



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 61 OF 2014**

**M M M.....1<sup>ST</sup> APPELLANT/APPLICANT**

**M N.....2<sup>ND</sup> APPELLANT/APPLICANT**

**J K.....3<sup>RD</sup> APPELLANT/APPLICANT**

**VERSUS**

**J G M.....RESPONDENT**

**RULING**

1. This appeal was filed on 7<sup>th</sup> August 2014 to challenge the ruling and directions given by the Children’s Court at Milimani on 24<sup>th</sup> July 2014 over a 9 year-old girl, H.G. On that day, the Court granted interim custody of the child to the respondent and issued a warrant of arrest against the 1<sup>st</sup> appellant. The parties are father and mother, respectively, of the child. The 2<sup>nd</sup> appellant and the 3<sup>rd</sup> appellant are the parents of the 1<sup>st</sup> appellant, and, therefore, the grandparents of the child.

2. This application was filed seeking the stay, setting aside and or variation of the orders, or that a status quo be maintained in respect of the order. It does appear that subsequent to the filing of the appeal there was an order that the appellant be sent to civil jail. She seeks the order be stayed, set aside and or varied. It does appear from the orders subject of the appeal that, while the main suit between the couple was on-going, on 5<sup>th</sup> January 2011 the 1<sup>st</sup> appellant was granted interim custody of the child. On 24<sup>th</sup> July 2012 the parties were ordered to have holiday access to the child on 50:50% basis. The 1<sup>st</sup> appellant did not comply with the order of access. The court ordered stay of the order of interim custody and issued a warrant of arrest against the 1<sup>st</sup> appellant. It would appear that the 1<sup>st</sup> appellant could not be traced for the execution of the orders, and she has failed to come to court. This is what led to the orders subject of the appeal.

3. The 1<sup>st</sup> appellant’s case is that she is the mother of the child and therefore the more suitable parent to have custody of the child, who is a girl aged 9. It is stated that the orders above were made without hearing the wishes of the child; that the orders were issued without hearing the 1<sup>st</sup> appellant; that the child is school-going and the orders given would prejudice it; that since 2010 the 1<sup>st</sup> appellant has had custody of the child and maintained it without any assistance from the respondents; that the respondent had a history of physically assaulting the child as was evidenced by the interview carried out in court on 20<sup>th</sup> April 2011; and that the 1<sup>st</sup> appellant was not aware that the Court was looking for. The appellant denied that she had disobeyed any court order.

4. The respondent opposed the application and stated that the 1<sup>st</sup> appellant abandoned the child when it was hardly one year old and went to pursue university education. For 6 years he stayed with the child. On 22<sup>nd</sup> December 2010, however, the 1<sup>st</sup> appellant called to say she wanted to see the child. She pretended that she wanted to buy the child Christmas gifts only to disappear with it. That was what led to

his filing the suit in the Children's Court to seek legal custody, care and control of the child. He denied that he had failed to maintain the child. He stated that the child had been poisoned by the 1<sup>st</sup> appellant to say that she had been assaulted by him, but that was not true and the trial court had, despite the interview, granted him access. He stated that he has a very close relationship with the child. Further he stated that he has equal rights over the child. Lastly, he stated that the 1<sup>st</sup> appellant had been served with process (as shown by the affidavit of service) but had not obeyed orders to allow him access the child. The court had given her a period to comply with the orders but she had failed to abide, he said.

5. The affidavit of the 1<sup>st</sup> appellant says that on 20<sup>th</sup> February 2007, when the child was 1 year and 8 months the respondent visited her and pretended that he was going to buy the child sweets but disappeared with it. She was unable to trace him and the child until December 2010. It was following the court's interview with the child that she was granted custody. The child was born on 4<sup>th</sup> May 2005.

6. I have called for and perused the file at Children's Court. It is clear that the orders subject of the appeal followed a long period of non-compliance on the part of the 1<sup>st</sup> appellant. The court appeared frustrated to the extent of issuing a warrant of arrest and staying the order of custody. Further, the orders sought in the application are substantially the same orders sought in this application. But more important, on 6<sup>th</sup> August 2014 the 1<sup>st</sup> appellant filed an application in the subordinate court seeking similar orders. That application is pending. The law is that anyone who, knowing of a court order, wilfully does something, or causes others to do something, to break the order or interfere with it, is liable to be committed for contempt (**MUTITIKA V- BAHARINI FARM LTD [1985]KLR 227**). The 1<sup>st</sup> appellant, when she felt aggrieved by the orders of 24<sup>th</sup> July 2014 or any previous orders, was obliged to go back to the court for stay, setting aside or variation of the same. This issue whether or not she was in disobedience of orders is pending in the Children's Court.

7. I am aware that in deciding any case where a child is concerned its best interests have to be considered, bearing in mind the matters under **sections 76 and 83 of the Children Act (No. 8 of 2001)**. It is also true that, *prima facie*, children of tender age should be with their mother, and it is only in exceptional circumstances that such custody should be given to the father (**D.K. V J.K.N, HC CIVIL APPEAL NO. 54 OF 2010 AT NAIROBI**).

8. I consider that the order of custody was an interim one. The case before the subordinate court is on-going. Custody had, again on interim basis, been given to the 1<sup>st</sup> appellant who, as per the record, became disobedient. The record also shows that for a long time in the past the child was staying with the respondent. In the peculiar circumstances of this case, I decline to grant the orders prayed in the motion dated 15<sup>th</sup> August 2014. The motion is therefore dismissed with costs. However, I order the Children's Court to prioritise this case and finally determine the issue of the custody of the child.

**DATED and DELIVERED at NAIROBI this 6<sup>th</sup> day of November, 2014.**

**A.O. MUCHELULE**

**JUDGE**