



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 89 OF 2019

MK.....APPELLANT

- VS-

RNG.....RESPONDENT

RULING

1. The Application coming for consideration in this ruling is dated 15.8.2019 filed under Certificate of Urgency seeking the following orders:

(i) THAT this Court do stay the orders granted by Hon. M. A. Otindo (SRM) which granted custody to the Applicant without giving the Respondent an opportunity to be heard.

(ii) THAT this Court do stay all proceedings relating to Children Case No. 1010 of 2017 which is similar to the ongoing Case No. 19-2-16442-5 in Kings County, Washington State, U.S.A which relates to similar issues, same children and same parties where all parties have engaged Attorneys and where the children in issue reside.

2. The Applicant swore an affidavit in support of the application in which she stated that she suffered domestic violence from the Respondent and that she travelled to the USA with the full consent of the Respondent.

3. She further stated that it is the Respondent who filed Children's Case No. 19-2-16442-5 in Kings County, Washington State in the USA.

4. The Applicant stated that the Court gave the Respondent custody in Children's No. 1010 of 2017 which order she is now seeking to stay.

5. The Respondent filed a Replying Affidavit dated 5.9.2019 in which he stated that the Applicant is in contempt of orders issued in Children's Case No. 1010 of 2017 and that any attempt to stay the Proceedings in Kenya would only delay the Respondent's attempt to re-unite with his sons.

6. The Parties filed submissions in the Application dated 15.8.2019 which I have duly considered and I find that it is not in dispute that the parties are married. The paternity of the three minors the subject of this case is not disputed. The said minors are as follows:

(i) JN born on 25.10.2008

(ii) FN born on 14.10.2012

(iii) FN born on 11.2.2014

7. The issues for determination in the Application dated 15.8.2019 are as follows:

(i) Whether this Court should stay the Orders issued in Children's Case No. 1010 of 2017 directing the Applicant to give custody of the minors to the Respondent.

(ii) Whether the Children's case is sub judice.

(iii) Who pays the Costs of the Application?

8. The Applicant is seeking stay of orders issued in Children's Case No. 1010 of 2017 on the basis that a similar case was instituted by the

Respondent in Kings County being Case No. 19-2-16442-5 in Washington USA.

9. The Respondent stated in his Replying Affidavit and submissions that the Court in Kings County sought to establish the position in Kenya as regards to the Custody of the minors.

10. I find that the proceedings in Children's case No. 1010 of 2017 cannot be stayed as it is not in the best interest of the minors to stay the said proceedings.

11. In **AOO & 6 others v Attorney General & another [2017]** eKLR that:

'Children need special protection because they are among the most vulnerable members of society. They are dependent on others - their parents and families, or the state when these fail - for care and protection. As a result, the drafters of our Constitution made children's rights a priority - and stated that the best interests of a child are the overriding concern when it comes to any matter affecting a child. Thus, the inclusion in the Bill of Rights of a provision on the rights of the child was an important development for Kenyan children...'

12. The children's case No. 1010 of 2017 is not sub-judice as the court in King's County, Washington USA does not exercise concurrent Jurisdiction with Courts in Kenya.

13. The sub-judice rule is described in **Section 6** of the Civil Procedure Act as follows:-

"No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other Court having jurisdiction in Kenya to grant the relief claimed".

14. In **Republic v Registrar of Societies - Kenya & 2 Othesr Ex-Parte Moses Kirima & 2 Others [2017]** eKLR the court held that:

"...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed..."

15. As directed earlier by this Court, the Applicant should await final determination of the Children's case before preferring an appeal. The orders issued by the Court are for the best Interest of the minors as it is the responsibility of the family and the Government to ensure survival and development of the minors as stated in Section 4 of the Children Act as follows:

"S.4(1) Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.

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

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to -

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as it necessary for the welfare of the child and in the public interest."

16. The Orders issued by Hon. Otindo (SRM) in Children's Case No. 1010 of 2017 were issued in interim basis and the same should be complied with.

17. I accordingly dismiss the application dated 15.8.2019 and vacate the interim orders issued by this Court.

18. On the issue as to whether the Applicant is in contempt of the orders of the Court, I find that the Respondent is at liberty to cite the applicant for contempt.

19. On the issue of costs, I direct that each party bears its own costs of the Application dated 15.8.2017 since this is a family dispute.

DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 14TH DAY OF FEBRUARY, 2020

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.