



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISC. APP. NO.85 OF 2019

IN THE MATTER OF THE ESTATE OF BA AND HA (CHILDREN)

SRA.....APPLICANT

VERSUS

AMAI..... RESPONDENT

RULING

1. The Application coming for consideration in this Ruling is the Notice of Motion dated 23.5.2019 seeking the following orders;

- (i) **THAT this Application be certified urgent, Service thereof be dispensed with and the same be heard ex-parte in the first instance.**
- (ii) **THAT this Honorable Court be pleased to grant the Applicant leave to Appeal against the Ruling/Orders given on 20th May 2019 in Milimani Children's Case No. 1535 pf 2017.**
- (iii) **THAT the Honorable Court be pleased to order a stay of execution of Ruling/Order given on 20th May 2019 in Milimani Children's Case No. 1535 of 2017 and all other orders consequential therefrom pending the hearing and determination of this Application inter parties.**
- (iv) **THAT in the interim, pending the hearing of this Application and the Appeal Interim custody of the minors herein BA (aged 3 years) and HA (aged 1 year) be granted to the biological mother.**
- (v) **THAT the Honorable Court be pleased to order a stay of execution of the orders in Milimani Children's Case No. 1535 of 2017 and all other orders consequential therefrom pending the hearing and determination of this appeal.**
- (vi) **THAT the Costs of this application be provided for.**

2. The Application is supported by the Affidavit of the Applicant dated 23.5.2019 in which she has deposed as follows:

- (i) **THAT she is the biological mother of the two minors the subject of Milimani Children's Court Case No. 1535 of 2017.**
- (ii) **THAT Orders were entered in Milimani Children's Court Case No. 1535 of 2017 in favour of the Respondent which orders are full of deviations from the best Court practices on granting custody of minors.**
- (iii) **THAT the said Orders were based on facts that were not substantiated and on applications not yet heard.**
- (iv) **THAT unless stay is granted the father who has custody of the children is at liberty to fly out of the Country with the minors to the disentanglement of the biological mother who is a Kenyan National.**
- (v) **THAT the Applicant is reasonably apprehensive that unless stay is granted, the Respondent will deny her an opportunity to bond with her children.**

(vi) THAT the Applicant will suffer substantial emotional and Psychological distress and loss if the stay is not granted.

(vii) THAT the trial Court did not factor competing rights of the parents or consider the best interest and welfare of the minors aged 1 and 3 years.

(viii) THAT the best interest of the child was not considered by the Court in granting the custody of the minors to their father.

(ix) THAT the appeal has reasonable chances of Success and if stay is not granted the appeal will be rendered nugatory.

3. The Respondent filed a Replying Affidavit to the application sworn on 13.6.2019 in which he deposed as follows:

(i) THAT he is the biological father and primary caregiver, custodian and guardian of the two minors

(ii) THAT the Applicant is seeking to appeal against an order made on 20.5.2019 which orders were by consent of the parties.

(iii) THAT the consent orders compromised and settled fully and permanently the issue of custody to the father and gave access to the Applicant.

(iv) THAT pursuant to the Consent Order of 17.4.2019, the Children were handed over to the Applicant and she disappeared with them to an unknown destination.

(v) THAT the Children were returned on 3.5.2019 after the Court issued warrants of arrest following an Application for rescue and release by the Respondent.

(vi) THAT after the Children were returned, the Respondent's Advocate wrote to the Applicant and said they were willing to offer supervised access because of the conduct by the Applicant of fleeing with the children.

(vii) THAT on 20.5.2019, the Applicant was directed to deposit her travel documents in Court but she has failed to do so.

(viii) THAT the Applicant is guilty of material non-disclosure as she failed to disclose the consent order of 17.4.2019 and she is a flight risk being a Somali National and holder of a Swedish Allien Passport.

(ix) THAT the applicant also failed to disclose that she abandoned the children in the possession, custody, and care and control of the Respondent and fled to Sweden and the Children have been in the custody of the Respondent.

(x) THAT in the present case, there exists exceptional circumstances that would permit the Court to deviate from the Principle that custody of the children of tender years is best suited with the mother.

4. The parties filed written submissions in the application which I have duly considered. I find that it is not in dispute that the Applicant and the Respondent are biological parents of the Minors the subject of this Application.

5. The Applicant is seeking Stay of Execution of the order granting the Respondent custody of the minors and she is also seeking leave to appeal. The issues for determination in this application are as follows:

(i) Whether the Applicant is entitled to stay of execution of the order made on 17.4.2019.

(ii) Whether the said Orders were entered by consent of the parties.

(iii) Whether the Applicant should be granted leave to appeal against the said order.

6. On the issue as to whether the Applicant is entitled to stay of Execution, **Order 42 Rule 6** provides as follows:

Stay in case of appeal.

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has

been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

7. The Court of Appeal in Butt v Rent Restriction Tribunal [1982] KLR 417 gave guidance on how a court should exercise discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

8. The Constitution of Kenya, 2010 in Article 53(2) provides as follows:

A child’s best interests are of paramount importance in every matter concerning the child.

Section 4(2) and 3(b) of the Children’s Act echo the Constitutional imperative:

(2) In all actions concerning children, whether undertaken by Public or Private Welfare Institution, Courts of Law, Administrative Authorities or Legislative bodies, the best interest of the child shall be the 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 the adopting a course of action calculated to –

a. Safeguarding and promoting the rights and welfare of the child;

b. and promote the welfare of the child.

9. The Judges of Appeal in the *Githunguri Case* approvingly quoted Roxburgh J. in Re S (an infant) [1958] 1 All ER 783, at 786 and 787:

I only say this; the prima facie rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule.

10. Finally, more recently, the Court of Appeal in J.O. v S.A.O (2016) eKLR stated:

There is a plethora of decisions by this court as well as the High Court that in determining matters of custody of children and especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother because mothers are best suitable to exercise care and control of the children. Exceptional circumstances include: the mother being unsettled; where the mother has taken a new husband; where she is living in quarters that are in deplorable state; or where her conduct is disgraceful and/or immoral.

11. And what amounts to exceptional circumstances? The decision in *Sospeter Ojaamong v Lynette Amondi Otieno, Court of Appeal Number 175 of 2006* had this to say about exception circumstances:

The exceptional circumstances would include if the mother is unsettled, has taken a new husband or her living quarters are in a deplorable state.

12. **On the other hand, *Martha Olela & another v Jackson Obiera* C.A 16 of 1979** explained the general principle that custody of young children should be awarded to the mother unless special circumstances and peculiar circumstances exist to disqualify her for being awarded custody. As per the judges, the exceptional circumstances would include “disgraceful conduct, immoral behavior, drunken habit, or bad company.”

13. In this instance, traits of special circumstances were demonstrated. I find that the Appellant abandoned the children with the Respondent who has been taking care of them.

14. On the issue as to whether the said order was entered by consent of the parties, I find that the answer is in the affirmative.

15. The Applicant is therefore not entitled to stay of execution of the orders as the same were consent orders. No appeal lies against the consent orders.

16. The Application dated 23.5.2019 is accordingly dismissed with no orders as to costs.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 20TH DAY OF SEPTEMBER, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.