



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**CIVIL APPEAL NO. 1 OF 2019**

**EOM.....APPLICANT**

**VERSUS**

**SWK.....RESPONDENT**

**RULING**

1. Before me is an application dated 3.1.19 (the Application), in which EOM, the Applicant seeks the following orders:

**1. Spent.**

**2. This Honourable Court be pleased to order a stay of stay of execution of judgement delivered on 31<sup>st</sup> December, 2018 in CHILDREN'S CASE NO. 421 OF 2018, SWK VS EOM and revert to the status ante allowing the parties children to continue schooling in their present school at [particulars withheld] Primary School (Boarding) and all the parties three children to continue to be in the custody of Appellant pending the hearing and determination of this application.**

**3. This Honourable Court be pleased to order a stay of execution of judgement delivered on 31<sup>st</sup> December, 2018 in CHILDREN'S CASE NO. 421 OF 2018, SWK VS E OM and revert to the status ante allowing the children to continue schooling in their present school at [particulars withheld] Primary School and all the parties three children to continue to be in the custody of Appellant pending the hearing and determination of the appeal filed herein.**

**4. The costs of this application be provided for.**

2. In the judgment complained about, the learned Magistrate inter alia granted joint legal custody of the 3 children the subject matter of these proceedings to the Applicant and the Respondent SWK, with the Respondent having actual physical custody. The children were to be transferred from [particulars withheld], Boarding School to [particulars withheld] Day School (particulars withheld School). It is this order that the Applicant seeks to have stayed so that *status quo ante* be maintained to the effect that the children continue schooling in St. Peters and remain in the custody of the Applicant.

3. The Applicant claims that he had paid school fees for 2 of the children at [particulars withheld] even before suit was filed and had bought school uniform. Custody was granted to the Respondent despite the Respondent having mistreated the children and threatened to kill them. The last born child suffers from sickle cell anaemia. Prior to the judgment the Respondent had left the children alone in the night to go for overnight prayers resulting in the last born being hospitalized. The Respondent had previously withdrawn the children from [particulars withheld] School and abandoned them with relatives. Custody was handed over to the Applicant by the children officer and the children taken to boarding school for their own safety. The Applicant contends that unless the orders are granted the children will suffer as there is no money left for school fees and school uniform in the new school and to cater for food for the children. The Applicant contends that he has an arguable appeal with overwhelming chances of success.

4. The Respondent though served did not file a response and further failed to attend Court on the date of hearing. The Application is thus not opposed.

5. The Application before me concerns children. Section 4(2) of the Children Act enjoins this Court to ensure, while considering the Application, that the best interests of the children are the primary consideration. Section 4(3) of the Act further requires this Court when exercising any powers conferred by the Act to treat the interests of the children herein as the first and paramount consideration. This paramountcy principle is further underpinned by the Constitution of Kenya, 2010 which provides at Article 53(2) that a child's best interests are of paramount importance in every matter concerning the child. Duly cautioned, my determination in this matter shall be founded on the best interests of the children herein.

6. In any application for stay of execution pending appeal, an applicant appeals to the discretion of the Court. In seeking stay of execution of the orders of the lower Court which affect the children herein, the Applicant must satisfy this Court that the orders sought are in the best interests of the children. This is the overriding principle.

7. The Applicant seeks *status quo ante* to be restored so that he is granted custody of the children and that the 2 older children remain in [particulars withheld] which is a boarding school. It was submitted that because he had paid school fees in that school which is not refundable there is no money for the children to be enrolled in the Royal School as ordered by the Court which is a day school. The Applicant took the older children to boarding school for their own safety as the Respondent had threatened to kill them. It was further submitted that [particulars withheld] performs very well academically. The Court was urged to allow the children to remain in [particulars withheld] for this school term even if it was of the view that the children ought not to be in boarding school.

8. The record shows that the 3 children are aged 8, 4 and 2 years respectively. They are therefore children of tender years within the meaning of Section 2 of the Children Act. The children in boarding school are aged 8 years and 4 years. The Court shudders at the thought of such young children especially the 4 year old being in boarding school, yet both parents are alive! While the Court has no reason to doubt the performance of the said school, the welfare and needs of the children encompass much more than just an education in a well performing school. No boarding school, no matter how good, can take the place of a mother or father of a child of tender years. Between these and delicate children being in boarding school and being with their mother, the balance tilts in favour of them being with their mother. Sending these young children off to boarding school all the way in Mumias which is close to 900 kilometers away from Mombasa where both parents reside, cannot in my view be in their best interests.

9. The suitability of the Respondent as a fit parent to have custody of the children has been questioned. The lower Court however granted actual physical custody to the Respondent. This Court has not had the benefit of seeing the lower Court record to make a considered determination on the issue. In any event, this is one of the grounds raised in the Appeal and this Court must refrain from preempting the outcome of the same by delving into the issue. The question of the suitability or otherwise of the Respondent as a mother must await the hearing and determination of the Appeal.

10. It is not lost on the Court that the Respondent neither filed a response nor attended Court for the hearing of the Application. Nevertheless the material placed before me is not sufficient to persuade me that stay of execution of the Judgment of 31.12.18 and restoration of *status quo ante* would be in the best interests of the children. In the premises, I dismiss the Application dated 3.1.19. In order to safeguard the welfare of the children, I direct that the Appeal herein be set down for hearing on priority basis, for the expedited hearing and determination of the same. This being a matter concerning children, there shall be no order as to costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 8<sup>th</sup> day of February 2019**

**M. THANDE**

**JUDGE**

In the presence of: -

.....**for the Applicant**

.....**for the Respondent**

.....**Court Assistant**