



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO. 16 OF 2015**

**K W M..... APPLICANT/APELLANT**

**VERSUS**

**R N..... RESPONDENT**

**RULING**

**INTRODUCTION**

1. In a ruling delivered on the 15<sup>th</sup> June 2015, the Children Court at Tononoka in case no. 464 of 2014 made orders granting joint custody of a 3 1/2 year old female child to the appellant father and the respondent mother; the actual custody of the child to the respondent mother with reasonable access by the appellant and maintenance of the child, among other orders, holding as follows:

*“I do therefore grant both parties the joint legal custody of the child. The defendant shall have the actual physical custody with the plaintiff having unlimited access every alternate weekend from Saturday 10.00am to Sunday 5.00pm and half of the school holidays. ....*

*The plaintiff has been paying school fees as well as school related expenses and catering for the child’s needs. Both parties are employed. The child herein is still very young and has many requirements which include food, clothing, shelter, medical care among other things. At this stage, I am of the view that the best interest of subject child shall be best served if he following circumstances prevail –*

- a. *The Plaintiff shall pay school fees directly to the school where the child is while the defendant shall cater for school related expenses.*
- b. *The child to continue being under the plaintiff’s medical care.*
- c. *The defendant to cater for her own rent and food.*
- d. *The plaintiff to contribute Ksh.3000/- every month payable to the defendant on or before the 5<sup>th</sup> day of every month to cater for clothing and other needs like soaps , lotions etc.*
- e. *This being a matter brought on behalf of he child each party shall bear their own costs and shall be at liberty to apply.”*

2. Being aggrieved by the said ruling the Plaintiff filed a Memorandum of Appeal dated 19<sup>th</sup> June 2015 and by an application dated 22<sup>nd</sup> June 2015, appellant father of the child the subject of this appeal filed an application for stay of execution of an order of the Children’s Court and sought specific orders as follows:

1. *THAT this application be certified as urgent and service of the same be dispensed with in*

- the first instance and the same be heard ex-parte;*
2. *THAT there be a stay of execution of the Ruling and further proceedings in Tononoka Children's Case No. 464 of 2014 pending the hearing and determination of this Application.*
  3. *THAT there be a stay of execution of the Ruling dated 15th June 2015 and further proceedings in Tononoka Children's Court Case No. 464 of 2014 pending the hearing and determination of the Applicant's Appeal.*
3. The application was based on grounds set out in the application as follows:
- a. *THAT the Applicant has filed an Appeal against the decision of the Tononoka Children's Court Case No. 464 of 2014 being an Appeal against the Ruling dated 15th June 2015.*
  - b. *THAT the said Appeal raises triable issues and has high probabilities of success.*
  - c. *THAT if the stay is not granted, the said Appeal shall be rendered nugatory.*
  - d. *THAT the Appellant stands to suffer loss if the stay is not granted.*
  - e. *THAT the Respondent having obtained order for custody in respect of the ruling dated 15th June 2015 in Children's Case No. 464 of 2014 will take away the child from the Applicant and the child's learning will be affected as the Respondent resides far away from where the child is schooling.*
4. The application was supported by the affidavits entitled supporting affidavit, supplementary affidavit and 2<sup>nd</sup> supplementary affidavit of the appellant sworn respectively on 22<sup>nd</sup> June 2015, 25<sup>th</sup> June 2015 and 29<sup>th</sup> June 2015. For the respondent was filed affidavits entitled replying affidavit, supplementary affidavit and second supplementary affidavit sworn by the Respondent respectively on 25<sup>th</sup> June 2015, 29<sup>th</sup> June 2015 and 1<sup>st</sup> July 2015. Counsel for parties then made oral submissions on the 1<sup>st</sup> July 2015 and the ruling of the court was, on the basis of urgency, scheduled for the 6<sup>th</sup> July 2015.

#### **ISSUE FOR DETERMINATION**

5. The issue for determination in this application is whether in the circumstances of this case the court will grant stay of execution and proceedings pending appeal.

#### **DETERMINATION**

##### ***Principles for the grant of stay of execution in children matters***

6. As I observed in ***Bhutt v. Bhutt*** Mombasa HCCC NO. 8 of 2014 (O.S.), in determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution Order 42 rule 6 of the Civil Procedure Rules, must be complemented by an overriding consideration of the best interest of the child in accordance with the injunction of Article 53 (2) of the Constitution -

*“6. In exercising its jurisdiction to grant stay of execution, the High Court is required by Order 42 rule 6 (2) of the Civil Procedure Rules to be satisfied that –*

1. *The applicant will suffer substantial loss if stay is not granted;*
2. *The application for stay has been brought without undue delay; and*
3. *The applicant has provided security for the due performance of the decree or order appealed against.*

*7. In the circumstances of this case, which involves two minor children of the Plaintiff and the deceased husband of both the plaintiff and the 2<sup>nd</sup> defendant, there is additional consideration imposed by Article 53 (2) of the Constitution which requires that “a child’s best interests are of paramount importance in **every matter concerning the child.**” The best interests of a child are superior to rights and wishes of parents, and they incorporate*

*not just the physical comfort of the child but the welfare of the child in its widest sense. See Court of Appeal decision in **Atwal v. Amrit** (2011) 2 EA 20.”*

7. I have noted the opinion of Musyoka, J. in two decisions – **Z.M.O. v. E.I.M.** [2013] eKLR and **M.N. v. P.A.S.** [2015] eKLR cited by the Counsel for the Respondent, and I, respectfully, agree with the learned judge that it is in very rare cases that courts grant stay of maintenance orders in cases involving minor children, where the duty to maintain a child is imposed on a parent by statute, as it is not in the best interests of the child to suspend a maintenance order particularly where parentage is not in dispute and that an expedited hearing of the main appeal might be a solution where there is a challenge on quantum of maintenance rather than staying the orders of the trial court pending appeal.
8. Although Counsel for the appellant suggested that her prayer at this stage was for stay only in relation to the grant by the court of actual physical custody of the child to the respondent, the prayers in the Notice of Motion dated 2<sup>nd</sup> June 2015 belie that submission as they seek to stay the entire orders of the court and further proceedings therein pending the hearing and determination of the appeal, in exact terms that -

*“THAT there be a **stay of execution of the Ruling dated 15th June 2015** and further proceedings in Tononoka Children's Court Case No. 464 of 2014 pending the hearing and determination of the Applicant's Appeal.”*

### **Best Interest of the Child**

#### **Welfare of the Child**

9. It appears from the supplementary affidavit of the applicant of 25<sup>th</sup> June 2015 that the grounds put forth by the father to justify his preference, as against the respondent, as the custodian of the child are purely physical and monetary related as opposed to the general well being including emotional and psychological welfare emphasized under section 76 (3) of the Children Act. As pointed out above quoting **Bhutt v. Bhutt**, supra, the *“The best interests of a child are superior to rights and wishes of parents, and they incorporate not just the physical comfort of the child but the welfare of the child in its widest sense. See Court of Appeal decision in **Atwal v. Amrit** (2011) 2 EA 20.”*
10. However, in paragraph 3(h) and (i) of his supplementary affidavit, the applicant herein tellingly states as follows:

*“h) That my current advocate Ms. Oballa, has explained to me and I have understood that the general rule is that custody of a child of tender years ordinarily rests with the mother unless there are exceptional circumstances.*

*i) That the respondent shall not suffer any prejudice should the orders of stay be granted in that –*

*i. That the respondent has not been living with the minor since January 2015.*

*ii. I am the one who personally been dropping and picking the minor from school.*

*iii. I assist the minor in home work*

*iv. the respondent has no house help to assist in certain house chores so as to create time for bonding with the minor. As the respondent is allegedly now in employment, I do not know under whose care the minor child will be while the respondent is at work.*

*v. That to the contrary, I have a help, who does manage the house hold chores cleaning, hence freeing my hands for bonding with the minor.*

*vi. The house help has been living with us for a very long time and has already bonded with the minor. Hence removing the minor from my custody is unnecessary at this point, it will only harm the child.*

*vii. I stay near the school in Tudor, so it's faster, safer and smoother for the minor to go to and from school...."*

11. The respondent has deponed in response that she has since the order for custody moved house to a place near the child's school and that she now has house help to assist her in the house. At this appellate stage the court is not able to determine with finality the disputed facts of the case which will be decided upon during the full trial before the Children Magistrate's Court, for now this court has to defer to the findings of the trial court.

***Presumption in favour of the mother of a child of tender years***

12. I did not hear anything from counsel for the appellant to dislodge the trite and commonsensical principle that the physical custody of a child of tender years should be with the mother unless the mother is shown to be an unfit person. Indeed the whole affidavit evidence of the appellant was geared towards showing the respondent as an improper or unfit person to bring the application with the exception of the general principle. At this stage of application of stay pending the hearing and determination of the appeal, and so as not to prejudice the hearing of the appeal, the court is not able to make concluded findings as to the suitability of the mother for the grant of physical custody of the minor child. The subject of these proceedings is a female child of three and a half years, and, therefore, by submission of both parties, a child of tender years in terms of section 2 of the Children Act.

***Additional evidence at appeal***

13. The appellant filed affidavits adducing new evidence not presented to the trial court that the respondent had no fixed abode and was sharing accommodation with a person of questionable moral character allegedly as a commercial sex worker. It was submitted by Counsel that in view of the importance of the question of custody of a child before the court, the receipt of additional evidence at the appellate level was necessary.
14. With respect, while Order 42 rule 27 of the Civil Procedure Rules provides for production of additional evidence in the appellate court, the procedure is an exception which must be justified in the circumstances of the case. Rule 27 is in the following terms:

*"27. (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if—*

*(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or*

*(b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.*

***(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission."***

15. As shown above, while the procedure of the court allows the taking of fresh evidence on appeal, this provision is subject to leave of court, which in this case had not been sought before the filing of the supplementary affidavits on this aspect of the case. However, the Court believing the issue of custody of the minor child to attract such great moment as to require consideration any relevant

matter, granted the leave for the affidavit and allowed the respondent a chance to respond to the allegations of fact therein. In her reply, the respondent while objecting to the reference to her co-worker at Fairdeal Hardware Ltd with whom she had lived as the latter looked for her own house as 'a commercial sex worker', protested the challenge on her suitability stating that *"after I was granted the actual custody of the minor, I got a new house and moved to Tudor on 28.6.2015 so as to have privacy and conducive environment with my child and also to be near [Particulars withheld] School which is also in Tudor and a walking distance."*

16. I consider that the disputes as to the moral uprightness of the respondent and her associates and the likely effect on the child are matters of fact that the court should make final finding upon hearing direct evidence *viva voce* either at the trial court or with special leave of the court at the appellate stage. Having read the affidavits filed by the parties in this Court, I am not able to find that the respondent is clearly an unfit person who should not have the custody of the child the subject of these proceedings. I am not persuaded by allegations of irrationality on the part of the respondent in her reaction to the situation that the parties find themselves as regards their relationship and the consequent arrangements for their child.
17. The court, therefore, does not find that substantial loss has been established, as it should be, on the part of the child for whose best interests the court is enjoined to always act, or the part of the appellant/applicant.

### **Discretion of the trial court**

18. Moreover, the issue of grant of custody of the child to the mother being one of exercise of discretion to make custody orders under the Children Act, the trial court's decision may only be interfered with by an appellate court upon the principles set out in ***Mbogo v. Shah*** (1968) EA 93, 96 (per Sir Charles Newbold, P) that –

***"[A] Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."***

19. In making her ruling the learned trial magistrate applied the rule that the custody of children of tenders years should be with the mother and found that –

*"The general rule, however, is that, where custody of a child is in dispute the mother should have custody unless special circumstances are established to disqualify the mother from having such a child.... I have looked at the Children Officer's Report, there is nothing that disqualify the mother from having custody. The plaintiff is also a fit person. The Plaintiff contested that the defendant (mother) does not have a job as alleged by her at Fairdeal. As a Court I am fully aware that financial disadvantage does not make one a lesser parent."*

20. The Children Officer's Report on the matter dated 27<sup>th</sup> April 2015 recommended as follows:

*"Your Honour,*

*The child is of tender age. She needs motherly care and protection. She also needs motherly and fatherly love. She also needs to get quality education and all her basic needs from both parents. First, I pray that joint custody be granted to both parents and actual custody be granted to the mother as the child is of tender age. Secondly, I pray that the father be granted access to the child. Thirdly, I pray that both [parents share in providing for the basic needs of the child. Further orders may be issued by the Honourable Court."*

21. In the circumstances of this case, I do not find that the trial magistrate was wrong, or that she

misdirected herself, on the application of the principle as regards the custody of children of tender years or that she took into account irrelevant factors in application of the principle arriving at her decision or that she was plainly wrong. Accordingly, the court does not at this stage interfere with the exercise of her discretion in the matter.

22. The appeal and application were filed without delay but in view of the finding on substantial loss test, the question of security for the stay of execution does not arise.

### **Liberty to apply**

23. In granting liberty to apply to the parties after ruling on custody and maintenance of the child made at the interim stage, the court was giving effect to section 88 (1) of the Children Act which provides for regular review, as necessary, of interim custody order, as follows:

*“88. (1) The court shall have power to make interim custody orders and may from time to time review, suspend or vary such orders.”*

24. In accordance with liberty to apply granted by the trial court, the appellant should seek the review of the matter before the trial court, if as it is contended, there is new information which was not presented before the trial court at the time of the decision subject of the appeal. The appellant should have sought review of the trial court’s order pursuant to the liberty to apply provision, and only approach the Court of Appeal after the court had finally dealt with the matter.

25. However, being a children matter, the best interest of the child however, dictates that the court seized of the matter at any time to deal with it in an expeditious fashion in terms of section 76 (2) of the Children act as follows:

*“76. (2) In any proceedings in which an issue on the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child”*

### **CONCLUSION**

26. The question of fact as to whether the respondent is a fit person to be granted the custody of the minor child the subject of the appeal herein is a matter for determination upon either the full trial of the suit in the trial court or upon final judgment of this court in the appeal. It is a matter which ought not be finally determined on the basis of disputed facts set out in affidavits filed by the parties at the interim stage. It would require trial by direct *viva voce* evidence with cross-examination of witnesses to test the veracity of their testimony. Moreover, interim orders of custody and maintenance of children by a trial court, being orders made in discretion of the trial court for the child’s benefit and best interest, should not lightly be interfered with except on full hearing on the appeal, where an appeal is filed, or the full hearing of the suit before the trial court.

27. In these circumstances, I consider that an order for the expedited trial of the appeal will meet the justice of the case so that the appeal is heard and determined expeditiously, unless the parties in the meantime agree to have the matter pending before the Children Court proceed to full trial for final determination of the dispute on its merits.

### **ORDERS**

28. Accordingly, for the reason set out above, I decline the request for stay of execution of the orders of the Tononoka Children Court made in Case No. 464 of 2014 on 15<sup>th</sup> June 2015. In accordance with the general principle for expedition in children matters under section 76 (2) of the Children Act, I direct that the appeal be heard expeditiously on a date to be fixed on priority basis at a mention for that purpose on the 13<sup>th</sup> July 2015.

29. Costs in the Cause.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 6<sup>TH</sup> DAY OF JULY 2015.**

.....

**JUDGE**

In the presence of: -

Alwanye for the Appellant

Njoroge for the Respondent

Musundi Court Assistant.