REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. E006 OF 2021

NR....................................APPEALLANT

VERSUS

TJS..................................RESPONDENT

RULING

1. The Applicant, NR by her application dated 12.2.21 seeks the following orders that:

> ***1. Spent.***
>
> ***2. The be pleased to find that this appeal was filed within time and is properly on record.***
>
> ***3. Spent.***
>
> ***4. Spent.***
>
> ***5. The orders issued by the court on 9th November 2015 awarding equal joint custody of the child to the Applicant and the Respondent until further orders of the court be and are hereby reviewed and vacated till this Appeal is heard and determined.***
>
> ***6. The legal and actual custody of the child be and is hereby awarded to the Applicant/Applicant pending the hearing and determination of this Appeal and Children's Case No. 1166 of 2015 (Mililani Children's Court NR vs TJS).***
>
> ***7. The Respondent be granted supervised access to the child limited to time during the day in a public place and in the presence of the Applicant or in the presence of an adult appointed and or approved by the Applicant pending the hearing and determination of Children's Case No. 1166 of 2015 (Milimani Children's Court CNR vs TJS).***
>
> ***8. The costs of this application be in the cause.***

2. The Applicant had filed an application dated 8.4.2020 in Nairobi Children's Court Case No. 1166 of 2015 seeking similar orders to those sought herein. The application was by the Court's ruling of 26.11.2020, dismissed for lack of evidence. Being dissatisfied with the decision of the lower Court, the Applicant filed the Appeal herein on 18.1.21. She thereafter filed the Application herein, which is supported by her affidavits sworn on 12.2.21 and 5.5.21.

3. The background of this matter is that the parties whose marriage has since been dissolved, have a 13 year old daughter who is the subject of the proceedings herein. The Children's Court did on 9.11.15 grant the Respondent access to the child on weekends and half the school holidays pending the hearing and determination of the suit therein.

4. It is the Applicant's case that in early 2020, she became aware that the Respondent had a history of sexually molesting children. She stated that the information came for the Respondent's uncle and his wife, whose daughter had been molested by the Respondent when she was 7 years old. Being apprehensive of the safety of the child herein while in the Respondent's custody, the Applicant moved to Court on 8.4.2020, seeking review of the orders of 9.11.15 of the lower Court. The Applicant's application was however dismissed on 26.11.2020 for lack of evidence. The Applicant faulted the Court for failing to appreciate the gravity of the Respondent's admission that he had sexually molested children when he was 17 years old, a time of self-discovery and that he requested the child to massage him and observed her in the shower to supervise her bathing herself. According to the Applicant, the lower Court in dismissing her application did not act in the best interests of the child. The Applicant urged the Court to grant the orders sought with a view to protecting the child.

5. In his replying affidavit sworn on 19.4.21, the Respondent opposed the Application arguing that the same and the appeal are malicious and vindictive. He accused the Applicant of always to exclude him from accessing the child out of malice and hatred for him even after the Court ordered that he has access. He stated that in the 11 years that the parties were married prior to their divorce on 2.1.17, there was never any evidence or allegations of the nature contained in the application dated 8.4.2020. The Court rightly dismissed the application as it was based on hearsay. He further stated that he and the child have a normal and healthy father/daughter relationship and accused the Applicant of is insecure and threatened by the bond between the child and the Respondent. According to the Respondent, the Application is driven by bitterness and malice as a result of the divorce and the fat that the Respondent is now in a stable long term relationship. He urged that the Application be dismissed with costs.

6. Parties filed their written submissions which I have duly considered.

7. I will first deal with the submission by the Respondent that the Appeal herein was filed without leave of the Court and is therefore not properly before the Court. The question as to whether leave to file appeal has been obtained or not goes to the jurisdiction of this Court to entertain the present Application and indeed the Appeal herein. Section 75 of the Civil Procedure Act relied on by the Respondent provides for orders from which appeal shall lie as of right as follows:

> ***(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—***
>
> ***(a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;***
>
> ***(b) an order on an award stated in the form of a special case;***
>
> ***(c) an order modifying or correcting an award;***
>
> ***(d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;***
>
> ***(e) an order filing or refusing to file an award in an arbitration without the intervention of the court;***
>
> ***(f) an order under section 64;***
>
> ***(g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;***
>
> ***(h) any order made under rules from which an appeal is expressly allowed by rules.***

8. Order 43 Rule 1 of the Civil Procedure Rules specifies the orders and rules from which an appeal shall lie as of right under the provisions of section 75(1)(h) of the Act.

9. The orders in the impugned ruling in respect of which the Applicant has filed the appeal herein are not amongst those from which an appeal lies as of right. Accordingly, leave was required to file the appeal.

10. Section 75 of the Act provides that leave to appeal may be sought from the Court which gave the order or from the Court appealed to. Order 43 Rule 3 stipulates that a party wishing to appeal from an order other than one from which an appeal lies of right, may orally seek leave of the Court making the order at the time the order is made, or within fourteen days from the date of such order.

11. There is no evidence that the Applicant sought leave to appeal in the lower Court, whether orally or formally and clearly she did not seek leave to appeal in this Court. It is trite law that a right of appeal is a creation of statute and the exercise of that right is governed by statutory parameters which must be adhered to, failing which any appeal filed without leave is rendered incompetent. In the case of Niazsons (K) Limted v China Road & Bridge Corporation (Kenya) [2000] eKLR, the Court of Appeal had this to say about the fate of an appeal filed without leave of the Court:

> ***The background to this application is that the applicant's earlier appeal was struck out as it was incompetent since no leave had been sought. In its ruling of 31st March, 2000 this Court stated inter alia:-***
>
> ***"In our judgment there is no right of appeal. The Applicant however does have a right of appeal to this Court with leave of the superior court or failing that of this Court. It is not in dispute that no such leave has been sought or obtained with the result that we have no jurisdiction to make any order in the matter.***
>
> ***......... it is trite that there can be no estoppel against the statute. Nor can jurisdiction be conferred by estoppel consent acquiescence or default!***
>
> ***For these reasons we are constrained to hold that this appeal is incompetent for want of leave. Accordingly, it is struck out but with no order as to costs"***

12. The Court of Appeal found the appeal before it incompetent as no leave had been sought or obtained. Similarly, this Court makes a finding that the appeal herein is incompetent for want of leave. In seeking to exercise of her right to appeal, the Applicant failed to comply with the stipulated statutory requirements. This failure on the Applicant’s part has stripped this Court of the jurisdiction to entertain the

Application. It follows therefore that the Application dated 12.2.21, which is anchored in an incompetent appeal is also incompetent. Nothing comes from nothing and nothing ever could. This was the tenure of the opinion the Privy Council Lord delivered by Denning in the case of Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, at page 1172 (1):

> ***If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.***

13. Duly guided, I find that what therefore is before me is an incompetent application that is incurably bad. The same is hereby struck out. This being a matter concerning a child, there shall be no order as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 11TH DAY OF JUNE, 2021

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M. THANDE

JUDGE

In the presence of: -

…………………………………………………………… for the Applicant

………………………………………………………… for the Respondent

……………………………………………………...……. Court Assistant