



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO.60 OF 2017

R W.....1ST APPELLANT

M N.....2ND APPELLANT

A W.....3RD APPELLANT

VERSUS

L KRESPONDENT

RULING

1. The minors in question are B.G. (who turned 18 years on 22nd May 2018) and I.W. (currently 6 years old). The appellants are their maternal aunts (sisters to their mother) while the respondent is their biological father. The mother of the minors died on 1st January 2017. At the passing on of their mother, the respondent had custody of the minors. There is an ongoing dispute before the Children's Court in **Children's Case No. 254 of 2017** between the appellants and the respondent regarding custody of the minors, with several orders having been issued.

2. The first set of orders was issued by the Senior Resident Magistrate Court (G.M. Gitonga) on 31st March 2017 and required that the *status quo* on custody to obtain; that the appellants access the minors on one Sunday every month with effect from 23rd April 2017 at the Chief's camp in Kawangware; that the District Children Officer Naivasha to interview the 2nd appellant (M N) and visit her home and a comprehensive Children Officer's Report be filed; and that the matter be heard on 8th June 2017.

3. Then came the 2nd set of orders contained in a ruling delivered by the Senior Resident Magistrate Court (G.M. Gitonga) on 28th August 2017, in which the learned magistrate directed that the respondent have interim custody for purposes of the younger child completing his 3rd term at his current school, and that parties to have access as stipulated in the orders of 31st March. The pending applications in the subordinate court were to be heard together with the main suit on 26th October 2017.

4. The appellants being aggrieved by the said order filed the current appeal on the following grounds:

- a) that the learned magistrate erred in law and fact in ordering that the appellants do grant actual care and custody of the minors to the respondent;
- b) that the learned magistrate erred in law and fact in ordering that the younger minor be given to the respondent for purposes of going to school for third term;
- c) that the learned magistrate erred in failing to be correctly guided by the best interest of a child principle in arriving at a decision that affects the welfare of the children herein;
- d) that the learned magistrate erred in law and fact in ordering the DNA which was not even prayed by the respondent;
- e) that the learned magistrate erred in law and fact by delivering a ruling in favour of the respondent; and
- f) that the learned magistrate erred in law and fact by failing to appreciate and or abandoning the current old maxim of equity that

he who comes to equity must come with clean hands.

They prayed that the appeal be allowed and the entire decision of the Senior Resident Magistrate delivered on 28th August 2017 be set aside. The appeal is pending determination.

5. On 1st September 2017, the appellants moved the court under certificate of urgency seeking stay of proceedings in Nairobi Children's Case No. 254 of 2017 pending the hearing and determination of the appeal. The application was based on the ground that the appellants being dissatisfied with the ruling delivered on 28th August 2017 by Senior Resident Magistrate had preferred an appeal against the same. An order was issued on 4th September 2017 staying the court orders of 28th August 2017, and directing that the appeal be filed, served on the respondent and be heard in the presence of a Children Officer provided by the Children Department.

6. On 15th September 2017, the respondent brought the present application seeking orders for stay of execution of the orders issued by this court on 4th September 2017 and dated 7th September 2017; that the appellants be compelled to produce the minor I.W. before this court; that the appellants be compelled to restore custody of the minor I.W. to him immediately; that the actual legal custody, care and control of all minors be granted to him exclusively, pending the hearing and determination of this appeal; that the appellants be restrained from taking/removing custody of the minors from him until the matter is heard and determined; and that the matter be returned to the subordinate court to proceed to main suit.

7. The application is based on the fact that the respondent was never aware of the appeal and only came to know about it through the court orders of 7th September 2017, which were served upon him without any other court pleadings whatsoever; that since the respondent married his late wife, he has always maintained the minors and maintained them fully and that the appellants are total strangers to the minors; that the respondent was granted interim custody of the minors while the appellants were allowed access and visitation rights which orders the respondent has always obtained; that the appellants have forcefully retained custody of the minors but B.G. managed to escape back to him; that the appellant's intention of taking custody of the minors is to extort and siphon money from the respondent in the disguise of child maintenance; and that the appellants have not demonstrated their capacity to be in custody of the minors, nor the respondent's unsuitability to have custody of his children. The application was supported by the affidavit of the respondent dated 15th September 2017.

8. The application was opposed by the appellants through the affidavit of the 1st appellant dated 6th October 2017. It was their case that the respondent's advocate was served by her advocate in open court with all the court documents of appeal and the evidence thereto on 5th October 2017 after several failed attempts to serve him in person; that the respondent as since remarried and his new wife who has on a number of occasions bullied and harassed the minors as they are not her biological children; that the respondent has not always had exclusive custody of the children since they had an opportunity of staying with the appellants since birth; that she has since enrolled I.W. at [particulars withheld] Schools Naivasha at her own cost in the best interest of the minor; that the appellants work to earn their living and do not in any way intend to benefit from the respondent on account of the minors; and that in any event the respondent has both constitutional and legal obligation and duty to provide for the minors who are his children their custody notwithstanding.

9. Parties filed their submissions which I have considered. I have also considered all the evidence on record. The court is faced with the question of whether or not to stay the orders issued by this court on 4th September 2017 and at the same time protecting the welfare of the minor.

10. The **Children Act, 2001** makes provision for various aspects of the care, welfare and protection of children and in **sections 4(2) and (3)** courts of law, administrative authorities or legislative bodies are mandated to take the best interests of the child as a primary consideration in all actions concerning children. Furthermore, the principle of the best interest of the child is emphasised by **Article 53(2) of the Constitution** which provides that a child's best interests are of paramount importance in every matter concerning a child.

11. I note that the appeal against the ruling delivered by the lower court on 28th August 2017 is pending determination. The orders of 4th September 2017 staying the appeal are in place. Before the trial court the main cause is pending. Whatever the merits of the respondent's application, the best interests of the children herein would dictate that the resolution of the dispute between the parties be expeditiously brought to an end.

12. That being the case, instead of dealing with the respondent's application, I direct that the appeal be heard with speed so that, depending on the way it is decided, the matter before the trial court can begin and end.

13. Consequently, I direct that the parties do simultaneously, and within 14 days from today, file written submissions on the appeal, and appear before the court on **27th September 2018** for highlighting.

14. I make no orders as to costs.

DATED and SIGNED at NAIROBI this 17TH day of JULY 2018

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 19TH day of JULY 2018

J.N.ONYIEGO

JUDGE