



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
CIVIL APPEAL NO. 114 OF 2019

MMW.....APPELLANT

VERSUS

EWM.....RESPONDENT

(Being an application for stay of execution pending appeal from the ruling of the Children's Court at Nairobi by the learned Hon. F. Terer delivered on the 27th September 2019 in Children's Case No. 746 of 2019)

RULING

1. The applicant MMW and the respondent EWM are father and mother, respectively, of a minor child EW who was born on 9th November 2013. The applicant lives in the United States of America and the respondent lives in Kenya. They are not married. The child was from birth living with the respondent. The applicant would travel to Kenya every end of year and in the process visit the child.
2. When he visited in November 2018 the respondent informed him that the child had been diagnosed with abnormally large tonsils and swollen adenoids which were causing slurred speech and obstructive sleep. A tonsillectomy procedure had been advised. The respondent was convinced by the applicant that the child could get better medical attention in the United States of America. The child would be taken to the United States of America for treatment and be returned soon thereafter to continue with school. The respondent could not travel along because she had another child who was in class eight. She signed a consent and on 16th January 2019 the applicant left with the child. The procedure was to be between 22nd January 2019 and 25th January 2019, and the child was to be back by 22nd February 2019.
3. The respondent filed a plaint in the Children Court at Nairobi on 25th May 2019 to complain that the applicant had not returned the child as agreed, or at all, and that had since blocked all communication with her. She had tried in vain to contact the doctor who was to perform the procedure on the child and whose contact the applicant had provided. She had reported the matter to the Ministry of Foreign Affairs and to the United States of America Embassy before coming to court. She prayed for an order that the applicant be ordered to produce the child; and order for custody care and control; and other orders. With the cause was filed a chamber summons for production and return of the child pending the hearing and determination of the matter.
4. On 3rd July 2019 the matter came before the Resident Magistrate. He allowed the applicant to file and serve a defence to enable the hearing of the main suit on 28th August 2019, instead of hearing the application. The court directed that the minor be produced on the hearing date. On 28th August 2019 the applicant's advocate asked for adjournment. She was not ready. The child has not been produced. The matter was adjourned to 30th August 2019. On 29th August 2019 the applicant applied to set aside and/or vary the order to produce the child; the court to dispense with the order for production; and for him to be granted temporary custody of the child. His case was that the child was still receiving follow-up treatment; the procedure had been quite costly to him; he could not afford to bring the child who had to be accompanied; the child was, in the meantime, happy and flourishing with the applicant's other two sons, the applicant's mother and other relatives; and that the child had since been admitted to school. The respondent opposed the application. The court heard the application and on 27th September 2019 declined to allow it.
5. On 8th October 2019 the applicant, feeling aggrieved, appealed against the dismissal of his application. On 16th October 2019 he filed the present application seeking the stay of execution of the ruling pending the hearing and determination of the appeal. He stated that the child is

receiving requisite medical care as well as maintenance in the United States of America, and that his return would not be in his best interests and would subject him to irreparable harm. He stated that there were outstanding procedures the child has to undergo.

6. The respondent opposed the application. Her case was that the applicant was in breach of the orders to return the child. She stated that it had not been shown that the continued treatment and procedure on the child could not be undertaken in Kenya. According to her, she had allowed limited time for the child to be treated while with the applicant, otherwise the child was now among strangers. The applicant had abused her consent by detaining the child in the United States of America and by cutting all communication, she stated. She has always been willing to pay for the child's return and for any adult accompanying him.

7. There is no dispute that the application for stay was brought timeously. However, there was no security that was offered for the performance of any decree that may ultimately be binding.

8. In dealing with the question whether or not the applicant will suffer substantial loss if the application is not granted, I consider that under **section 4(2)** of the **Children Act (Cap. 141)** and **Article 53(2)** of the Constitution this matter is about the minor child whose best interests are of paramount importance. The matter is not about the interests of the applicant. All things being equal, the best interests of this minor child can only be served if it is staying with the mother (**K.M.M. –v- J.I.L [2016]eKLR**). This is given the child's age.

9. Lastly, it has not been demonstrated that any further treatment of the child cannot be undertaken in this country, or that the respondent cannot afford it.

10. Let me not mention that the trial court did not issue a positive order capable of execution. It dismissed the application to set aside or vary the order for the applicant to return the child. In that sense, the application for stay was misconceived (**Venture Capital and Credit Ltd –v- Consolidated Bank of Kenya Ltd, Civil Application No. 349 of 2003**).

11. I find that the application for stay lacks merits and is dismissed with costs.

DATED and SIGNED at NAIROBI this 6TH FEBRUARY 2020

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 13TH FEBRUARY 2020

A.N. ONGERI

JUDGE