



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO. E004 OF 2021.**

**LO.....APPLICANT**

**VERSUS**

**SKM.....RESPONDENT**

**RULING.**

1. The applicant and the respondent are husband and wife. The respondent filed a suit at the children's court seeking custody of the minor children. The children's court granted custody to the respondent with visitations rights to the applicant.
2. The applicant aggrieved by the said decision sought to set aside the orders but the trial court disallowed the application by its orders dated **20<sup>th</sup> April 2021**. The applicant dissatisfied with the same has filed this appeal and contemporaneously filed the **Notice of Motion dated 24<sup>th</sup> June 2021** seeking orders that there be stay of the said orders and or alternatively the same be suspended or set aside pending the determination of the application and thereafter the appeal.
3. The application is supported by the affidavit of the applicant dated even date and the grounds thereof.
4. The gist of the application is that the trial court did not consider the best interest of the minor who according to the records is aged about four years old or thereabouts. That the said child had been abandoned at night under the hands of some strangers by the respondent. That he shall suffer prejudice should this application not allowed and the appeal shall be rendered nugatory.
5. The respondent vide her replying affidavit dated 4<sup>th</sup> August 2021 has opposed the application arguing that she was best suited as found by the court to take care of the child who was 4 years old now. That there was nothing the applicant would suffer as the substantive issue regarding the minor's custody was yet to be decided by the court.
6. The court has also seen a supplementary affidavit by the applicant which contains most of the pleadings at the lower court including some attachments in respect to some judicial review application before this court.
7. The court has perused the entire application, the order of the trial court and the relevant annexures provided by the parties.
8. What is clear is that the parties herein are husband and wife. The minor is their child. They seem to have some marital challenges which has spilled over to the custody of the children. According to the findings of the trial court the applicant had taken the minor under his custody and this necessitated the respondent to make the application.
9. In its orders dated 25<sup>th</sup> February 2021 the court directed that in view of the age of the minor, she be handed over to the respondent with the directive that the children's officer to facilitate the visitation rights of the applicant. This was an interim directions pending the determination of the suit.
10. Respectfully this court does not find anything at this level to fault the trial courts directives. If the child is about 4 years old, the law governing children and other plethora of legal authorities unless otherwise demonstrated favours the custody to be by the mother. From the gleaning of the issues herein, although they don't appear very clear, it has not been demonstrated how the respondent is unable to take care of the minor.
11. The trial court perhaps at the substantive stage shall be told how the respondent is not fit to have custody of the minor. At any rate there is no evidence that the applicant has been denied access to the child. Neither has the applicant demonstrated to this court why the respondent is not fit to have custody of the minor.
12. **This court for now does not find the application meritorious. The orders of the trial court are not too onerous for the parties. The application is disallowed with no orders as to costs.**

**DATED SIGNED AND DELIVERED AT NAKURU THIS 15TH DAY OF DECEMBER 2021.**

**H K CHEMITEI**

**JUDGE**