



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO.72 OF 2015**

**M O..... APPELLANT**

**VERSUS**

**M E M..... RESPONDENT**

**RULING**

M O, the applicant herein, is the biological mother of a minor who is the subject of these proceedings while M M (the respondent), is the biological father of the subject minor. On 28<sup>th</sup> July 2015 Hon. M. Aguttu, Resident Magistrate sitting at Kisumu, granted some access orders to the respondent allowing the respondent access to the minor for three days a week from Friday 6.p.m. in the evening and terminating on Sunday at 4 p.m. By these orders it meant that the respondent would pick the minor on Friday at 6 p.m. and return the minor on Sunday at 4.00 p.m.

The applicant being dissatisfied with these orders filed an appeal and thereafter took out a Notice of Motion dated 13<sup>th</sup> August 2015 under **Orders 42 rule 6** and **51 rule 1** of the Civil Procedure Rules 2010 and sought stay of execution of the orders granted by the learned magistrate. An interim stay of the orders was granted for 14 days but was later extended pending the hearing of this application. The application finally came before me on 2<sup>nd</sup> September, 2015 when it was heard and a ruling reserved.

In her application, the applicant has complained that the learned magistrate was wrong in granting the orders of access to the respondent which, according to the applicant, was not deserved and the applicant has doubted the ability of the respondent to have the minor during the period of access. The applicant further says that using the orders in question, the respondent visited the applicant's house with strangers to claim the minor without any prior communication or arrangement with the applicant and took the minor away at night without disclosing to the applicant where he was going with the minor and only returned the minor on a Sunday at 7 p.m.

The applicant has made several other allegations against the respondent to paint a picture that the respondent is not entitled to the access orders and that he has turned it to be joint custody. She says that the orders granted by the learned magistrate were not in the best interest of the minor and prays that her application for stay be granted.

The respondent has opposed the application through a replying affidavit sworn on 26<sup>th</sup> August 2015. The respondent says that he moved the court for access to the minor after the applicant had shut him out of the minor although he is the biological father to the said minor with equal rights to those of the applicant over the minor. The respondent says that he is in the country for a limited period of time hence he is entitled to have access to the minor whenever he comes visiting. According to the respondent, the orders granted to him were only for access and the court specified the days and time when he should have

access to the minor.

The respondent further says that he went to pick the minor from the applicant's premises on 31<sup>st</sup> July 2015 but could not gain access and was only able to pick the minor at about 8.00 o'clock that evening after intervention by the applicant's sister. From there he went to a Guest house to pick his luggage and travelled the same night with the minor to Budalangi, his ancestral home and returned the minor on Sunday as ordered by the court. The respondent on his part blames the applicant as one who is not capable of taking care of the minor's interests. The respondent in a nutshell denies the accusations by the applicant and says that he is a responsible parent and one who can take care of the minor. He prays that the application be dismissed.

When this application came up for hearing, Mr Wasuna appeared for the applicant while Mr Nyamweya was for the respondent. Mr Wasuna, learned counsel for the applicant, pleaded with the court to grant the application relying on the affidavit in support of the application and the grounds on the face of the motion. He told the court that the orders granted by the learned magistrate were not in the best interest of the minor and that they had been turned into joint custody.

Mr Nyamweya, learned counsel for the respondent on the other hand, beseeched the court not to interfere with the orders granted by the learned magistrate saying that the respondent as the biological father to the minor, was entitled to access and that there was no problem with the orders of access granted to his client. He relied on the affidavit in response and asked the court to dismiss the application. He also said that the court was not properly seized of the application since none had been filed in the court below.

I have considered the application, perused the affidavits both in support and opposition to the application and taken into account the rival submissions by counsel. The dispute herein revolves around access to a minor by the biological father to that subject minor. The court, M Aguttu – Resident Magistrate, had granted orders of access to the respondent father which the mother is unhappy with and has lodged an appeal against those orders and now she wants execution of those orders stayed pending the hearing and determination of the appeal.

The application before me seeks stay of execution of the orders of the learned magistrate, which application has been brought pursuant to **order 42 rule 6** of the Civil Procedure Rules, 2010. That rule lays down conditions that a party seeking a stay of execution must meet if the court is to grant such stay. In short, the court must be satisfied that substantial loss will result to the applicant if stay is not granted, that the application has been made without delay and such security as the court may order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

The orders that the applicant seeks to stay relate to access to a minor. During the hearing of the application, the court enquired from counsel about the gender and age of the minor, the subject of these proceedings, and both counsel were in agreement that the minor is female aged seven (7) years and in school. The applicant has for that reason argued that the orders granted by the learned magistrate were not in the best interest of the minor and that should they remain in place, they will negatively affect the interest of the minor. The respondent on the other hand holds the view that there is no problem with the orders and that this court should not interfere.

On the first issue for consideration whether the applicant will suffer substantial loss if the order she seeks is not granted, it is important to bear in mind that what is in issue is a right to parental access and ensure that the welfare and interests the minor access to whom, the respondent was granted will not be affected. The minor is aged seven years and is female. The respondent is supposed to pick the minor on a Friday at 6.00 p.m. spend the week end with her and return her on Sunday at 4.00 p.m. It is not clear under what conditions this minor is kept during the period of access when she is away with the respondent. If the conditions are not favourable, that may amount to substantial loss. It is the minor who will suffer and not the applicant. On that basis I am of the view that what the court should consider is how the minor will be affected and not the substantial loss to be suffered as we understand it in the ordinary sense.

The respondent does not reside in the country. It has not been disclosed when the respondent left the country or how often he has been meeting the minor and most importantly, for how long he has interacted with the minor. It is not clear, at least from the record, if the minor at her age, is used to the respondent and is free with him to the extent that she will be free with him for the entire period of access. Who cooks for the minor, who washes her clothes and where she sleeps, are issues, in my view, that might affect the interests and welfare of the minor which tend to answer the question of substantial loss that may be suffered.

Regarding the question of whether the application was brought without delay, it is clear that the orders were made on 28<sup>th</sup> July 2015 while the application was filed on 14<sup>th</sup> August 2015 within a period of 15 days. I therefore find that the application was filed timeously which satisfies the second condition when dealing with an application of this nature.

As for the third condition of security, this is a matter that relates to the interests of a minor and nothing more. The applicant has moved the court, in her view, to protect the interest and welfare of the minor and therefore cannot be burdened by the usual issue of security. This condition cannot apply in the ordinary sense to an application like the one before me. As long as an applicant demonstrates that he/she is litigating on behalf of and for the interest and welfare of a minor, the issue of security will not apply. That is why **section 4(3)** of the Children's Act (Cap 141) Laws of Kenya obligates Judicial and Administrative Institutions and all persons acting in the name of these institutions where they are exercising powers conferred by that Act to treat the interests of a minor as the first and paramount consideration and adopt a course that will promote the interest and welfare of that minor.

For that reason, insisting on security when the issue at hand relates to a minor, will not be furthering the interests and welfare of that minor when the question of staying orders affecting such a minor is under consideration. I am of the considered view, that the kind of security the court should concern itself with is whether the minor will be available should the appeal fail and the respondent seeks to execute the orders granted to him.

Further more it has not been suggested that the minor may not be available for purposes of executing the orders of access granted by the learned magistrate should the appeal fail. I am therefore satisfied that the third condition has been met and in the absence of any suggestions to the contrary, the minor will be available for purposes of access should the appeal fail.

Counsel for the respondent has also objected to the application saying that the applicant should have first applied for stay of execution in the lower court which granted the orders before moving to this court in terms of **order 42 rule 6(i)** of the Civil Procedure Rules, 2010.

Order 42 rule 6(1) is in the following terms:-

***“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order, but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from., the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”*** (emphasis added)

My reading of **order 42 rule 6(i)** is that it is couched in a permissive rather than a mandatory language. It does not seem to say that an applicant must first apply for stay of execution in the lower court before moving to the High Court for stay. **Order 42 rule 6(i)** is merely a rule of procedure and I do not think it should be applied in a manner that will disentitle the applicant from approaching the High Court for stay of execution. This court has inherent powers under **section 3** of the Civil Procedure Act to hear any application such as the one by the applicant and pronounce itself on it. In any case **sections 1A** and **1B** of

the Civil Procedure Act now require the courts to facilitate just, expeditious proportionate and affordable resolution of disputes thus do substantial justice rather than concern themselves with procedural technicalities. This is the same principle that is now contained in **Article 159(2)(d)** of the Constitution, which requires that justice be administered without undue regard to procedural technicalities. The argument by the learned counsel for the respondent that this court is not properly ceased of this application cannot hold and must be rejected.

For these reasons I find that the applicant's application is merited and is allowed. I hereby grant stay of execution of the ruling and order of the Honourable M. Aguttu, Resident Magistrate given at Kusumu on the 28<sup>th</sup> July 2015, pending the hearing and determination of this appeal. The request for stay of proceedings before the lower court is however delivered.

Each party will bear their own costs.

**Dated and delivered at Kakamega this 4<sup>th</sup> day of September 2015.**

**E. C. MWITA**

**J U D G E**