



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISC. APPLICATION NO. 158 OF 2019

IN THE MATTER OF B M AND BMK (MINORS)

RKM.....APPLICANT

-VERSUS-

DMM.....RESPONDENT

RULING

1. The Application coming for consideration in this Ruling is dated 19.9.2019 seeking the following orders:

- (i) **THAT this Application be certified urgent and be heard ex-parte in the first instance, Service be dispensed with. (Spent)**
- (ii) **THAT the Honourable Court be pleased to set aside and/or vary the orders dated on 27th July, 2017, 31st October, 2016, 30th July, 2018 and undated orders issued on the 11th May, 2018 in Milimani Children's Case No. 269/2016.**
- (iii) **THAT the Honourable Court do stay the hearing and further proceedings in this case pending the hearing and determination of this Application.**
- (iv) **THAT the Notice to show Cause application dated the 18th February, 2019 and the Ruling thereof be stayed pending the hearing and determination of this application**
- (v) **THAT fresh orders be issued upon the results of the second (2) DNA test**
- (vi) **THAT costs of this Application be in the cause.**

2. The Application is supported by the Affidavit of RKM(Suing as next friend of the Applicant) of even date to which the Respondent filed a Replying Affidavit dated 11.11.2019.

3. The Parties filed written submissions in the Application dated 19.9.2019 which I have duly considered.

4. I find that this case involves Maintenance in respect to two minors and the Application dated 19.9.2019 is in respect of interlocutory orders made by the trial Court. In matters involving young children, the welfare of the children is of paramount importance and every institution and individual is duty bound to ensure that the best interest of the child or children is safeguarded. **Section 4(2)** of the Children Act 2011, which provides:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

6. **Section 83** of Children Act stipulates the principles to be applied in making a custody order as follows:

“83.(1)In determining whether or not a custody order should be made in favour of the applicant, the court shall have regard to—

(a) the conduct and wishes of the parent or guardian of the child;

(b) the ascertainable wishes of the relatives of the child;

(c) the ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;

(d) The ascertainable wishes of the child;

(e) Whether the child has suffered any harm or is likely to suffer any harm if the order is not made;

(f) The customs of the community to which the child belongs;

(g) The religious persuasion of the child;

(h) Whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;

(i) The circumstances of any sibling of the child concerned, and of any other children of the home, if any;

(j) The best interest of the child.”

7. I find that it is not in the best interest of the minors to suspend the order of maintenance or to stay the Proceedings in the Children's Court.

8. I also find that the Applicant has not established the grounds for review or setting aside and/or varying of the orders dated on 27th July, 2017, 31st October, 2016, 30th July, 2018 by the Children's Court.

9. The Applicant has not shown that there is an error apparent on the face of the record or that there is discovery of new evidence to warrant this Court to review or set aside the orders of the Children's Court.

10. The Maintenance in respect of the child cannot be stayed as it would be detrimental to the child. The said orders were made on interim basis and the Applicant should await the final determination of the case.

I find that the Application dated 19.9.2019 lacks in merit and the same is dismissed with costs to the Respondent.

I direct that the hearing of the Children's case proceeds expeditiously to full determination as any further delay is detrimental to the welfare of the child.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 7TH

DAY OF FEBRUARY, 2020

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.