



**REPUBLIC OF KENYA**

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

**CHILDREN'S CASE NO.6 OF 2015**

**CNB.....APPLICANT**

**VERSUS**

**MSM.....RESPONDENT**

**RULING**

1. This matter emanates from High Court of Kenya at Bungoma. It landed on my desk during the vacation. The case is pending appeal following the issuance of an order by the Chief Magistrate's Court at Bungoma on 14/9/2015 granting custody of the children J.N. and W.M to the Plaintiff herein, MSM.

2. What is before me for determination is the Notice of Motion dated 03/07/2015 brought by CNB, the Defendant/Applicant. The Applicant prays for ORDERS:-

1. **THAT this application be certified a urgent and be heard exparte in the first instance.**
2. **THAT the children J.N and W.M be returned to the Applicant herein by the Respondent who took them away in execution of the said exparte orders of the 14<sup>th</sup> day of January 2015.**
3. **THAT the exparte custody orders of the children J.N and W.M issued on the 14<sup>th</sup> day of January 2015 be set aside and/or stayed pending the hearing and determination of this Application.**
4. **THAT leave be granted to the Applicant herein to file an appeal out of time arising from the orders of Honourable P.N ARERI, Principal Magistrate delivered on the 14<sup>th</sup> day of January 2015.**
5. **THAT costs be in the cause**

3. The application is premised on the grounds that are set out on the face of the application and is also supported by the applicant's affidavit sworn on 03/07/2015. The three grounds in support of the application are:

- a. **THAT the application dated the 13<sup>th</sup> day of January 2015 was heard exparte and exparte custody orders were granted to the Respondent herein.**
- b. **THAT the Applicant herein was not given an opportunity to be heard.**
- c. **THAT the matter involves children whose best interest should be paramount AND WHICH APPLICATION is further grounded on the annexed affidavit of CNB and on such other and further grounds as may be adduced in court at the hearing thereof.**

4. In her supporting affidavit, the applicant depones that the ex parte orders issued by the Chief Magistrate's Court were based on a social enquiry report dated 23/09/2013 which report was manipulated by the Respondent herein. She also says that since 2012 when the parties parted ways, she has been having custody of the children until sometime in February 2015 when the situation changed. She wants the children returned to her as the continued stay of the children with their father, the Respondent, is not in the children's best interest.

5. The application is opposed vide the Replying affidavit dated 11/07/2015. The Respondent says that the instant application is made in bad faith and the same has been made after inordinate delay for which no explanation has been given. The Respondent also alleges that the applicant, though duly served, failed to respond to the application dated 13/01/2015, which application gave rise to the custody orders issued to the Respondent on 14/01/2015, and the Respondent also says that he had been forced to make the application for custody of the children because the applicant had abandoned the children and further that she had failed to comply with the Court order requiring her to release the children to the Respondent. The Respondent therefore contends that the Applicant has not come to Court with clean hands and is therefore not entitled to the orders sought. Finally the Respondent contends that since the Applicant has made it difficult for him to access the children whenever the children are with her, it is not in the children's best interests for them to be taken back to the Applicant.

6. The parties filed and exchanged written submissions. From the applicant's submissions the children herein were handed over to the Respondent on 26/06/2015 after the Applicant was committed to civil jail for failure to avail the children to Court. The Applicant contends that the trial Court failed to apply the spirit of law on children in making the custody order in favour of the Respondent and in particular Section 4(2) of the Childrens Act which stipulates that:-

**“4(2) In all actions concerning children whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration”**

7. Counsel for the Applicant also cited Section 4(3) of the Childrens Act for the proposition that all the persons/institutions set out in Section 4(2) (above) must do all that they do solely to safeguard and promote the rights and welfare of the child. Counsel also relied on the provisions of Article 53(2) of the Constitution of Kenya and submitted that the trial Court in granting the custody orders to the Respondent failed to consider the children's best interest as well as the wishes of the Applicant.

8. Counsel also cited some authorities in support of his arguments. **Mombasa High Court Divorce Cause No.34 of 2002 – B –vs- M** was cited for the proposition that:-

**“In situations when two spouses are separated and the children of marriage are living separately with each parent and seem comfortable the age of the children is to be the deciding factor as to which parent is to get custody. The two children of the marriage, one aged 7 and the other 2 ½ years, were still within ages that dictated that they live with their mother unless she be found to be hopelessly unable to take care of them.”**

9. The case of **Githunguri –vs- Githunguri – Nairobi - Civil Appeal No.30 of 1978** was cited for the following propositions:-

**i) The appellate court will not interfere with the Judge's exercise of discretion unless it is based on a wrong principle or was clearly a wrong decision. The Trial Judge in this case made the wrong decision, since the custody of young female children should be granted to the mother unless there are exceptional circumstances. In this case there are no exceptional circumstances shown to justify depriving the mother of her natural right to have her children.**

**ii) The trial Judge correctly directed himself that in cases of this nature, the**

**paramount consideration was the welfare of the children but misdirected himself by not finding that the rule was in favour of the mother.**

**iii) The rule is that the mother should normally have custody of children of tender years and where the court gives it to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude prima facie rule.**

The Applicant therefore prays that the application be allowed as prayed.

10. The Respondent on the other hand submits that the Applicant has been indolent all along in addition to the fact that she is in blatant breach of Court orders. The Respondent also submits that the Applicant's application dated 11/03/2015 remains unprosecuted. In the said application which is annexed to the Respondents replying affidavit and marked MSM -111(b) the Applicant prayed for stay of execution of the orders given on 14/01/2015 and also prayed that the orders be set aside. She also prayed that the application dated 13/01/2015 be set down for inter partes hearing. It is also submitted by the Respondent that the Applicant does not stay with the children because while the Applicant stays in a rented house in Nakuru, the children had been left to stay with the applicant's sister one MB in Kitale.

11. Reliance was placed on four cases, but two of them stand out Nrb HC Civil Case No 6 of 2009(Original Nairobi Childrens Case No.278 of 2006) – M.S.A –vs- P.K.A for the proposition that a child of tender age in respect to custody, care and control should be given to the mother in the absence of exceptional reasons. The reason being that a mother is generally best disposed to provide better quality care to such children than the father. Nrb HC Civil Appeal No.73 of 2013 – E.W.K. –vs- J.KJ was relied upon for the proposition that where exceptional circumstances exist like the children big boys who need their fathers input in their lives then custody of such children shall be given to the father.

12. I have now carefully considered the application, the law and the submissions by Counsel. The question that stands out in my mind is whether the Applicant is deserving of the orders made. In my considered view she is not. First and foremost, the instant application is very similar to the unprosecuted application dated 11/03/2015. The Applicant has not said anything about that particular application, yet the tenor of the orders sought therein is the same as that of the instant application. In my humble view, the Applicant is being vexatious and is also guilty of abuse of Court process.

13. Secondly, there was inordinate delay in bringing the instant application. The impugned orders were issued on 14/01/2015. There is no explanation for the delay. In any event, if the Applicant really wanted the Court to give her an ear regarding the said orders, she should have pursued her application dated 11/03/2015. In my considered view, the Applicant has been indolent and now wants to confuse issues by filing a multiplicity of applications without intending to prosecute them. For her indolence, the Court will not grant the orders sought herein.

14. Thirdly, the Applicant has not disputed the Respondent's contention that she does not actually stay with the children. In my view therefore, this is a special circumstance that would make any Court depart from the principle that the custody of children of tender years should be given to their mother. The Respondent has stated that he has taken the children to school at [Particulars Withheld] Academy and is paying school fees. In my considered opinion, it will be in the best interests of the two children for them to remain in the Respondent's custody.

15. In the premises and for the reasons hereinabove given I find that the application dated 03/07/2015 lacks merit, is frivolous and vexatious. The same is hereby dismissed. Each party shall bear its own costs.

16. Orders accordingly.

**Ruling delivered, dated and signed in open Court this 9<sup>th</sup> day of November 2015.**

**RUTH N. SITATI**

**J U D G E**

**In the presence of:**

**Mr. Bororio (present)for Applicant**

**Mr. Situma (absent) for Respondent**

**Mr. Lagat - Court Assistant**