



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION**  
**CIVIL APPEAL NO. 8 OF 2016**

**R.L.B ALIAS W.N .....THE CHILD**

**VERSUS**

**L.R.B .....APPLICANT**

**R U L I N G**

1. This Chamber Summons application dated 21<sup>st</sup> January 2016 seeks orders in the main, that pending the hearing and determination of this application and the Appeal herein, this Honourable Court be pleased to order a stay of execution of the judgment issued by the magistrate's court on 14<sup>th</sup> January 2016, and the child be ordered to remain in the custody and care of the Applicant. It also seeks such further or other orders as the court may deem fit in the interest of justice.

2. It is taken out under **Article 53** of the **Constitution**, **Sections 76, 102(3), 147** and **148** of the **Children Act 2001** and **Order 42 Rule 6** of the **Civil Procedure Rules**. It is predicated on the grounds that the child has been under the care and control of the Applicant since March 2015, has adjusted to his new environment and has started school and made several friends. That the child will be affected psychologically and emotionally if he is suddenly uprooted from the familiar and safe place he calls home. Lastly that the Applicant seeks to protect his emotional wellbeing by maintaining his usual environment as the Appeal is considered.

3. The Applicant swore a supporting affidavit dated 21<sup>st</sup> January 2016 and deponed that Baby W.R. alias W.N. was born on 13<sup>th</sup> March 2013 at Tigoni District Hospital. That his mother, one S.J.K surrendered him to K.K.P.I Adoption Society as she was not able to take care of him and his father did not take parental responsibility. Baby W.R. was admitted to The Nest on 13<sup>th</sup> March 2013 and given the name W.R. He was later committed to the same home by the Limuru Resident Magistrate's Court on 5<sup>th</sup> June 2013 through P&C No.19/2013.

4. The Applicant avers that Baby W.R. came under her care in March 2015 through the Nest Children's Home, Limuru Children's Centre and the Children's department. She later went to court seeking to be appointed legal guardian or in the alternative be granted custody of Baby W.R. so that he could enjoy better facilities such as medical care from her employer and also enable her make decisions for his benefit. On 26<sup>th</sup> January 2016 the lower court gave a ruling not only rejecting the Applicant's prayers,

but going beyond to order for the return of the child to the Nest immediately. In that ruling the court had noted that the baby was happy and moved about freely. The Applicant filed an appeal and also obtained a temporary stay of those orders.

5. Mrs. Mbugua Learned counsel for the Applicant submitted that the Applicant qualifies for guardianship and the court erred by imposing the requirements of Adoption in a guardianship application. That it would not be in the child's interest to be removed in light of the testimony of the nurse, and his performance in the kindergarten. She stressed that the magistrate confirmed that the child looked happy. Counsel urged the court to take cognisance of the requirements of **section 76(3)** of the **Children's Act** when making its decision. She argued that uprooting the child with immediate effect to return him to the Nest would work against his best interests both emotional and physical and educational. Further that Institutions are not the best places to raise a child, and to separate him from the home, parent and friends that he knows would not be in his best interest.

6. Mrs. Mbugua submitted that the Applicant works in Kenya and has a renewable contract, and that her employer too understands her situation. She prayed that the order of the court be stayed pending the filed appeal which they intended to canvass quickly.

7. On the issue of whether or not to grant a stay of the lower court's orders pending Appeal, the provisions of the law are very clear and couched in mandatory terms on when the court may grant stay orders. The Court shall not issue any stay orders unless the two grounds set out in sub-rules (a) and (b) of Order 42 Rule 6(2) are satisfied. Rule 6(2) provides that:

**“No order for stay of execution shall be made under sub rule (1) unless – (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay:”**

The court finds that the Applicant has satisfied the second limb set out in sub-rule (a) of Order 42 Rule 6(2), as the application was made without undue delay from the time the lower court orders were issued.

8. On the question of substantial loss, in law, any matter concerning children, the best interest of the children is paramount. **Article 53(2)** of the **Constitution** provides the guiding principle on this question as follows:

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

The other pertinent law is the **Children Act No. 8 of 2001** and in particular **Section 4(3)** thereof, which provides that:

***“(3) All judicial 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 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...”***

The orders made by this Court, must therefore serve the interests of the child in question more than those of the litigants.

9. The court observes that the Applicant who profess the Christian faith has attached photographs of the Baby W.R. going through a Christian baptism, and present are his Foster mother, his god mother and the Priest who officiated at the baptism ceremony. The Applicant has enrolled him for horse riding and football, she has also annexed photographs of the child with other children and on various excursions with

the Appellant, including one he took with President Obama of United States of America when he visited Kenya. It seems that the child has become quite outstanding.

10. The Law on Foster care is in Part 6 of the Children’s Act. The magistrate appears to have taken **section 148(2)** of the **Children’s Act** as being mandatory. The word used in the section is “may” and not “shall”. She seems to have taken particular interest in the relationship between the Foster parent and the child and in particular the sex of the child and the guardian. The magistrate erred by imposing the requirement in **Section 158(2) Children’s Act**, which relates to Adoption, into this matter and proceeding to deem the placing of the child with the guardian as a contravention of **Section 151** of the **Children’s Act**.

11. Under **Rule 9(4)** on **guardianship**, people who can approach the court for guardianship include anyone who has parental responsibility over a child. The Forster parent has parental responsibility over a child just like that of a parent under **Section 153 Children’s Act**. This is the status the Applicant had at the time she filed for guardianship. **Section 102(3) of the Act** states that a guardian appointed under this act need not be a Kenyan citizen or residence. The testimony of one Catherine Ojuang, a nurse at the Nest shows that the Foster arrangement has worked in the child’s favour and the Nest has been monitoring the baby.

12. In the premise it is worth repeating that it is the child’s best interest and not the interests or wishes of the Applicant that is paramount. This court therefore holds that it is in the best interest of Baby W.R for the Applicant to have temporary custody of the child and to continue to provide for him as she did there before, pending the hearing and determination of the Appeal filed herein.

It is so ordered.

**SIGNED DATED and DELIVERED in open court this 12<sup>th</sup> day of February 2016.**

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**L. A. ACHODE**

**JUDGE**