



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL NO. 12 OF 2018

IN THE MATTER OF: M S, R S AND R S (MINORS)

S A M H.....APPELLANT/APPLICANT

VERSUS

L S O.....RESPONDENT

RULING

1. By an undated Notice of Motion filed on 13.3.18, S A M H the Appellant/Applicant seeks stay of execution of the Judgment in Tononoka Children's Case No. 276 of 2015 (the Children's Case) on 26.2.18 pending the hearing and determination of an Appeal filed herein. He also seeks that *status quo ante* be maintained until the hearing and determination of the Appeal.

2. In the Judgment, the Court ordered that the parties' 3 children should stay with the L S O, the Respondent during the school term and were to be handed over to the Respondent in April to facilitate smooth transition to a new school beginning second term 2018.

3. It is alleged by the Appellant/Applicant that the Respondent abandoned their children without caring how that would affect the children. The children are settled with the Appellant/Applicant for more than 3 years and have bonded with their step sister. The children are in school and giving custody to the Respondent will disturb their stability as it would remove them from the family environment the Appellant/Applicant has provided them with. The Respondent had transferred the children to more than 7 schools. According to the Appellant/Applicant no prejudice shall befall any of the parties herein should the orders sought be granted. The children's lives and educational schedule and the lives of the parties will continue as normal and previously pertaining.

4. It is further alleged that the Appeal has high chances of success as the Court failed to appreciate that the Respondent abandoned the children when young and that the Appellant/Applicant single-handedly took care of them. Should the Appeal succeed then the effect of separation of the children and the Appellant/Applicant and their step sister will be devastating to the children. The social enquiry report stated that the children should be with the Appellant/Applicant as they have bonded well with their step mother and step sister. The orders in the Judgment are not in the best interest of the children and were against their ascertainable wishes.

5. The Respondent has averred in her Replying Affidavit sworn on 20.4.18 that following the delivery of the Judgment, she on 19.4.18 picked up the 3 children from their Madrassa School and the head teacher informed the Appellant/Applicant accordingly. Given that she is the biological mother of the children, she is in agreement with the Judgment that it is in the best interest of the children that they be with her. The children being female and of tender years need their mother in their mile stones. They should not be placed under the care of a father and a step mother yet their biological mother is alive and willing to take up her responsibility as a mother. She prayed that the Application be dismissed with costs.

6. Section 4(2) of the Children Act imposes a duty on all Courts, including this Court, to ensure that in all actions concerning a child the best interests of the child shall be a primary consideration. Section 4(3) of the Act further enjoins the Court when exercising any powers conferred by the Act to treat the interests of the child 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:

“(2) A child's best interests are of paramount importance in every matter concerning the child.”

7. It is trite law that grant of stay of execution of an order pending appeal is discretionary. A party seeking stay of execution of any orders of a Court affecting a child must satisfy the Court that the orders sought are in the best interests of the child. This principle overrides all else.

8. The Appellant/Applicant seeks stay of the Judgment of the Children's Court which ordered *inter alia* that the parties' children stay with

the Respondent during the school term. The Court notes from the record that the children are and have been with the Respondent in Nairobi since April 2018 when she took them from the Madrassa in Mombasa, following the Judgment. To move them again to the Appellant/Applicant in Mombasa pending the hearing and determination of the Appeal would cause disruption and destabilization to their young lives. This would not be in their best interest.

9. The gravamen of the Appellant/Applicant's application and indeed the Appeal, is the suitability of the Respondent to have actual physical custody of the children during the school term. This is a matter that is best left for consideration and determination in the said Appeal. To delve into the rival arguments of the parties herein in respect of the said matter and to make a determination thereon will in my view preempt the outcome of the Appeal pending before this Court.

10. In view of the foregoing, I consider that a stay of execution of the Judgment would go against the aforesaid paramountcy principle and would in fact have an adverse effect on the interests of the children herein. In the premises, I dismiss the Application filed on 13.3.18 and direct that the Appeal herein be fixed for hearing on priority basis, for the expedited hearing and disposal of the same.

DATED, SIGNED and DELIVERED in MOMBASA this 9th day November 2018

M. THANDE

JUDGE

In the presence of: -

..... **for the Appellant/Applicant**

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

.....**Court Assistant**