



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC. CIVIL APPLN. NO. 123 OF 2014

M. N. W.....APPLICANT

VERSUS

O. S. G.....RESPONDENT

RULING

1. By a Notice of Motion dated 14/07/2013, M.N.W, the mother of the two children the subject herein sought the following orders: -
 - i. ***That the Applicant be granted leave to file an appeal challenging the whole judgment of P. ACHIENG, Ag PM in KAKAMEGA CM CHILD NO. 46 OF 2013 delivered on 16/4/2014 out of time.***
 - ii. ***That there be a stay of execution of the said judgment pending the hearing inter parties of this application***
 - iii. ***That this honourable court be pleased to order a stay of execution of the said judgment of the lower court pending hearing and determination of the intended appeal.***
 - iv. ***That the costs herein be provided for.***
2. Prayers 1 and 2 were already granted in the course of earlier proceedings in this matter and an Appeal No. 82 of 2014 was filed on 04/08/2014. Prayer 3 is therefore the subject of this ruling.
3. Parties herein relied on their various Affidavits in support of their opposing views and the matter was left to the Court to make its finding.
4. This Court is therefore charged with the responsibility of determining if the Applicant has met the conditions for the grant of the orders of stay of execution of the decree pending the hearing and determination of the appeal.
5. It is not in dispute that the two issues herein are the biological children of both the Applicant and the Respondent. One of them is now aged around 6½ years and the other aged 3 years old.

In the judgment delivered by the then Acting Principal Magistrate at Kakamega on 16/04/2014 the following orders were made: -

- a. ***Legal custody of the children P.B. S. aged 4 years old and P. I. K. aged 2 years old is granted to the Plaintiff.***
- b. ***The Plaintiff is to ensure that the said children remain in school by paying their school fees and providing for other school requirements until they complete their education.***
- c. ***The Defendant is to have reasonable access to the said children upon prior arrangements being***

made with the Plaintiff.

6. As a result of the proceedings in this matter, the execution of the above judgment was stayed pending the determination of the application hence as at now the issues are still has the custody of the Applicant.
7. The Applicant averred that since the Respondent who is the father to the children has not been maintaining them since the Applicant and the Respondent parted ways in February 2013, she has single-handedly done so and was forced to go and look for a job in Nairobi but she keeps on coming back home every weekend to check on the children. It is also averred that the Applicant stays with the children during School holidays and that she enrolled them in [*particulars withheld*] Academy prior to proceeding to Nairobi. During the time the Applicant is in Nairobi the children are in the care of her mother who is aged around 50 years old and are always happy, it is also averred. The Applicant does not see how the children will be well taken care of by another woman who has a young baby in circumstances where the other woman came in her place and is staying with the Respondent as his wife. She is of the view that the best interests of the children will be served by the grant of the orders sought pending the determination of the Appeal moreso given that the children are of tender ages. To her the appeal has overwhelming chances of success.
8. The Respondent truly admits that he is the biological father of the children. He also confirms that he is married to another wife and given the chance to stay with the children will provide the most suitable environment for them since they were left behind by the Applicant for Nairobi. The Respondent however does not state whether or not he has been maintaining the children since he parted ways with their mother, his wife, moreso given that he is in the employment of the Ministry of Immigration as a Clerical Officer. However from the proceedings before the Children's Court the Respondent admitted that the last time he sent items to the children was on 31/07/2013. That is over 1 ½ years ago.
9. The Respondent therefore opposes the application and prays that the judgment delivered by the Children's Court be effected accordingly.
10. The children herein as stated earlier are about 6½ years and 3 years being a boy and a girl respectively. As per **Section 2 of the Children Act** they are children of tender years since the said Act defines a "**child of tender years**" as a child under the age of 10 years.
11. Where a dispute touches on a child, the overriding principle is the paramountcy of the best interest of the child. This is expressly provided for under Article 53(2) of the Constitution of Kenya 2010 which states as under: -

"A child's best interest issue of paramount importance in every matter concerning the child."

Section 4(2) of the Children Act provides that: -

"In all actions concerning children, whether undertaken by public, or private social welfare institutions, court of law, administrative or legislative bodies, the best interest of the child shall be a primary consideration."

12. The Court in matters of stay of execution have a discretion to order stay if the resultant effect will be in the best interest of the children. By having that in mind, if the Applicant demonstrates to the Court that she has an overwhelming chance of success in the appeal and that by refusing to grant the stay the appeal if successful would be rendered nugatory; the stay order ought to be granted.
13. In this case, the custody of the minors was granted to the father (the Respondent) after a Social Inquiry Report revealed that indeed the Applicant was working in Nairobi and had left the children

at home with her mother. I must however admit not to have seen the said Report to interrogate its contents including the possibility of the Applicant having secured the job at Nairobi after testifying before the Children's Court. That will then be subject of the appeal when the lower Court file is availed before this Court.

14. The substantive appeal being Civil Appeal No. 82 of 2014 was filed on 04/08/2014. I have seen the Memorandum of Appeal. It raises strong issues of law and fact in challenging the legal custody of the children. The same therefore amounts to an arguable appeal in law. The other issue of consideration is that of delay. The same was fully addressed during the preliminary stages where the leave to appeal was granted. I wish to say no more on that.
15. Against the foregone background, it is important that this Court looks into the best interests of the children in the circumstances of this case. It is on record that since February 2013 when the parties parted ways, the Respondent has not been in custody of the minors neither has he been maintaining them. They have all along been in the sole custody, care and maintenance of the Applicant. There is no evidence that the Respondent has ever had time with them since then. Taking into account the ages of the minors and the period which has lapsed, I am not quite sure if the minors especially the younger one is able to recognize the Respondent as the Father since when the Applicant left in 2013 the minor was less than 2 years old. Another consideration is what the children will go through if they are to be handed over to the Respondent and it happens that the Applicant becomes successful in her appeal – the children will have to be taken back to the Applicant. To me that will amount tossing them back and forth and I choose not to create a possibility of such anxiety upon the parties.
16. The best interests of the welfare of the children in the prevailing circumstances of this case is to maintain the status quo until a substantive decision is made when the main appeal is determined since it has not been demonstrated, or even alleged, that the children are in any danger whatsoever.
17. In reaching the above finding, I am so guided by the Court of Appeal in the case of **KARANU VS KARAMU (1975) EALR 18** when it stated as follows: -

“The substantial question in this appeal is whether or not the Judge was right in giving custody of the children to the father. All the time the application was heard, the daughter of the parties was just over seven years of age, and the son was six years old. The Judge correctly directed herself that in cases of this nature, the paramount consideration was the welfare of the children, but he did to specifically refer to the generally accepted rule that, in the absence of exceptional circumstances the custody of young children should be given to the mother.”

The above finding was firmly restated in the case of **ZULEKA MOHAMMED NAAMAN VS GHARIB SULEIMAN GARIB (Court of Appeal, Mombasa, Civil Appeal No. 1234 of 1997 (unreported))**.

18. In allowing the application at hand, this Court is alive to the fact that the children are in school and would therefore not wish to disturb Order (b) in the Judgment requiring that the Respondent herein do ensure that the children do remain in School by paying their school fees and to provide for other school requirements.
19. In sum therefore this Court makes the following final orders: -
 - a. ***That pending the hearing and determination of the Kakamega High Court Civil Appeal No. 82 of 2014, stay be and is hereby granted staying the actual custody of the children herein namely P.B. and P.I. from being in the custody of O.S.G. the Respondent herein and that they shall continue to be in the custody of the Applicant M.N.W.***
 - b. ***The Respondent herein shall ensure that the said children do remain in school by paying their***

school fees and providing for other school requirements until further orders of this Court.

- c. *The Respondent herein to have reasonable access to the said children upon prior arrangement being made with the Applicant and the Applicant to ensure that such access is not unreasonably impeded and/or met with hostility as the case maybe.*
- d. *The costs of this application be borne in the appeal.*

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 5th DAY OF February 2015.

A. C. MRIMA

JUDGE