



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL NO. 68 OF 2015

BETWEEN

J K W APPELLANT

AND

M A A RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J. Mitey, RM in Senior Resident Magistrates Court at Rongo in Children's Case No. 21 of 2014 dated 23rd January 2014)

RULING

1. The appellant and respondent are the parents of H B W (6 years) and K B W (4 years). It is common ground that they are now separated and the live issue for consideration before the subordinate court was the custody, maintenance and access to the children.
2. After hearing the parties, the learned magistrate drew the following conclusions and made the following orders in the judgment;

Hence each of the parties must contribute equally to provide food shelter, clothing, education and all their requirements even as custody is given to one of them.

Owing to the needs of each of the issues, the best interest is allow the two issues being of tender age to stick and grow together as siblings, during their early childhood, developmental stages under the case of their mother the defendant herein, but with the right of access to their father, the plaintiff upon proper arrangement of the parties.

I therefore proceed to grant legal custody of the two issues H.B and K.B.W to the defendant. As for the issue of maintenance, both parents have an equal responsibility to provide as stated above.

3. The appellant was dissatisfied with the judgment and commenced appeal proceedings by filing his memorandum of appeal. He also moved this court by a Notice of Motion dated 5th February 2015 seeking an order of stay of execution, implementation and or enforcement of the judgment and decree rendered on 23rd January 2015 in ***Rongo SRM Children's Case No. 21 of 2014.***
4. In his deposition supporting the motion, the appellant claims that the appeal will be rendered nugatory if a stay is not granted as the respondent does not have a fixed abode nor means of income to support the children and as a result the children's life is bound to deteriorate to their prejudice. He complains that removing them from a familiar environment and taking them to a

new school will affect them negatively and that the stay order will enable him continue to stay with them and take care of them as he was doing before. Counsel for the appellant reiterated these points and urged the court to grant an order of stay.

5. The respondent in her deposition opposes the application. She states that she has now secured employment in Migori and has transferred the children to a school near her so that she can take care of them while working. She depones that she is able to take care of them and that the children have adjusted to their new school and are comfortable in this environment.
6. I have considered the respective depositions and arguments. I am alive to the principles governing the grant of stay of execution pending appeal in the High Court and in particular the provisions of **Order 42 rule 6** of the *Civil Procedure Rules*. I am also alive to the fact that the appellant has an undoubted right of appeal. Those principles are, however, subsumed under the general principle of the best interests of the child which is now underpinned by **Article 53(2)** of the Constitution and reinforced by **section 4(2)** of the *Children Act*.
7. As the appeal is pending, I restrain myself from commenting on its merits. I note, however, that the children have joined a new school and there is no evidence that they are suffering. They are staying with their mother, who is now employed and is taking care of them. In other words, the grant of an order of stay would be disruptive in the circumstances and would definitely not be in the best interests of the children.
8. The Notice of Motion dated 5th February 2015 is therefore dismissed and the costs shall abide by the appeal.

DATED and DELIVERED at MIGORI this 3rd day of March 2015.

D.S. MAJANJA

JUDGE

Mr Onchwangi instructed by Oguttu-Mboya & Company Advocates for the appellant/applicant.

Respondent in person.