



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 16 OF 2004

HABIB AHMED SALIM.....APPELLANT

=V E R S U S=

SUMAIYA HABIB AHMED SALIM

(suing thro' her mother & next friend)

ALYE ALI ABDI SHEIKH.....RESPONDENT

R U L I N G

Application before the court is dated 19/2/04. It is brought under the provisions of Section 3A Civil Procedure Act, Order XLI rule 4(1) Civil Procedure Code. Order L rule 1 Civil Procedure Code the main order sought is to stay hearing of entire proceedings in Malindi Children Court No.113 of 2003 before Subordinate Court pending hearing of an appeal filed by the Applicant herein against an Order made in that case by Hon. Resident Magistrate at Malindi.

The grounds upon which the application is based are written on the application and are that the Applicant stands to suffer irreparably unless execution of the said orders are stayed and the intended appeal will be rendered nugatory. That it would be difficult to obey the court order made by subordinate court against the Applicant in that the orders are supposed to be implemented outside the territorial boundaries of Kenya. That there is no jurisdiction and there is bias on the part of Children's Court.

The Affidavit in support shows that the Applicant has filed Civil Appeal No.16 of 2004 in this High Court.

The Appellant is the father of a child Sumaiya Habib Ahmed Salim on whose behalf the proceedings were instituted by her mother as "next friend" . On 14/11/2003 in the Children's Court order was made:-

"That the Defendant hereby is ordered to produce the Plaintiff child before court on 19/12/03."

The Applicant swears that at the time the order was made he was outside the country and it is only when he returned on 16/1/04 when he saw the order and proceedings referred to. He says it is also the time he saw proceedings in Kadhi's Court No.132 of 2003 in which orders were made against him in his absence. It is in the Chief Kadhi's Court that divorce was granted and the custody of the child granted to the mother.

I have perused the record of Chief Kadhi's proceedings. It is stated that the Applicant resides in Saudi Arabia and works there and since 2001 when the wife left the family in Saudi Arabia the Applicant and the child have never returned to Kenya. Until his return the proceedings and orders were never served upon him.

It is to be noted that the address of the Applicant in Kadhi's records was given as P.O. Box 60516, Riyadh, Kingdom of Saudi Arabia, 11555.

I am urged to grant orders so that the appeal filed against the order is not rendered nugatory.

I have perused the grounds of intended appeal. I have also perused the whole record of proceedings before both lower courts and it is my view that the proceedings were fatally flawed. There was no material laid before the court as to the best interests of the child. Both courts ignored the cardinal principal that in considering any case in which matters of children are the issue the paramount consideration is the welfare of the child.

Furthermore, the proceedings were never served upon the Applicant who was admittedly out of jurisdiction of Kenya courts. The procedure of service process out of the country as laid out was completely ignored. That means the orders were made before hearing the other party. The principles of rules of natural justice were not followed.

Considering the above I am satisfied that the Applicant has a reasonable appeal which would be rendered nugatory by further proceedings in the lower court. I also come to the conclusion that in the circumstances of this case to deny the order sought would cause the substantial loss to the Applicant by subjecting him to orders made in contravention of rules of procedure.

Upon perusing the material before me I do not see any damage that can be suffered by the child pending these proceedings. She has been residing with the father since November 2001. There are no complaints made on account of her welfare.

I therefore allow the application and grant orders prayed for.

Each party to bear its own costs of this application.

Dated at Mombasa this 15th day of March, 2004.

JOYCE KHAMINWA

J U D G E

Ruling read on 15/3/04 in presence of:-

Mr. Kinyanji

Mr. Machuka holding brief for Mr. Mouko.

JOYCE KHAMINWA

J U D G E