



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
FAMILY DIVISION
CIVIL APPEAL NO. 91 OF 2015
(CHILDREN COURT CASE NO. 885 OF 2015)

K N C S.....1ST APPELLANT
J K S.....2ND APPELLANT

-VERSUS-

N G.....1ST RESPONDENT
A S.....2ND RESPONDENT

RULING

INTRODUCTION

The Appellants filed an Application under certificate of urgency on 25th October 2015 to be heard on priority basis for the following reasons:

- 1. The minor subject of these proceedings V K S in the custody of strangers.**
- 2. The Appellants who are the biological parents of the minor wish to be allowed access to the minor.**
- 3. The Appellants further desire to undertake a thorough and comprehensive medical appraisal of the minor from the date of birth to present to enable them file appropriate medical reports in this case and utilize the same for their further purposes.**
- 4. The Appellants wish to seek directions on the expeditious hearing and disposal of the Appeal filed herein to protect the minor's best interests.**

APPELLANTS' CASE

Annexed to the application is the notice of motion brought under **Article 53 of Constitution 2010 and Section 133 of the Children Act 2001**; seeking that pending hearing and determination of the appeal, the appellants would have access to their child; the interim custody granted to the Respondents be varied by requiring supervision by the Director of Children Services or be revoked. The Respondents be ordered not to leave or remove the minor from the jurisdiction of the court and or source funds for the upkeep of the

minor. The court to grant orders directing the hearing and determination of the appeal.

In a nutshell the Appellants' case is that their child, the minor herein resides with the Respondents who obtained interim custody from the Children Court and they were not given a hearing. The court orders were granted pursuant to the Children Officer's report which in their view was not comprehensive and objective but biased against them as biological parents of the child.

The Appellants Affidavit filed on 9th October 2015, they confirmed that the minor child herein, V is their biological child born with a twin sister, V. They were born on 10th June 2010 premature, the twin sister was fine but the minor herein had to be incubated for 22 days. At 6 months, V had global development delay. At 10 months, she fell from the sofa and had a mild misplaced fracture in the left parietal bone and generalized brain atrophy. The Appellants took her to India for treatment and she was left with her grandmother from 2011-2014 when she rejoined the family and was enrolled in My School [particulars withheld]. Later, the School management alleged the child V went to school with bruises and was deprived food. The Appellants claim that V came from school with bruises and was beaten by one of the teachers.

The Appellants contended that the Respondents are strangers to the child, their fitness and character is not ascertained to warrant the grant of unsupervised interim custody of the child which does not protect the best interests of the child. They contended that the child has been seen in their company wearing bandages from injuries arising from the child's stay with the Respondents.

The Appellants alleged that the Respondents are British nationals and may leave and take the child out of the Court's jurisdiction. The respondents may use the child as a pawn to solicit funds here and abroad. The Respondents' business and financial connections may be dubious and illicit. They are embroiled in protracted litigation with family. The Appellants advanced these allegations so as to persuade the Court on their unsuitability to have interim custody of the child.

The Appellants reiterated the Respondents' unsuitability to retain custody of the child due to the fact that the 1st Respondent threatened to have the 1st Appellant's employment terminated. The Appellants alleged the 1st Respondent demanded the Appellants leave the country and allow him adopt their child. He further threatened to use influence of law Enforcement officers to have the Appellants imprisoned.

the Appellants seek that the interim custody order is revoked or varied and V is allowed to reunite with the her sister V.

RESPONDENTS' CASE

The Respondents filed grounds of opposition to oppose the Appellant's Notice of Motion Application dated 25nd October, 2015 on the following:

- 1. The Application is *res judicata* in that it seeks to re-introduce the prayers in the Appeal and in the Notice of Motion dated 25th August, 2015.**
- 2. The issues raised are manifestly similar to the issues raised in the Appeal itself and the Court had *vide* its Ruling dated 17th September, 2015 refused to deal with the issues at the interlocutory stage ordering instead that the germane issues raised should be determined at the hearing of the Appeal itself.**
- 3. The Application seeks to introduce fresh evidence at the Appellate stage by bringing into evidence various affidavits which had not been introduced before the Trial Court.**
- 4. The Interim Social Inquiry Report was made immediately after the rescue of the minor and before any *inter parties* orders could be granted in relation to the minor. It was a means for the Trial Court to evaluate the status on the ground from a neutral Government Officer.**

5. Directions for the hearing of the Appeal should be given post haste so that this matter can be expeditiously concluded.

6. The various allegations have been raised against the Director of Children Services and it is only fitting that they appear in Court to respond to the allegations raised in the interests of justice and fairness.

The Respondents' affidavit filed on 24th November 2015, they deposed that the Court order by Hon Justice Musyoka of 12th October 2015 was that the appeal shall be heard on priority basis, the Appellants have never set it down for hearing. The issue of custody could not be determined at the Interlocutory stage. The Director of Children Services authorized officer conducts regular visits to the Respondents home to ensure the child is taken care of and her interests are safeguarded.

The Children Court sought a Social Inquiry report but before the same could be provided the Appellants moved to High Court. The Respondents relied on the various medical reports that concluded that the child has a medical condition that required urgent attention and thereafter the issue of interim custody and or visitation and or access to the child may be considered.

The child's removal from the Appellants' custody arose out of reports of alleged mishandling of the child resulting in health risk and by the Children Officer's Report that was presented to the Children Court and resulted in the Court order that the child be removed from custody of the natural parents.

The Respondents are Kenyan citizens and have no other citizenship British or any other and have no intention to remove the child from the Court's jurisdiction.

DETERMINATION

The matter presented for determination is with regard to the interim custody granted to respondents of the Appellants child. The Appellants submitted they have been deprived of contact, association and relationship to their child for over 10 months. in reliance to **Section 88, 113, 114 130 of the Children Act 2001**, they sought the Court to revoke, vary or amend the orders and grant them full custody, visitation and or access to their child or grant supervision orders.

The Appellants through Counsel relied on the following cases;

NOORDIN vs KARIM [1990] eKLR where it was held that *"to deprive a parent of access [to the child] is to deprive a child of an important contribution to his emotional and material growing up in the long run"*.

TROXEL VS GRANVILLE 530 US [2000];

"it is cardinal with us , custody, care and nurture of the child reside first in the parent..."

The Appellants attached to their application 10 affidavits of witnesses, comprising of neighbours, family friends, Visa Oshwal community, Chairman Hindu Council of Kenya and Appellants house-help and they attest to the Appellants capability of safeguarding their child's best interest.

The Respondents relied on **Civil Appeal 575 OF 2010 GODFREY KINUU MAINGI & 4 OTHERS VERSUS NTHIMBIRI FARMERS COOPERATIVE SOCIETY** which held;

There must be an end to applications of similar nature that is to further; under principles of res judicata apply to applications within the suit.

This Court considered the application, replying affidavit documents and submissions with regard to the instant application and states as follows;

On 17th August 2015 Hon Justice Musyoka admitted the appeal pending filing of the record of appeal, obtaining directions and setting it for hearing on priority basis. The same remains pending. Instead the instant application was filed and seeks to have similar orders granted.

Be that as it may, during the pendency of the application and the appeal the Respondents filed under certificate of urgency on 21st April 2016. The application was heard and culminated with this Court's ruling of 27th April 2016. In a nutshell, the child was to be accompanied by foster parents for urgent operation in India scheduled on 2nd May 2016. Thereafter, all relevant reports on the successful operation and recovery of the child, status and progress of the child's recovery and return to the country were to be filed with the Deputy Registrar Family Court for transmission to this Court. Similarly, the Appellants were granted the option to make separate arrangements to visit the child in India and the Director of Children services to provide the relevant information and updates of their child from the Respondents.

Todate, the Court record contains no medical reports, or any other reports to confirm the whereabouts and status or progress of the child and improvement of recovery from the medical condition.

There is no feedback on the child who is a ward of the Court.

This Court cannot at this stage proceed to issue any orders on custody or otherwise until and unless the whereabouts and condition of the child are ascertained to this Court.

Secondly, the direct cause of the child's malady is contested; the Respondents alleged the Appellants mistreated the child; the Appellants, on the one hand attributed the medical condition to birth defects and accident as an infant, then attributed the bruises to epileptic fits, then to beating by a teacher at the school and finally being in custody of the Respondent. For this Court to determine the issue of custody the cause of the child's condition ought to be determined first so as to avoid having the child in jeopardy by being released in the environment that would be unsafe and a threat to her well being. The Court is supposed to uphold the best interests and welfare of the child and natural parents have priority of custody and parental responsibility. However, if there allegations to suggest that the child may not be safe with the child this right is suspended. The Children Officers report and various medical reports vitiate the Appellants right to full custody of their child at this stage.

Thirdly, the Children Court orders of custody included investigations to be conducted into the matter and this culminated with the Criminal proceedings preferred against the appellants in Criminal Court in Milimani. The status of the matter at this stage and whether it would be prudent to release the child to the Appellants while the criminal case is pending.

For these reasons, this court is of the view that the hearing and determination of this application is premature more so the orders sought are identical to those sought from the appeal.

DISPOSITION

The Court therefore orders as follows'

1. The Respondents to provide documents to confirm the child underwent the operation and is back in Kenya and is recuperating.

2. The Respondents to produce the child in Court for interview.

The Director of Children Services facilitate conduct of investigations, interviews with both Appellants and Respondents and visits and compile and produce the same in Court

3. The Appellants may provide any relevant information with regard to the child.

4. Matter be mentioned on 16th February 2017.

DELIVERED SIGNED DATED IN OPEN COURT ON 24TH JANUARY 2017.

M. W. MUIGAI

JUDGE