Mugo, J. ordered as follows:-

“This is not a matter capable of being heard ex parte. The application should be served for hearing inter-partes and if what the applicant seeks is to have orders set aside then a suitable application ought to be filed and served.”

If effect, there is nothing on record to show that the learned Judge directed that the case be heard at Kakamega.

And if there had been an order so specifying, the Applicant should have brought it to the attention of this court, so that I could verify the scope of the said orders. The need to verify the scope of the orders arises from the fact that even after the alleged order, permitting the case to be heard at Kakamega, the trial court still issued orders at Kisumu, as recently as 10th June 2008.

The fact that that order was made in Kisumu implies that the case was still being dealt with at Kisumu.

Given that fact, I have serious misgivings about the Applicant's choice of Kakamega as the High Court station at which he filed the appeal. I say so because there is a High Court station at Kisumu. And, it is to that High Court that appeals emanating from the magistrate's courts falling under the jurisdiction of that High Court, should be filed, heard and determined.

Therefore, I believe that when the appeals herein do come up for hearing, assuming that they will be admitted to hearing at Kakamega, the Applicant herein would first have to satisfy the High Court at Kakamega, that it is the proper forum before which the appeal should be canvassed.

For all the foregoing reasons, I find no merit in the application dated 19th June 2008. The application is therefore dismissed with costs.

Dated, Signed and Delivered at Kakamega, this 16th day of September, 2008.

FRED A. OCHIENG

J U D G E