REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 36 OF 2018

M N M.....APPELLANT

VERSUS

J G M.....RESPONDENT

RULING

1. By a notice of motion dated 28th March 2018 but filed on 3rd April 2018, the applicant/appellant suing as the mother and next friend to the minor herein sought various orders against the respondent her husband and father to the said minor. The orders sought are particularized as hereunder:

> **(a) That the ruling and order given by the Hon. T.B. Nyangena SPM in the Nairobi Children's Court Case No. 376/2013 M N. M vs J G. M on 16th February 2018 be stayed on interim basis pending the interpartes hearing and determination of this application.**
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> **(b) That the ruling and order given by the Hon. T.B. Nyangena SPM in Nairobi Children's Court Case No. 376 of 2013 M N. M Vs. J G. M on 16th February 2018 be stayed pending the interpartes hearing and determination of the appeal herein.**
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> **(c) That the time limited for filing this appeal be deemed as duly filed within the prescribed time.**
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> **(d) That costs of this application be provided for.**

2. The application which is filed under certificate of urgency under the High Court practice and procedure vacation rules is predicated upon grounds set out on the face of it and affidavit in support deponed on 28th March 2018 by M N M the applicant herein. Prior to the filing of this application, the applicant had already lodged a memorandum of appeal dated 20th March 2018 but filed on 22nd March 2018.

3. On 3rd March 2018, the duty court certified the application urgent but directed for service upon the respondent and for interpartes hearing during the normal court session as the vacation period was lapsing the same day. Subsequently, the court allowed prayer two of the application on the interim basis pending interpartes hearing and determination of the application. Further, the court directed that the orders of the trial court then subsisting (consent judgment) before the impugned orders of 16th February 2018, to remain in force pending the interpartes hearing and determination of the application.

4. In response to the application, the respondent filed a replying affidavit deponed on 2nd May 2018 and filed on 3rd May 2018 by J G M. When the matter came up for interpartes hearing on 3rd May 2018, Mr. Ochieng counsel for the appellant and Omari counsel for the respondent agreed by consent on a number of prayers.

5. Firstly, by consent, the prayer seeking enlargement of time to file the appeal out of time and the draft memorandum of appeal already filed to be deemed as duly filed was allowed. Secondly, parties agreed to dispose the application by way of written submissions only in so far as prayer 3 was concerned. Consequently, the appellant/applicant filed her submissions on 14th May 2018 and the respondent filed his on 16th May 2018.

Appellant's/Applicant's Case

6. The applicant's case is anchored on the consent judgement (orders) entered on 29th October 2015 before the Children's Court in the Children's Case No. 376/2013 wherein the defendant was allowed supervised access to the minor on alternate Saturdays between 11.00am and 2.00pm among other orders. According to the applicant, that particular order was varied by Hon. Nyangena vide her ruling delivered on 16th February 2018 pursuant to the respondent's (defendant's) application dated 12th January 2017.

7. That through the said ruling which was allegedly delivered much earlier than the scheduled date of delivery that is 9th March 2018 without notice, the respondent was granted unlimited access to the child while at school and alternate weekends (Saturdays and Sundays) from 9.00am to 4.00pm subject to parties' agreement on picking and dropping points and that the defendant to have access during half of the school and public holidays.

8. The applicant averred that the variation of the consent judgment did not take into account the interests and welfare of the minor considering that the orders were to disrupt the minor's education and concentration being a candidate due to sit for her common entrance examination in May 2018. She further contended that the respondent who has for the last 2 years seen the minor once despite the consent judgment allowing him access, has no business seeking for enhanced access period yet he does not even answer telephone calls from the minor.

9. In his submissions, Mr. Ochieng for the appellant/applicant urged the court to stay the impugned orders on grounds that the appellant has an arguable appeal given that the learned magistrate awarded orders that were not prayed for in the application dated 12th January 2017 and more particularly Order No. 3 granting access during half of the school and public holidays. To buttress his case, counsel quoted the case of **Kenya Tea Growers Association and another vs Kenya Planters and Agricultural Workers Union civil application Nai No. 72/2001** wherein the court rendered itself that an applicant need not show that an appeal is likely to succeed.

10. Learned counsel further made reference to **Kenya Airports Authority vs Mitu Bell Welfare Society and 2 Others (2016) eKLR** where the court held that:

> **"it is trite law that a court is required to base its decision on pleadings before it."**

Mr. Ochieng opined that the applicant had complied with Order 42 (b) (2) of the Civil Procedure Rules in that the application was filed without inordinate delay and that unless stay is granted, the appeal may be rendered nugatory and that it is in the best interests of the minor that the orders be granted. In support of this argument, counsel relied on the case of **BKC v BCS (2013) eKLR**. Learned counsel contended that the grant of stay orders is a discretionary power vested upon the trial court and that the same if granted will not prejudice any party.

Respondent's Case

11. In response, the respondent adopted his averments contained in his replying affidavit thereby contending that the appellant had blatantly denied him access to his daughter contrary to the court order. He urged the court to grant him unlimited access to the minor as her father. He maintained that the variation orders were lawful and in the best interests of the baby who is at a critical stage requiring parental guidance and that pursuant to Section 24(1) of the Children's Act no parent should have superior right to the minor against the other.

12. To bolster the respondent's case, the firm of Musyoki Mogaka filed lengthy submissions arguing that the orders being challenged were in the best interests of the minor and issuance of stay orders will be prejudicial to the minor and contrary to Article 53 (2) of the Constitution, United Nations Convention on the rights of a child and the African Charter on the rights of a child. Mr. Omari made reference to the case of **M.A v R.O (2013) eKLR** where J. Kimaru defined the best interest of a child as being subject to circumstances of each particular case at any particular moment but commonly and universally accepted minimum requirements such as provision for shelter, food, clothing, education and parental guidance.

13. Mr. Omari further asserted that the orders granting the respondent unlimited access to the baby if stayed will be prejudicial to the baby as the minor is in dire need of bonding with the father and also open up an opportunity to know the step-mother and the rest of the step family members as well. Counsel argued that there will be no prejudice or substantial loss suffered if the orders for stay were not granted and that there was no proof that the appeal will be rendered nugatory. To support this position, counsel quoted the case of **Zacharia Okoth Obado vs Edward Akang'o Oyugi and 2 others (2014) eKLR** where the court held that, stay order would only issue if the appeal or intended appeal is arguable and not frivolous and that if the orders sought to be stayed are not stayed appeal will be rendered nugatory. Lastly, counsel submitted that no parent has a superior right over a child than the other **(See Section 6 and 24(1) of the Children's Act)**.

Analysis and Determination

14. I have considered the application herein, affidavit in support, replying affidavit and rival submissions by both counsels. After careful analysis of the impugned ruling, submissions and materials placed before me, the following issues fall for determination:

> **(a) Whether the appellant has an arguable appeal? Whether the appeal will be rendered nugatory if stay order is not granted;**
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> **(b) Whether the applicant will suffer substantial loss if the orders are not granted;**
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> **(c) Whether the application has been filed without undue delay and**
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> **(d) Whether any parent has superior rights to the child over the other.**

15. The law governing issuance of grant of stay orders pending appeal is anchored under order 42 (6) and more particularly order 42 (6) Sub-Rule (2) of the Civil Procedure Rules 2010 in which an aggrieved party must prove that he or she will suffer substantial loss if the orders for stay are not granted; and that the application would have been filed without inordinate delay and where appropriate security for due performance of such degree has been furnished. It is therefore within the court's remit and unfettered discretion to issue or not to issue stay orders after carefully and diligently weighing all facts and or merits of each individual case against upholding the interest of the holder of a

decree who would be prejudiced if execution of his judgment, ruling or decree were to be delayed **(See Masisi Mwita vs Damaris Wanjiku Njeri (2016) eKLR)**.

16. From the court record, the ruling in question was delivered on 16th February 2018 and the application herein filed on 3rd April 2018 a period of 1½ months which cannot be said to be inordinate delay considering that this is a children's case where the best interests of the minor is paramount. To that extent, it is my finding that the application was filed within reasonable time.

17. What substantial loss will the appellant or minor suffer if the order sought is not granted? According to the appellant, the variation of the consent judgment is detrimental to the best interest of the baby who has not been staying with the father. It is trite that, before an order for stay can issue, the applicant must prove or demonstrate or advance prima facie evidence or plausible explanation that there is actual or reasonable apprehension that he or she would suffer substantial loss. **(See Carter and Sons Ltd vs Deposit Protection Fund Board and two others Civil Appeal No. 291/1997)**.

18. According to the appellant, the respondent has never stayed with the baby worse still with the step mother. It is her contention that the baby will feel out of place and uncomfortable staying with the father. She further went on to argue that the order for the respondent to stay with the baby over the holiday was not even prayed for in the application dated 12th January 2017. I have perused the said application carefully and the orders issued. The appellant has not fully demonstrated actual substantial loss to be suffered, or that there is likelihood that the baby will be prejudiced by the father visiting her in school unsupervised. The baby is now 13 years old hence capable of distinguishing bad and good things. The father was directed to provide medical cover, pay school fees and meet all necessary requirements for the comfort of the child. He cannot be deemed to be a good father for provision of material needs and not paternal love and guidance. To that extent the grant of orders No. 1 and 2 are not prejudicial to the baby or the appellant hence no substantial loss will be suffered by anybody.

19. However, regarding Order No. 3 granting unlimited access to the child during half school and public holidays, there is sufficient ground advanced which is persuasive enough that the appeal herein is an arguable one and that it is not frivolous. This reasoning is premised on Mr. Ochieng's submission that the orders made and more particularly order No. three is based on nonexistent prayers in the application dated 12th January 2017. On the basis of this submission, it is only fair and reasonable that the appellant be granted an opportunity to argue her appeal without delving into the merits of the appeal at the interlocutory stage. The appellant has sufficiently persuaded this court to grant the stay order only in so far as Order No. 3 is concerned.

20. Based on the above holding, it is apparent that the appeal will be rendered nugatory if the stay order is not granted and that it will be prejudicial to the appellant to proceed with the appeal without staying Order No.3. To fortify this finding, I am guided by the court of appeal decision in the case of **Reliance Bank Ltd (in liquidation) vs Norlake Investment Ltd (Civil Appeal No. 93/02 (UR)** where the court of appeal held that; "the appeal or intended appeal is an arguable one, if it is not a frivolous appeal. The appeal herein is raising arguable and substantive issue which if upheld will set aside the impugned ruling and the orders emanating therefrom. This position is further strengthened by the court of appeal in **Housing Finance Company of Kenya vs Shadrack Khan Mohamed Ali Hivji and another (2015) eKLR**, where it was held that:

> **"it is trite too that demonstration of even one arguable point will suffice in favour of the applicant".**

21. Who has priority over the baby? Although Section 6 and 24 (1) of the Children's Act and Article 53 (2) of the Constitution provides for equal parental rights and responsibility, the same are not absolute. They are subject to certain known exceptions or limitations. That is why a court can grant in full and at times limit certain rights including actual and legal custody, access and provision of basic necessities. Each case is unique and therefore determined on its own merits depending on the circumstances. In the instant case, they will be determined in detail during the hearing of the main appeal.

22. Accordingly, it is my finding that the application herein is merited and the same is allowed as prayed in terms of prayer No. 3 and that the orders of the trial court dated 16th February 2018 be and are hereby stayed only in respect to Order 3.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JULY, 2018.

J.N. ONYIEGO (JUDGE)

In the presence of:

MS Wangeci holding brief for Omari…….. Counsel for respondent

M/S Kakingu holding brief for Mr. Ochieng…….…… Counsel for appellant

Edwin ……..…….. Court Assistant