



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL APPEAL 53 OF 2013

G S A.....APPELLANT

VERSUS

A S A.....RESPONDENT

RULING

1. The appellant moved this court on 14th August 2013, by an application of even date, seeking stay of execution of the decree or orders of the Deputy Chief Kadhi Ali Omar made on 10th July 2013 pending the hearing and determination of the appeal herein.

2. In her affidavit in support of the application, the appellant states that she has filed an appeal which has very good chances of success. She avers that she is the biological mother of four children aged five, four, three and one, respectively. According to her the children are of such tender years has to be taken care of by their father. She is apprehensive that if custody of the children is given to the father he would place them under the care of his other wife, who is likely to abuse and mistreat them. She also fears that he may relocate them to Somalia to live there with his first wife, yet she, the appellant, who is their biological mother, is still alive. She accuses the respondent father of failing to pay for their maintenance and upkeep.

3. The respondent father opposes the application. He swore an affidavit on 21st August 2013. He avers that he was previously married to the appellant and they had seven (7) children. Thereafter their marriage was dissolved by decree of the Kadhi's Court made on 7th July 2012. I transpired that the appellant remarried thereafter. The two parties have tussled over the children, culminating in suits before the Children's Court and the Kadhi's Court. Eventually the Kadhi's court ruled on 10th July 2013 that custody of the minors be given to the respondent husband, that the appellant do vacate the respondent's matrimonial house by 23rd August 2013 and that both the appellant and her new husband do surrender all the legal property and household items belonging to the respondent.

4. The instant appeal was lodged in court on 3rd August 2013 against the order of 10th July 2013. The principal ground of the appeal is that the lower court did not act in the best interests of the children in granting the orders made on 10th July 2013.

5. I note that this is a matter concerning custody of children aged five years and below. These are certainly children of tender years. Affairs concerning children are governed by the provisions of the Children Act, No. 8 of 2001. The said statute is of universal application. It applies to Kenyan citizens and residents alike, irrespective of their ethnicity, race vice or creed. I have not encountered any provision is that law which excepts Muslims from the provisions of the Act.

6. **Section 4** of the Children Act legislates the best interests of the child principle. The said provision states as follows:-

“4. (1)...

(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 interests of the child shall be a primary consideration.”

7. My understanding of **Section 4(2)** of the Children Act is that the best interests of the child should be applied by all courts of law established under the Kenyan Constitution. This should include the Kadhi's Court. Whether the Kadhi's court applied this principle in its orders of 10th July 2013 is a matter for testing on appeal. In my view there is a serious point of law for determination by the appeal court.

8. **Section 4 (2)** of the Children Act should be read alongside Article 170 (5) of the Constitution, 2010, which set out the jurisdiction of the Kadhi's Court. Article 170(5) reads as follows:-

“The jurisdiction of a Kadhi's Court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the muslim religion and submit to the jurisdiction of the Kadhi's court.”

9. From the wording of Article 170(5) of the Constitution it would appear that the Constitution has not granted jurisdiction to the Kadhi's court over matters touching on custody and maintenance of children. It is doubtful therefore whether the Kadhi's court can grant custody and maintenance orders over children. This is moot point for determination on appeal.

10. The impugned orders were made by the Kadhi's court on 10th July 2013. The appeal was lodged in court on 2nd August 2013. The Motion the subject of this ruling was filed on 14th August 2013. I am satisfied therefore the application was made without inadequate delay.

11. Although the said application is predicated on Order 42 rule 6 of the Civil Procedure Rules, the issues relating to security for costs and substantial loss do not arise. The only matter for consideration would be the best interests of the children the subject of the proceedings before me.

12. I have already noted that the children in question are of tender age. They are currently with the appellant, their mother. I believe the situation should remain that way. I also note that there are serious points of law arising which ought to be canvassed at the hearing of the appeal.

13. I hereby find merit in the application dated 14th August 2013. I allow the same in the terms proposed. Costs shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 14th DAY OF March 2014.

W. M. MUSYOKA

JUDGE