

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 19 OF 2014

A K B.....APPELLANT

VERSUS

G M A.....RESPONDENT

RULING

1. On 21st February 2014, the Children’s Court in Nairobi Children’s Court Children’s Case No. 905 of 2013, delivered a ruling to an application dated 25th June 2013 where it was ordered that custody of the subject child be granted to the appellant, that the case be set down for full hearing on priority basis and both parties be restrained from publishing the matter in the media. The appellant was aggrieved with that decision on the grounds that it did not grant orders for maintenance of the child the subject of the dispute. She then filed the instant appeal.

2. The interlocutory application for determination is dated 15th April 2014. It seeks three principal orders – stay of the proceedings in Children’s Case No. 905 of 2013 pending hearing and determination of this application and appeal, and for maintenance of the minor the subject of the proceedings. The appellant swore an affidavit on 15th April 2015 in support of the application. The issues raised in the affidavit regurgitate the facts the subject of trial at the lower court, and which are also the subject of the appeal. She has attached to her affidavit a number of papers lodged at the lower court as well as the ruling the subject of the appeal.

3. The respondent reacted to the application vide a replying affidavit sworn on 29th April 2014. He denies the allegations made in the supporting affidavit, and largely regurgitates the facts that he placed before the lower court in Children’s Case No. 905 of 2013. To that reply the appellant swore an affidavit on 11th May 2014, largely responding to particular issues raised in the replying affidavit.

4. It was directed on 5th June 2014 that the application be disposed of by way of written submissions. There has been compliance with the said directions. On 31st March 2016, this court, at the request of the appellant, ordered for a report of a children’s officer. The report was filed in court on 4th April 2016.

5. The critical issue in the application is maintenance of the minor the subject of the suit at the lower court. The lower court had the parties cross-examined on the matter, and was reluctant to make any orders at that stage, preferring that that matter be dealt with exhaustively at the full trial. This was founded on the fact that the child in question was not biologically the respondent’s and the issue as to whether he had assumed parental responsibility was a matter that could only be resolved at the conclusion of the matter upon the taking of full evidence.

6. I do not exactly see the value of having a children officer’s report as requested by the appellant. I have perused closely through the report of the children’s officer, and noted that the observations made therein appear to mirror those made by the trial court. It would appear to suggest that the issue be resolved only at the completion of the full trial.

7. I am not persuaded that I ought to make orders on interim maintenance. It is one of the principal

grounds of the appeal, indeed it is Ground Number One in the Memorandum of Appeal. Making an order with respect to it would amount to disposing of the appeal at interlocutory stage.

8. Should I order stay of the proceedings before the lower court? I think not. Such proceedings would not prejudice the appellant in any way. Either way, the lower court and the appellate court are being called upon to decide the same point, whether the respondent assumed parental responsibility over the subject child. No prejudice would be suffered should the lower court go ahead to take evidence over the matter. Indeed, it had already ordered that the matter be heard as a matter of priority thereon.

9. Overall, I do not find any material upon which I can grant the orders sought in the Motion dated 15th April 2014. I do hereby dismiss the same. The consequence of this is that the interim orders granted on 17th April 2014, and extended several times thereafter, automatically lapse.

DATED and SIGNED at NAIROBI this 3RD DAY OF MAY, 2017.

W. MUSYOKA

JUDGE

DELIVERED and SIGNED this 5TH DAY OF MAY, 2017.

M. MUIGAI

JUDGE