



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MARSABIT
CIVIL APPLICATION NO.E002 OF 2021
JNN.....APPLICANT
VERSUS
JIL..... RESPONDENT

(Being an appeal from the ruling of Hon. Ombija Collins – Resident Magistrate in Marsabit Law courts delivered on 12th May 2021)

RULING

1. The Applicant has filed a Notice of Motion dated the 26th May 2021 seeking for orders that:

1. Spent

2. Spent

3. Spent

4. The court be pleased to grant a stay of execution of orders dated 12th May 2021 in Marsabit Children Case No. E005 of 2021 pending full hearing and determination of the main suit hearing.

5. The court be pleased to vary the order of custody in favour of the Applicant herein and further order that the Applicant herein be allowed access until final orders of this case.

6. Any other orders that meets the ends of justice.

2. The application is premised on the grounds stated on the face of the application and supported by the affidavit of the applicant. The gist of the application is that on the 12th May 2021 the trial magistrate in Marsabit Children case No.E005 of 2021 between the applicant and the respondent herein made some interim orders that the applicant pays Ksh20,000/= per month to the respondent, being money for upkeep of their 4 minor children, pending the hearing and determination of the respondent's notice of motion dated 21st April 2021 where the respondent is seeking monthly support for the children in the said sum pending the hearing and determination of the main suit. There were further orders for the children to remain in the custody of the respondent.

3. The court record indicates that the orders were made ex parte. The applicant however deposes in her supporting affidavit that she was present in court on the material day and the court indicated that the matter was to proceed virtually at noon. That her advocate **Mr. Biwott Korir** was waiting for the court link to be sent to him so that he could join virtually but that that was never done only for her to learn later on that the matter had proceeded.

4. The applicant further deposes that the subject children are being catered for adequately save for the issue of custody which the Respondent has denied her access even to the minor ones. She asked the court to vary the order of custody in her favour and give her access to the children until the determination of the case.

5. The application was opposed by the Respondent vide his replying affidavit sworn on the 17th June 2021 in which he deposes that the application dated the 21st April 2021 was served on the applicant but that his advocate **Mr. Halake** was never served with any response. That on the 12th May 2021 he and his advocate appeared before the trial magistrate in chambers but neither the applicant nor her counsel were present. The court then proceeded with the matter. It was further deposed that the links for all courts have been provided in the Marsabit Advocates Whatsapp forum where the applicant's counsel on record is a member.

6. I have considered the grounds in support of the application and the grounds in opposition thereto. There is no dispute that the applicant and her counsel were aware of the hearing date. The applicant alleges that she was actually present in court on the date of the *inter partes* hearing and that her counsel was to proceed on-line. The respondent on the other hand alleges that the applicant was not present in court on that day. The court record indicates that the applicant was not present.

7. In face of two opposing versions by the applicant and the respondent on whether or not the applicant was present in court on the material day, it may not be possible to tell as to who between them is telling the truth. The respondent indicated that the matter was dealt with in chambers. It is possible that the applicant was within the court precincts when the matter was called out in chambers. That would explain why the court record indicates that she was absent. None of the advocates appearing for the parties have sworn affidavits to support either of the two versions stated by their clients. The court may not know whether Mr. Biwott had intimated to the other side that he would proceed on-line

8. It is a cardinal principle of the rule of natural justice that a person should not be condemned unheard. Though the trial court was right to proceed with the matter in the absence of the applicant and his counsel who admit that they were aware of the hearing date, the court has discretion to set aside orders given *ex parte* on such term that are fair and just so as to do justice to the parties. It has been held at many a times that such discretion should be exercised judiciously and not whimsically or capriciously- see the Court of Appeal decision in **Pithon Waweru Maina v Thuka Mugiria** (1983)eKLR on the principles of setting aside *ex parte* judgment.

9. The trial court had not heard the side of the applicant when it ordered her to pay monthly upkeep of Ksh 20,000/=. There are minor children involved in the matter whose interests are paramount whenever an order of custody is being made. It is only fair that the applicant is given an opportunity to give her side of her story before the orders are made.

10. In the foregoing, I do hereby set aside the *ex parte* orders of the trial court made on the 12th May 2021 and order that the application thereof be heard afresh in the presence of the parties and/ or their legal representatives.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT MARSABIT THIS 8TH DAY OF JULY 2021.

JESSE N. NJAGI

JUDGE

In the presence of:

..... for Applicant

..... for Respondent

Parties:

Applicant

Respondent

Court Assistant:

30 days R/A.