REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL CASE NO. E053 OF 2020

DN...APPLICANT

VERSUS

GG.......................................RESPONDENT

(Being an Appeal from the Ruling dated 12th October, 2020 delivered by Hon. G.M Gitonga (SRM) in Children's Case No. 352 of 2020 Milimani Law Courts between G.G. (suing as mother and next of Friend) –v- D.N.)

RULING

1. The applicant DN and the respondent GG are the biological parents of children MJN. and ENN They lived together between May 2012 and November 2019. MJN is now about 9 and ENN is about 5. They are girls. In a plaint dated 22nd April 2020 filed before the Children Court at Milimani, the respondent sought judgment against the applicant for her to be given actual custody, care and control of the children and the applicant be ordered to provide for their fees, transport and other school related expenses.

2. The plaint was filed along with a chamber summons in which she sought interim custody, care and control of the children pending the hearing and determination of the suit. She sought an order granting structured access to the minors by the applicant; an order restraining the applicant from removing the children from the jurisdiction of the court; and for the applicant to provide fees and related expenses for the children.

3. The applicant opposed the application. The respondent had alleged that the applicant had caused her and the children physical and mental abuse which he denied, and stated that he was a loving, devoted and present father to the children with whom he had a strong bond. He asked for joint legal custody of the children, shared actual custody of the children and a 50:50 sharing of the children's school fees and related expenses. He further asked that the monthly expenses of the children be equally shared by the parties.

4. The court heard the application and found that, because these were female children of tender years, their interim physical custody be given to their mother (the respondent). It found that there were no exceptional circumstances that had been shown to make the court depart from the principle that the custody of the children of such tender age be given to their mother. The parties were given joint legal custody. The applicant was given access and visitation rights.

5. On maintenance and education of the children, the court noted that the parties at that stage had not given evidence as to their financial means. It also considered what each side had stated, and considered the rights of the children under **section 23(2)(a)** of the **Children Act** and **Article 53(1)(e)** of the Constitution that provide that there be equal responsibility between the mother and father of the children. It made interim orders that the applicant pays school fees and related expenses while the respondent takes care of housing, food, clothing and medical expenses.

6. The applicant was aggrieved by these orders and filed an appeal dated 5th November 2020. The Memorandum of Appeal had various grounds. One of them was that the court had misdirected itself both in law and fact in granting sole physical custody of the children to the respondent and symbolic rights of infrequent visitation by solely or substantially relying on, or being influenced by, "the tender years" doctrine and "gender rule" as stated by the Court of Appeal in **Githunguri –v- Githunguri [1979]eKLR** without realising that both doctrines were no longer good or controlling law in Kenya or a binding precedent in view of the **Children Act 2001** and **sections 3, 30** and **82** of the old Constitution. His case was that the doctrines were irrational, repugnant, inconsistent and discretionary given the best interests of the child provisions in the **Children Act**. Further that, the doctrines went against the provisions in the **Act** that provides for equal responsibility by the father and mother over a child. The other ground was that the court had wrongly been influenced by the "tender years" doctrine to give custody to the respondent which was inconsistent with **Articles 2(5), 27, 45(3)** and **53(2)** of the Constitution and **sections 4, 5, 6, 23, 24, 76,** and **81** of the **Act**. The third ground was that the court, in granting custody to the respondent, failed to undertake a

mandatory, non-biased, gender-neutral and non-discriminatory statutory analysis of all relevant factors in **sections 76** and **83** of the **Act** which were designed to weigh each parent's parental capabilities with the evolving physical, psychological and emotional needs of the children, with a view to establishing viable options available to it. The result was that he was highly prejudiced in his right of access to the children in the context of maintaining and building a father-daughter relationship and bond.

7. The applicant complained that the court fundamentally misdirected itself and arrived at a wrong decision on the question of maintenance and educational expenses of the children by altering the *status quo ante* without considering the financial status of applicant and his diminished earning capacity due to his sudden loss of employment, the effect of covid-19 and his medical record.

8. These were just some of the grounds.

9. The present application by the applicant was dated 4th April 2021 and asked that, pending the hearing and determination of the appeal, this court should:-

(a) declare as presumptively void and suspend the legal validity of the tender year's doctrine and the gender rule doctrine;

(b) stay the proceedings in the Children Court over the children:

(c) stay the orders in the ruling of 10th October 2020, and substitute them with the orders that:-

(i) there should be shared joint legal and physical custody of the children, with shared parental responsibility:

(ii) both parents to have reasonable access to the minors; and

(iii) both parents shall have a shared financial duty to maintain the children and shall meet their educational needs on a 50:50% basis.

There were other prayers in the application.

10. The respondent filed a replying affidavit sworn on 17th May 2021 to oppose the application. Her case was that the application did not meet the conditions under **Order 42 rule 6** of the **Civil Procedure Rules** and failed to consider the overriding consideration in **Article 53** of the Constitution. She stated that the application had been brought quite late, 6 months after the ruling. Secondly, it had been brought to run away from his responsibility to pay school fees; that it was a reaction to his failure to pay fees which had been followed by notice to show cause in the trial court. Therefore, she stated, the application had not been brought in good faith by a person with clean hands. Thirdly, the issue of substantial loss had not been demonstrated and no security had been offered. Lastly, the stay of execution of the orders in the impugned ruling would adversely affect the best interests of the children.

11. The applicant and the respondent's counsel each filed written submissions which I have considered.

12. Under **section 73** of the **Children Act**, it is the Children Court that has the original jurisdiction to hear and determine all civil disputes relating to children. Such disputes include custody, care and control and maintenance; and all matters relating to their rights to shelter education, health, food and nutrition and so on. The court has power to give both interim and final orders on any of these issues. It can also review any order it has given where there are changed circumstances, or where a party has sought such review. Any of the orders given are subject to appeal to the High Court.

13. The substantive dispute between the applicant and the respondent over the children has not been heard by the Children Court. The appeal herein arose from the interim decision by the court following application by the respondent. Secondly, the appeal has not been heard and determined. The grounds in the memorandum of appeal will only be considered when the appeal comes up for hearing. The grounds have been included in the application for stay, which application also seeks substantive prayers relating to the custody, maintenance, education and health of the children. First, this court should allow the Children Court to finally decide the dispute between the applicant and the respondent before it can intervene on appeal. This court cannot usurp the powers of the Children Court. For instance, when the Children Court was giving the orders over the education, food and health of the children it acknowledged that those were interim orders given without the benefit of the financial status of the parties. Secondly, it is now trite that an order which results in granting of a substantive relief claimed in the suit or appeal ought not be granted at an interlocutory stage when the suit or appeal has not been heard **(Olive Mwihaki Mugenda & Another –v- Okiya Omtata Okoita & 4 Others [2016]eKLR).**

14. Consequently, the substantive prayers contained in the application cannot be dealt with at this stage. The court will only deal with the question whether or not to stay the orders in the ruling that was delivered by the Children Court on 12th October 2020 pending the hearing and determination of the appeal.

15. An application for the stay of execution pending the hearing and determination of the appeal is usually brought under **order 42 rule 6(1)** of the **Civil Procedure Rules** which states as follows:-

> **"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the**

court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

16. An order of stay of execution pending the hearing and determination of appeal is a discretionary order granted upon the applicant satisfying the court that substantial loss will be occasioned if stay is not granted; that the application has been made without unreasonable delay; and the applicant has furnished security for the due performance of the decree or order that may ultimately be binding on him.

17. It is also trite that under **Article 53(2)** of the Constitution and **section 4(2)** of the **Children Act,** the court in dealing with this application has to consider the best interests of the two children. Lastly, in dealing with the application the court should balance the constitutional rights of the applicant to appeal the decision of the Children Court that has aggrieved him and the right of the respondent who has orders which she is entitled to execute.

18. The applicant did not offer any security. The application was brought after 6 months, which the respondent contented that there was inordinate delay in bringing it. The respondent stated that the application was prompted by her notice to show cause brought against the applicant before the trial court following his failure to pay the ordered school fees for the children. The fact the he failed to pay fees and that the applicant filed notice to show cause were not challenged. It is material to point out that the orders sought are discretionary in nature and should ideally not be issued to a party who has failed to obey the order he is complaining about when he has no stay.

19. On the question of delay, the applicant acknowledged the fact and explained that time was spent on him trying to retrieve the respondent’s payslips to show that she was a person of means able to take care of the children. When the ruling in question was delivered the court had not asked for the affidavits of means from the parties. The ruling contained interim orders pending the court obtaining the evidence of means. Therefore, such means (payslips) were not necessary or required to file the application for stay. It follows that the explanation for the delay is not acceptable. The court accepts the respondent’s evidence that the application was a reaction to her application for the applicant to show cause. If that is the case, I find that the delay in bringing the application for stay was unreasonably long.

20. As to whether the applicant will suffer substantial loss if stay is not granted, he talked about his lack of financial means, having been affected by Covid-19 and having been sick. However, in his prayers he still proposes that the upkeep and education of the children be met by the parties at 50:50%. That is not a proposal of a person without financial means. Infact his concern was that because parental responsibility is a shared one, each party should meet half the bargain. I therefore do not find that there has been a demonstration of substantial loss.

21. In any case, the parties were each given a responsibility to bear while waiting for the hearing and determination of the appeal. The children have statutory and constitutional rights to shelter, food, education and good health. If stay is granted, the rights of the children will be compromised. That is not in their best interests.

22. In conclusion, I do not find merit in the application which I dismiss with costs.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY 2022

A.O. MUCHELULE

JUDGE