



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL NO. 87 OF 2015
(FORMERLY KISUMU HCCA NO. 32 OF 2015)

BETWEEN

J O APPELLANT

AND

S A O..... RESPONDENT

(Being an appeal from the Ruling and Order of Hon. J. Mitei, RM at the Senior Resident Magistrates Court in Rongo in Children's Case No. 2 of 2013 dated 17th March 2015)

RULING

1. This is a matter that has been brought under certificate of urgency as it relates to the welfare of children. The parties herein are the parents of J B and A T who are aged 6 years old and 9 years old respectively.
2. The matter in dispute commenced in the Children's Court at Rongo and was compromised by a consent recorded on 24th February, 2015 as follows;
 - a) *The custody of the children JBO and ATO both females aged 9 and 5 respectively be granted to their Mother S A O.*
 - b) *The Respondent/Father is hereby granted access to the said children during school holidays (day and night full access) and two weekends every month during the day.*
 - c) *The Father/Respondent maintenance of Kshs. 20,000/= every month payable before 10th of every month to the Mother/Applicant and the Mother to provide every other needs upon receipt of the said amount.*
 - d) *This consent settled the entire suit and all other pending applications filed herein hence the decree herein is hereby varies herein as the parties consent above. In default execution to issue.*
3. Before the ink could dry on the consent, the appellant moved the Children's Court by a further application on 10th March 2015 seeking orders of custody. This arose after he had taken the children for the weekend on 6th March, 2015. He stated that the children declined to go back to Rongo to stay with their Mother.

4. As the children were not returned, the respondent also filed an application before the Children's Court on 12th March 2011 seeking to commit the appellant for contempt of court on the ground that the Appellant had not returned the children in terms of the consent agreed after.
5. Both applications were consolidated and heard together. In the course of the proceedings the Court directed that the two children be brought to Court to be interviewed. The learned Magistrate interviewed the children on 17th March, 2015. The tenor of the interview was that the appellant had enrolled the children in Aga Khan School, Kisumu and the children expressed the wish to remain in that school.
6. In her ruling dated 17th March, 2015, the learned Magistrate declined to set aside the consent order and directed the parties to abide by its terms. It is this ruling that has precipitated the appeal herein.
7. What is before me, however, is an application for stay of execution of the orders of the Resident Magistrate's Court at Rongo pending an appeal from the said Ruling. From the outset I must state that as a matter of legal principle there is nothing to be stayed as the Court declined to review the consent. However, the issue here is what is in the best interest of the children as an interim measure pending the appeal. In dealing with the matter, the Court must not be shackled by technicalities when confronted with matters concerning the welfare of children.
8. Ms Kyamazema, learned counsel for the appellant, laid emphasis on the fact that the best interests of the children lay in giving effect to the wishes or desires of the children to attend a better school. She pointed to the fact that the appellant was capable of taking care of the children and he would continue doing so. She submitted that the learned Magistrate failed to take these facts into account in dismissing the application for review.
9. Mr Kisera, learned counsel for the respondent, opposed the application. The thrust of his submissions was that the consent was valid and that the respondent is taking advantage of his position having taken the children for a weekend and having stayed with them. He contended that respondent has had custody of the children since 2011 and enrolled them in a school they were attending without any complaint.
10. I have considered the arguments and my duty is to determine the best interests of the children at this stage. I am aware that I have not heard the parties or the children but I must do the best I can in the circumstances. I am also aware that the appeal from the decision of the subordinate court is yet to be canvassed and I am therefore circumspect in dealing with the reasoning of the court.
11. In light of what I have stated, I take the following view of the matter. The parties agreed on terms of a consent in which the respondent was given custody of the children subject to the appellant having visitation rights. This consent was consistent with the general principle that children of tender years particularly girls should be in the custody of the mother unless there are exceptional circumstances. It is not in dispute that even though both parents do not see each other eye to eye, they both love their children and have taken care of them as required as the consent order clearly shows.
12. The issue is whether at this interim stage I should reverse the custody of the children on account of the children's wishes to attend a different School. It is correct to state that in considering their best interests, the wishes of the children must be taken into account but the same are not decisive of the issue. The court must consider the same in light of all the circumstances of the case (see **section 83** of the *Children Act*). At this stage, I find that the respondent is a capable parent, she was granted custody and I do not think it could be in the best interests of the welfare of the children to reverse the order of custody only on the ground the children wish to attend another school. I am alive to the fact that apart from the children's views, there has been no independent verification of the circumstances of both schools.

13. I note that the appellant, despite the consent order, took it upon himself to enroll the children in another school. He did not consult the respondent or seek directions of the Court. The granting of an order in his favour would be to validate his action as a *fait accompli*.

14. I dismiss the Notice of Motion dated 6th May 2015. I direct the appellant to return the children to the respondent on or before the close of the day on Sunday, 10th May 2015 so that they may continue the schooling at their previous school.

DATED and DELIVERED at MIGORI this 8th day of May 2015.

D.S. MAJANJA

JUDGE

Ms Kyamazima instructed by Amondi and Company Advocates for the appellant.

Mr Kisera instructed by Omonde Kisera and Company Advocates for the respondent.