



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CHILDREN FAMILY DIVISION APPEAL NO. E006 OF 2021

LDTAPPELLANT/ APPLICANT

-VERSUS-

PAO.....RESPONDENT

RULING

BACKGROUND

1. This a ruling on application dated 23rd August 2021 filed by the applicant/appellant seeking the following orders: -

- a. That the honorable court be pleased to issue an order staying execution and/ or proceedings emanating from the ruling of the Senior Resident Magistrate court at Nakuru in Children's Cause No. E130 of 2021, delivered on 11th August 2021.
- b. That the honorable court be pleased to order the minors namely EST, ANT, and SLT do attend the already paid school ([Particulars withheld] Academy) pending the hearing and determination of the application.
- c. That the honourable be pleased to issue an order placing the minors in the actual custody of the appellant to enable them to attend school pending hearing and determination of this application.
- d. That the honorable court be pleased to issue an order transferring Nakuru Children Case No. E130 of 2021 to a Court outside Nakuru County for hearing and determination.
- e. That the Court do issue an ordered staying execution and/or any proceedings emanating from the ruling of the senior Resident Magistrate's Court delivered on the 11th day of august 2021, in Nakuru Children Cause No. E130 of 2021 pending the hearing and determination of this appeal.

2. This appeal was filed following ruling delivered on 11th August 2021, by Hon B.B. Limo in Nakuru Children Case No. E130 of 2021 where he ordered as follows: -

- a. That the minors be returned to the previous school until parents shall agree with leave of the Court for any proposed or further transfer of the minors to another school.
- b. The party who has been paying school fees in the previous school to continue paying fees.
- c. And the actual custody was granted to the mother pending the hearing of the suit. The defendant to be granted structured access to the minors.
- d. The Court to nominate the in-charge Bondeni Children Officer to assist parties in reaching a settlement on the structured access.

3. Grounds on the face of the application are that the appellant was condemned unheard on merit due to favoritism as a result of the huge influence the respondent command's as a children's officer; that the Court issued final custody orders in the interim and denied the applicant access orders without considering the application. Further, he has incurred huge expenses in transferring the minors to the new school which was necessitated by their poor performance and the increase in school fees. That he was unfairly condemned to pay school fees twice.

4. The application is supported by affidavit sworn by the applicant.

5. In response the respondent filed a replying affidavit dated 1st September 2021. She averred that the application is frivolous and an abuse of the Court process in that the appellant made a unilateral decision to transfer the minors to [Particulars withheld] Academy without her consent and the transfer of the minors from [Particulars withheld] is against their best interest and an infringement of their academic transition and performance, as the curriculum in the two schools are different and the minors will be greatly jeopardized.

6. She further averred that her position as a children officer in Nakuru did not in any way affect the independent discretion of the Court as the parties had signed a deed of settlement where she was to have the custody of the minors while the appellant was to have access.

APPLICANT'S SUBMISSIONS

7. The applicant submitted that the purpose of stay of execution was to preserve the subject matter and not render the appeal nugatory; that the respondent and the minors will not be prejudiced if the stay orders are granted.

8. The applicant submitted that the minors were taken out of his custody during the pendency of the children's case and if stay orders are not granted, the minors will suffer a substantial loss, and they will be denied affordable quality education, the right to parental care and protection which includes equal parental responsibilities and failure to provide security should not deny him grant of a stay.

9. The applicant further submitted that the applicant has been with the minors since they were born, and thus denying him custody due to their tender age is unjust; that **Article 53 of the Constitution** envisages equal parental care and protection and thus **Section 2 of the Children's Act** is unconstitutional to the extent of **article 53**. He submitted that the minors need to be under the care and guidance of both parents and the respondent is not best suited to be granted custody of the minors as she has in the past threatened to kill them.

10. The applicant submitted that the respondent works within the jurisdiction of Nakuru as a probation officer and there is need to transfer this file to another Court of competent jurisdiction. He urged this Court to allow this application.

RESPONDENT'S SUBMISSIONS

11. The respondent submitted that in determining stay of execution in children matters, the best interest of the child is paramount as provided by **Section 53(2) and Section 4 of the Children Act**.

12. There was no delay since the application was brought on 23rd August 2021 only 12 days from the ruling. Further, the issue of security does not apply as the issue relates to minors.

13. The respondent further submitted that granting stay of execution orders is detrimental to the minors who stand to suffer irreparable loss as it will involve their removal from the current school [Particulars withheld] and the applicant has failed to demonstrate to the Court the loss the minors will suffer if the stay orders are granted as he has only stated that he will suffer financial loss. Further the minors being of tender age the custody is vested on the mother who has been in the care, control, and custody.

14. The respondent submitted that the applicant failed to attend the meeting at the children's office which was geared at preparing structured access to the minors and he cannot blame the respondent.

15. The respondent further submitted that the applicant has not adduced sufficient grounds to warrant the transfer of the suit from Nakuru to any other Court outside the jurisdiction of Nakuru since no evidence has been adduced to show that the respondent has held sway over any of the judicial officers operating within Nakuru County neither has evidence been tabled on the issue of a personal relationship with the magistrate; that the transfer is not in the best interest of the minors and the respondent who resides in Nakuru as it will occasion financial hardships and delay in prosecuting the matter. She urged this Court to dismiss the application with costs to the respondent.

ANALYSIS AND DETERMINATION

16. I have considered averments and the submissions by the parties herein and wish to consider where prerequisites for grant of stay orders have been demonstrated by the applicant. The principles for granting stay of execution in children matters was well settled in the case of **Bhutt v. Bhutt Mombasa HCCC NO. 8 of 2014 (O.S.) where the Court stated as follows: -**

“In determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution Order 42 Rule 6 of the Civil Procedure Rules, must be complemented by overriding consideration of the best interest of the child in accordance with Article 53 (2) of the Constitution.”

17. In exercising discretion in respect to stay of execution, **Order 42 Rule 6(2)** provide that the Court should be satisfied that:-

- a. The applicant will suffer substantial loss if a stay is not granted;**
- b. The application for stay has been brought without undue delay; and**
- c. The applicant has provided security for the due performance of the decree.**

18. While considering stay of execution in respect to children matters, beside the above, the Court has to consider the best interest of the child. The applicant is expected to demonstrate that the minors will suffer if a stay is not granted. I however note that the applicant averred that he will suffer great prejudice as he will be condemned to pay school fees twice if an order of stay is not granted.

19. Averments herein indicate that the children were transferred to [Particulars withheld] Academy School which offers a different curriculum from the current school [Particulars withheld] and students in [Particulars withheld] Academy are already halfway in the curriculum for the first term.

20. *The best interest of a child is superior to rights and wishes of parents; they should incorporate the welfare of the child in its widest sense.* The respondent submitted that she has the actual custody of the minors and the minors are attending [Particulars withheld] and if the orders of stay are granted, it will not be in the best interest of the minors since it will mean the custody reverts to the applicant and the minors attend [Particulars withheld] Academy thereby interfering with education of the children.

21. On allegation that the respondent is a threat to the children as she had previously threatened them, no evidence was availed to support the allegation. It is not disputed that the children herein are of tender age and are better placed being in the custody of their mother unless there is proof that their stay with their mother will negatively affect the children.

22. The respondent averred in her replying affidavit that she was in the actual custody of the minor and when she granted the applicant access to the minors, he proceeded to transfer them from their school without consulting her. The applicant has not shown that the respondent is not suitable to have the care, control, and custody of the minors.

23. From the foregoing, I find that the applicant has failed to demonstrate the substantial loss the minors will suffer if a stay order is not granted. This Court is enjoined to look at the best interest of the minors.

24. FINAL ORDERS

- 1. I decline to stay orders made by the trial magistrate 11th August 2021.**
- 2. Structured access to the children by the applicant to be agreed between counsels herein.**
- 3. Costs shall be in the Cause.**

RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 14TH DAY OF OCTOBER, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Mr. Omenya for Appellant

Mrs. Mukira for Respondent