



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 40 OF 2014

JACKSON KAMAU NDEGWAAPPELLANT

VERSUS

HELLEN WANJIKU NGUYORESPONDENT

RULING

1. Before the court is the appeal number 40 of 2014. The record shows that the preparations for the hearing and determination of that appeal have been hampered by what has turned out by now to a circus of applications and counter applications relating to the custody of the children, maintenance, contempt et al.
2. The record of appeal was filed on 18/8/2015. No progress has been made in the appeal due to the multiple applications and counter applications.
3. In the meantime, the best interest of the minors herein aged 11 and 10 years continue to be prejudiced. These children have a right to a final and conclusive order in respect of their welfare as regards custody and maintenance.
4. Indeed, this court found the need to interview the children in presence of the children officer and this was done on 1/11/2018. The record is clear on their expressed wishes.
5. The court further made an order that the children officer was to conduct an inquiry to find out the current situation of these children in their current place of abode and also on the suitability of periodical custody with the Appellant.
6. The children officer has filed a report. She opines that the appellant should have the custody of the children one weekend in a month and custody be shared equally during the holidays and midterms.
7. A suggestion by counsel for the respondent to have all applications abandoned and focus be on the appeal has been opposed by the appellant who also contests the report by the children officer. It is the view of the appellant that he would wish to have all applications heard. I note that he has filed a further application as recent as on 30/11/2018.
8. All attempts by the court to demonstrate to the parties and especially the appellant that in the matter before court the paramount consideration in the best interest of the children has been ignored and largely unheeded.
9. As the trial court, I have now come to the conclusive observation that the personal differences between the appellant and the respondent have been spilled over into this matter and focus has been lost from the main goal, the best interests of the children.
10. This court has the ultimate responsibility and duty to guide these proceedings to achieve justice and to do so expeditiously.
11. This court is enjoined by **section 4(2)** of the **Children Act** (the Act) to take the best interests of the child as primary consideration.
12. I am also enjoined by **Section 4(3)** of the Act to protect a child. **Section 4(3)** provides;

“Sec 4(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 adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.”

13. I take note of the fact that in children matters, I am not shackled by technicalities and indeed **Article 159(d)** frees this court from the shackles of technicalities.

14. In exercise of judicial authority I am enjoined by **Article 159(1)** to ensure that justice is not delayed and to ensure that the purpose and principles of the constitution shall be protected and promoted.

15. I am persuaded that **Section 76** of the **Children’s Act** comes into play and this court must make an order that will be beneficial to the interests of the children herein.

16. The competing interests, nay, personal differences and the emotional conflict between the parties herein who were previously man and wife must be stemmed so as not to get into the way of this litigation and succeed in obscuring the real issues in controversy to an extent that the parties lose sight of the trophy. The trophy herein being the ultimate determination of the rights of the children herein as regards their custody, maintenance and all aspects of their well being.

17. From the court’s independent observation both parties have not been helpful in ensuring an expeditious prosecution of the appeal herein. Indeed, it appears that it is only after counsel now on record for the respondent came on board that there has been brought a breath of fresh air. There is now a sense of order and I surmise this is emanating from sound legal advice received.

18. This court must rise above the din and cacophony of noise and refuse to be derailed from its primary duty of doing justice to the parties.

19. This will be achieved through a firm but fair grip of the matter before it, all the while alive to the court’s duty to protect the fundamental rights of a fair trial under **Article 50** of our **Constitution**.

20. To bring an end to this protracted litigation and in the best interest of the children, I hereby direct that other than the application for contempt filed against the respondent herein, this court shall not entertain and hear any other application on record.

21. In the interests of justice and more specifically in the best interest of the children herein, I will adopt the recent report of the children officer dated 13/12/2018 in its entirety. This is the experts report which addresses the current situation of the minors and the suitable visitation programme.

22. The current recommendations by the children officer shall in the interim guide custody and visitation rights pending the disposal of the appeal which shall be determined in any event not later than by the 28th February, 2019.

23. For the avoidance of doubt, the effect of paragraph 22 above will be to stay the execution of the orders of the lower court in regard to custody and visitation and substitute thereof orders in the following terms;

1. The custody of the children be given to the respondent who should ensure that she exercises proper parenting.

2. The appellant to have unlimited access especially when the children are out of school. The appellant to be taking the children on one weekend every month and custody be shared out equally during school holidays and midterms.

3. The handing over and taking over the children be supervised by the sub county children officers at first instance until a time the parties will have an amicable situation.

4. The contempt application dated 30th November, 2015 is fixed for hearing on 22/1/2019. Summons to issue on the process server.

5. Appeal be placed before court for admission on 22/1/2019.

6. The respondent who has misplaced her record of appeal which was duly served to procure a copy of the same at her own cost.

7. The children officer is to make periodical checks on the status of the children on a monthly basis and file monthly reports to court till further orders of this court.

8. These orders be served on the Sub-County Children Officer Nyahururu.

Dated and Delivered at Nakuru this 13th day of December, 2018.

A. K. NDUNG'U

JUDGE