



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

H.C.C.A 48 OF 2016

S N K APPELLANT

VERSUS

J K K RESPONDENT

RULING OF THE COURT

1. The **Notice of Motion** before the court is dated 23rd June 2016. It is filed by the Applicant **S N K**. The Applicant is the maternal Aunt of the minor herein and she seeks to secure the following orders:-

- 1. “THAT this application be heard *ex parte* in the first instance and as a matter of urgency.**
- 2. THAT legal custody of the said child be granted to the Appellant who is the maternal Aunt.**
- 3. THAT the Respondent do pay and be paying school fees and all other basic needs for the minor until he attains the age of majority.**
- 4. THAT any other orders that the court may deem fit to grant in the circumstances.**
- 5. THAT the costs of this application be provided for.”**

2. The application is premised on the grounds set out therein and is supported by the affidavit of the Applicant sworn on 23rd June 2016.

3. The Applicant’s case is that she is the maternal Aunt for the minor **B M K** herein hence the Respondent is his father. The minor’s mother who was the Applicant’s sister died on 19th October 2002. After her death the Respondent herein married another woman who is allegedly mistreating the minor. The Applicant alleges that the minor has disappeared from his father’s home to her home due to mistreatment by his father and his grandmother. The Applicant reported the matter to the Children Officer who after interrogation gave her the custody of the child. Thereafter, the Respondent went to court and filed an application asking for the custody of the minor. The court ruled that the custody of the minor be with the father, the Respondent herein, but that the child be taken to a boarding school outside **Athi River area**. However, the Respondent herein allegedly defied the court ruling and took the child to his rural home and in a day school where he is staying with his grandparents. However, since the Applicant and her brother **P M** were given access to the child they followed up from the school head teacher **[Particulars Withheld] Primary School, Mr Maundu**, who told them that the child was not attending school. They further established that the said minor was suffering, not concentrating in school, and could sneak again

and/or harm himself due to the hardships he was experiencing while under the care of the father. That is why the Applicant is praying for the custody of the child and for an order that the child be taken to school.

4. The application is opposed by the Respondent who is also the father of the minor and who has the legal custody of the child. The Respondent's case is that he has the legal custody of the minor pursuant to a court ruling and that he has taken good care of the minor. The minor was originally staying with his grandparents where he was enrolled in school by the Respondent. The Respondent's case is that the minor had earlier complained of stomach complications and was put under medication for ulcers. However, the Applicant visited the child and concluded that the child had been assaulted by the parents. The Respondent's case is that he enrolled the minor in school and used to communicate with him through the Respondent's parents. Soon the minor started missing classes. On one occasion the minor took his clothes and left home without informing his grandparents. The minor was later seen in **Kimoini Deliverance Church** and later proceeded to his Aunt's (the Applicant's place). The minor then took refuge at the Applicant's home on the grounds that his father was mistreating him.

5. When the application came up for hearing on 12th July 2016, the minor was also in court and appeared to be in support of the application. He preferred to stay with the Aunt rather than with the father. However, the father gave a convincing case of his love for his son, the attempts he has made to buy him books, clothes and to take him to school. The court observed that the minor needs to get leadership from both the parents and the Aunt, and that a minor can easily be misled to think that his father hates him simply because his mother is not alive.

6. After the hearing, court made temporary orders enrolling the child to **[Particulars Withheld] Primary School** at the expense of the Applicant, and directed that the boy shall from school stay with the father until this ruling is delivered.

7. Having considered this application the issues I raise for the determination are as follows:-

i. Who has the legal custody of the child?

ii. Who is to pay for the child's schooling?

8. It is not disputed that the father Respondent herein has the legal custody of the child pursuant to the Ruling dated 22nd April 2016 in the **Mavoko Children's Court File Number 17 of 2016**. Although the said decision is being appealed, the appeal has not been determined and so the legal custody remains with the Respondent.

9. The above notwithstanding, the child is now in a boarding school of **[Particulars Withheld] Primary School** where he was enrolled by the Applicant who is also paying the school fees and other expenses. The child will continue with his studies in that school. However, full school fees and other expenses shall be paid by the father Respondent and if he fails to do that the Applicant is at liberty to cite the Respondent for contempt and also to apply for the review of the order of custody.

10. During school holidays, the child shall return to the father, but will be at liberty to spend one half of the holiday period with the Aunt Applicant.

11. In the upshot, this court makes the following orders:-

(a) The minor herein being **B M** shall continue to be enrolled at **[Particulars Withheld] Primary School**.

(b) The Respondent father shall retain the legal custody of the said minor **B M**, and shall pay full school fees and other expenses in time to avoid the minor being sent away from school.

(c) During the school holidays the said minor shall stay with the father Respondent, but he shall be

at liberty to spend upto one half of the school holiday period with the Aunt Applicant.

(d) Any party may apply for variation of these orders to suit the circumstances of the said minor.

(e) The school fees and other costs and expenses already incurred by the Aunt Applicant before this ruling shall not be refunded by the Respondent.

(f) The Respondent shall pay the costs of this application.

Orders accordingly.

Dated and delivered at Machakos this 5th day of September 2016.

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E. OGOLA

JUDGE