



REPUBLIC OF KENYA



KENYA LAW
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DMN v CWN (Civil Appeal 126 of 2020) [2023] KEHC 2105 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2105 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 126 OF 2020
MM KASANGO, J
MARCH 17, 2023

BETWEEN

DMN APPELLANT

AND

CWN RESPONDENT

*(Being an appeal from an order of the Senior Principal Magistrate's Court at Ruiru
(J.A. Agonda, SRM) in Children Case No. 26 of 2020 dated 19th October, 2020)*

JUDGMENT

1. The child, the subject of this appeal was born on February 2, 2020
2. This is an appeal against the order made by the trial court on October 19, 2020. The trial court ordered on that day the father to return the custody of the child to the mother. That order was interim pending the hearing and determination of the interlocutory applications filed by both the mother and father of the child.
3. The suit before the trial court was filed by the father. In the plaint, the father pleaded that he cohabited with the respondent and during their period of cohabitation they were blessed with the child, the subject of this action. The father further pleaded that the mother absconded her parental responsibility which included failure to breast feed the child and to afford the child emotional and physical care. In his claim the father set out events that occurred on September 21, 2020 which led to him leaving their home together with the child. The father's final prayers in his claim were an order amongst others vesting in him legal and actual custody of the child.
4. The father simultaneously with the plaint filed an interlocutory application dated October 6, 2020 seeking custody, care and control of the minor child pending the determination of the suit.
5. The mother filed an interlocutory application dated October 12, 2020 seeking similar order as the father by his interlocutory application.



6. Those two applications had not been heard and determined when this appeal was filed. The appeal is centred on the interim order made that the custody of the child be in the mother.
7. In my consideration of this appeal is against that interim order of the trial court, and I need to tread very carefully to ensure I do not usurp the trial court's discretion when it does hear the interlocutory applications and the substantive suit. It is for that reason that I will not consider in substance in this judgment the very detailed submissions of the parties. The father indeed was correct to submit that the trial court made the impugned order on a date fixed for mention and whereas that would be material in any other case when it is a case involving a child the welfare of the child would be the dominant consideration not whether or not the matter was slated for mention or not. In this regard, the respondent/mother was correct in her submissions that when the matter involves a child, the court is guided by the principle of the best interest of the child.
8. I will consequently to what is stated above only make general remarks in this judgment in attempting to ensure the trial court retains its independence in determining the matter before it.
9. The courts in handling children's matters ought to be guided by the constitutional provisions under Article 53(2) that: -

“A child's best interests are of paramount importance in every matter concerning the child.”
10. The *Children Act* 2022 echoes that imperative in the *Constitution*. The welfare of the child must be the first and paramount consideration and accordingly, the rights of the natural parents and foster parents must give way to that overriding consideration.
11. When this appeal was filed this Court on October 22, 2020 this Court granted an order for the maintenance of status quo in respect to the custody of the child, that is the child's custody has from that date to today's date remained vested in the father. In my view, in attempting not to determine the issues before the trial court which have not been entertained by that court, I order that the status quo ordered on that date October 22, 2020 be maintained in the best interest of the child pending hearing and determination of the interlocutory applications before the trial court.
12. In conclusion therefore, I order that in the interim, pending determination of the interlocutory applications in Ruiru SPM Court Children Case No. 26 of 2016, the custody care and control of the child be vested in the appellant. To that extent this appeal succeeds. There shall be no order as to costs.
13. The subordinate court file is hereby remitted back to Ruiru SPM Court for hearing and determination by another Magistrate other than J.A. Agonda, SRM.

JUDGMENT DATED and DELIVERED at KIAMBU this 17th day of MARCH, 2023.

MARY KASANGO

JUDGE

In the presence of:-

Coram:

Court Assistant : Mourice/Julie

Instructed by Mundia Mwangi & Co. Advocates for appellant:- Mr. Mundia

Instructed by Bundi Grace & Co. Advocates for the Respondent:- N/A

COURT



JUDGMENT delivered virtually.

MARY KASANGO

JUDGE

