

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. 9 OF 2004**

D M M.....APPELLANT

VERSUS

F N N.....RESPONDENT

R U L I N G

The applicant D M M brings this notice of motion pursuant to order XLI R(1) Civil Procedure Rule and Section 3A Civil Procedure Act. The application is dated 10.2.2004. The prayer is for stay of execution of the ruling and order made on 9.2.2004 in PMCC 27/03 till the appeal is heard and determined. The grounds upon which the application is premised are found on the face of the application. One of the grounds is that the lower court failed to stay its own orders; that the applicant is dissatisfied with the ruling of the lower court and has filed an appeal which has high chances of success. The application is also supported by the affidavit of the applicant dated 10.2.2004 and a supplementary dated 18.3.2004. The Respondent filed grounds of opposition dated 25.2.2004 in which the Respondent contends that the applicant failed to disclose the true status of the application filed before the lower court, that the respondent will also suffer substantial loss if order of stay is granted; that the applicant does not have physical custody of the children and no hardship will be occasioned and no substantial loss will be suffered. In her affidavit in opposition, the respondent claims that she had already found schools for the children once the order was made giving her custody. She has already filed and served her answer and cross petition (FMM4) and that the children are being subjected to suffering by denying them from being with the natural mother.

The applicant petitioned the court seeking orders of dissolution of he marriage and custody of the issues of the marriage. The respondent in reply also prayed for the custody of the children and the lower court granted custody to the mother, the respondent. This is the order that the applicant seeks to say.

The children the subject of custody are allegedly aged about 8yrs and 5 years. They are three little girls. The applicant has been in custody of the children since 14.1.2003. When the respondent left after she was allegedly beaten by the applicant.

Under order 41 rule 4 (2) (a) an application for stay has to be brought without reasonable delay. There is no doubt the present application was brought on 13.2.2004 soon after the ruling of the lower court. The respondent has submitted that at the time the applicant moved to this court for stay, there was a similar application pending in the lower court which was only withdrawn on 23.2.2002 after grounds and replying affidavit were filed. The applicant did not deny this. It is true that under order 41 one has an option whether to seek stay from the lower court which made the order appealed from or proceed to the High court for such order. Since the applicants had filed an application for stay in the lower court they should have prosecuted it and only if it was refused would they come to the High court on appeal. They came to this court seeking interim orders which the court granted while they knew very well that another application subsisted in the lower court. They should not have sought similar orders from the two courts at the same time. They had not withdrawn that application on 9.2.2004 when they came to court. The applicants non disclosure of the status of the application that was pending before the lower court amounts to abuse of the court process.

In exercising the court's discretion in an application for stay the applicant has to show that he has an arguable appeal. As earlier noted the children, subject of custody are children of tender age of between 8 and 5 years. They are girls. When considering the issue of custody the court takes into account the welfare of the children first and the respondent cited authorities in which the courts have held that the mother will have automatic right to custody unless there are exceptional circumstances which would take

away this right. Respondents counsel cited the cases of Wambua versus Okumu 1970 EA 578 and Karana versus Karanu 1975 EA 18 where the courts ruled that in absence of exceptional circumstances, young children should be with their mothers. Even in the case of Githunguri M. versus Githunguri 1989 KLR 598, the court made similar observations as above. In the present case the applicant contends that the respondent abandoned her children when she left the matrimonial home and that she has been to court for other matters and never bothered to find out where her children were. The Respondent alleges that the applicant has assaulted her prior to her departure from the matrimonial home. Later on the applicant assaulted her or they fought as per annexures annexed to Respondents affidavit i.e. court proceedings in SRMCC 132/03 where the applicant had been charged with assaulting the respondent and both the applicant and respondent were charged with affray. There was also a constitutional reference to the High court regarding the same matter. It is apparent from these annexures and evidence available that there was grave animosity between the parties and it may explain the year that the respondent kept away and with the filing of the petition the respondent then seized the opportunity to make the application for custody. So far the applicant has not shown any exceptional circumstances that should preclude the respondent from having custody of her children.

In the ruling of the lower court, the magistrate found that the children were living with the sister of the applicant in Athi River. The applicant claims to have moved to Athi River so that his sister can assist with the children. The fact that the applicant has to get assistance from his sister to look after the children is an indicator that he is not in a position to take care of the children alone. The mother is offering to have her children and the children can be in no better place then with the mother, not with an aunt or anybody else.

Will the applicant suffer substantial loss if the prayer for stay is not granted? This being a case for custody of children the court should make its priority the welfare of the children. The respondent cited the case of consolidated Marie Contractors versus Benedetta Manipiffa CA 93/1989 where the court held that stay would not be granted where the respondents have an interest in the subject matter because that would afflict more hardship then it would avoid. In the present case, the court should consider whether an order of stay would cause more hardship to the children or not. Of course the applicant has not shown what loss he would suffer if an order of stay was not granted and I doubt that any would be suffered the subject matter being children.

The petition is still pending before court. The issue of custody is not completely determined as it will be revisited at the full hearing of the petition.

As regards the order for maintenance, I believe that is also an interim order since the petition is not heard. If affidavit of means were not filed the applicant should have filed his own affidavit of means and moved the court to make an order based on that. That again will be revisited at the full hearing.

In conclusion I find that the prayer for stay is not merited and the application is therefore dismissed with costs to respondent.

Dated, read and delivered at Machakos this 5th day of May, 2004.

R. WENDOH

JUDGE