



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**CIVIL APPEAL NO. 20 OF 2019**

**IN THE MATTER OF SSG (MINOR)**

**BOG.....APPELLANT**

**VERSUS**

**ENK.....RESPONDENT**

*(Being an appeal from the Order of Honorable M. W. Kibe delivered on 14<sup>th</sup> February 2019 in Children's Case No. 1566 of 2018.)*

**R U L I N G**

1. The application before court is dated 28<sup>th</sup> February 2019 and filed in court on the 4<sup>th</sup> of March 2019. The application seeks orders as follows:

a. ....(taken over by events)

**b. That this Honorable Court be pleased to issue an order of stay of proceedings in Children's case No. 1566 of 2018 pending the hearing and determination of the appeal herein.**

**c. That this Honorable Court do issue an order directing the appellant reasonable access to the minor pending hearing and determination of the Appeal.**

**d. The Honorable Court do issue an injunction against the Respondent from taking the minor outside the country without the consent of the Appellant pending hearing and determination of Children Case No. 1566 of 2018.**

2. The application is based on grounds that; on the 14<sup>th</sup> of February 2018 the Court in Children's case No. 1566 of 2018 gave the Respondent permanent orders as relates to custody of the minor subject matter without giving the Applicant an opportunity to be heard and while the matter had not fully been determined. The Applicant is the biological father of the minor, and though he does not live together with the minor's mother, he has taken up parental responsibility and that prior to the said orders the applicant had reasonable access to the minor which the order seems to scrap.

3. The Respondent **ENK** responded to the application vide a replying affidavit dated 27<sup>th</sup> March 2019 wherein she stated *inter alia* that the child is not comfortable visiting the father and his other family comprising a wife and 2 other children aged 4 and 6. Secondly, that the Applicant does not discuss matters touching on the child with her so that the 2 parents may reach a consensus insisting on his way or no other. Further she opines that she has fully catered for all the needs of the child as the Applicant had earlier declined to do so.

4. The Applicant and the Respondent are divorced and the Appellant now has another family.

5. Divorces and separations have consequences to the concerned parties including issues borne of such parties. It is never business as usual as the parents move on by re-marrying or getting other partners and such arrangements do sometime end up affecting the issues of such parties.

6. Having stated the above it is important to take note of the provisions of law under the **Constitution 2010** and the **Children's Act No. 8 of 2001**. Both pieces of Legislation bestow parental responsibility upon both parents.

7. **Article 45** of the Constitution provides:

**“45(1) The family is the Natural and Fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the state.**

(2) .....

**(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during and at the dissolution of marriage.”**

8. In matters affecting Children of paramount importance is

*‘ what is in the best interest of the child’.*

**Article 53** of the Constitution provides as follows; -

**Article 53(1)** every child has a right: -

**(c) to have nutrition, shelter and health care.**

**(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.**

**(2) A child’s best interest are of paramount importance in every matter concerning the child.**

9. In line with the spirit of the Constitution the Children Act No. 8 of 2001 makes the following provisions;

**Section 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, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration (*emphasize provided*)**

**Section 6(1)**

**A child shall have a right to live with and to be cared for by his parents.**

10. The Children’s Act further in Part III defines parental responsibilities as follows:

**Section 23(1)** in this Act,

**“Parental responsibility means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child’s property in a manner consistent with the evolving capacities of a child.**

**(2) The duties referred to in subsection (1) include in particular-**

**(a) the duty to maintain the child and in particular provide him with:**

**i) adequate diet**

**ii) shelter**

**iii) clothing**

**iv) medical care including immunization; and**

**v) Education and guidance.**

**(b) The duty to protect the child from neglect, discrimination and abuse.**

**(c) The right to:**

**i) Give parental guidance in religion, moral, social, culture and other values.**

**ii) .....**

**iii) .....**

**Section 24(1)**

**Where a child's father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and either the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility."**

**11.** I have quoted the law extensively in deliberate effort to bring to light the obligations the law has bestowed on both the parties herein as parents.

As it were the pleadings are based on accusation and counter accusation with no supporting evidence, each blaming the other yet their current situation is as a result of a decision made by them; a divorce.

It must now dawn upon the parties that none of them has any more superior right than the other in the eyes of the law, they both have responsibilities and therefore in a civilized society such as ours they have no alternative but to engage each other in the best interest of the child who is only 7 years as the journey of parenting is yet too long, and comply with the responsibilities of parenthood.

**12.** The court engaged the parties, and the minor in a bid to resolve the matter in the best way. The child expressly indicated to the court that he loved both his parents and would want to spend time with each one of them. I was impressed by the young child, his feeling is certainly commendable as he needs the input of both his parents for his mental, physical and social wellbeing.

**13.** The order subject of the appeal will be canvassed at the hearing of the appeal, the merits and demerits of the same will be ventilated upon.

**14.** Suffice it to say that for now I will make the following orders in the interim pending hearing and determination of the appeal.

**a) That both parents of the minor will share half of the school holidays pending further orders.**

**b) The Applicant will have access to the child the last weekend of the month. He may pick the child on Friday after school to return him back to the mother on the following Sunday not later than 5.30 p.m.**

**c) None of the parties will remove the child from the jurisdiction of the court without the approval of the other or an order of court.**

**d) The appeal be set down for hearing forthwith in order to pave way for the hearing of Children's Case No. 1566 of 2018.**

**e) Costs in the cause.**

**f) Deputy Registrar to make available a copy of this ruling to the lower court.**

**DATED, SIGNED and DELIVERED IN NAIROBI this 9<sup>TH</sup> day of May, 2019.**

.....

**ALI-ARONI**

**JUDGE**