



REPUBLIC OF KENYA

High Court at Meru

Civil Appeal 25 of 2013

L. K. (M. M. M. BABY).....APPELLANT

VERSUS

H. M. K.RESPONDENT

R U L I N G

The appellant in her application dated 14th March, 2013 brought under Section 101 of the Children Act, Order 22 Rule 22 of Civil Procedure Rules 2010 and Article 53 of the Constitution of Kenya, 2010 seeks an order pending hearing and determination of this appeal stay orders of actual custody of the minor child herein namely M. M. M. aged 4 years be granted to the applicant. In the alternative the court's order dated 22nd February, 2013 be varied, reviewed, substituted, suspended or set aside altogether, and the actual custody of the minor child be granted to the applicant.

The application is based on the grounds on the face of the Chamber Summons. It is further supported by applicant's affidavit dated 14th March, 2013. The application is on the other hand opposed by the respondent who swore an affidavit dated 20th march, 2013.

The court heard oral submissions of both parties. It has also considered the contents of the applicant's affidavit in support and the respondent's affidavit in opposition. It has considered the opposing positions of the parties.

The issue for consideration is whether the applicant has met the conditions for granting orders of stay of execution.

In the instant application there is no dispute that the issue is a biological child of both the applicant and the respondent but both are not married to each other. The child is aged 4 years and has all the time been and still is in custody of the applicant. That in June, 2012 the lower court delivered judgment in Meru C.M. Children Court No. 28 of 2011 vesting the custody of the minor child to the applicant and the respondent was ordered to provide for the child's upkeep and maintenance but has not complied with those orders. The applicant averred as a result she was forced to leave the child with her mother temporary to go and look for a job in Nairobi but she keeps on coming back home every two weeks to check on the child.

She also averred that she sends money for upkeep of the child to her mother through M-Pesa. Applicant further deponed that she got a job as a saloonist and earns Kshs.20,000/- per month and is in the process

of moving to Nairobi with the child once she gets affordable accommodation within a clean vicinity. That applicant averred she has enrolled the child in school and pays school fees alone without any help from the respondent. That the respondent filed an application on 5th December, 2012 to have court's earlier orders reviewed in which he sought the custody of the child. The court allowed the application and vested the minor child in the custody of the respondent. The applicant being dissatisfied by that order preferred this appeal. The applicant avers that her appeal has overwhelming chance of success as she contends, the court's order is not founded on guiding and sound principles on custody of minor children and that no exceptional circumstances on her part as the mother of the child, like immorality and drunkenness were demonstrated to the Honourable court. The applicant further averred that the court's decision was based on the applicant's sorry financial state and that the orders issued do not serve the best interest of the child in view of the child's age, sex and ascertainable wishes. She further averred that if the court's ruling is executed before determination of her appeal, which she contends is meritorious, and before it is heard and determined the same would be rendered nugatory.

The respondent on his part admits that he is the biological father of M. M. M. He admits that judgment of June, 2012 vested the child to the applicant and that the applicant was unable to provide adequately for the child due being financially unable. He further contends the appeal has no chance of success. The respondent averred that he does not know of the whereabouts of the child and averred that he is very sure that the child does not attend school. He further averred that he supports the child. The respondent further averred the applicant hid the child to defeat the court's order which had granted him the custody of the child.

The child subject of this application is 4 years old and of tender years as per Section 2 of the Children Act which defines "Child of tender years" as a child under the age of ten years.

In the case of **KARANU-V-KARANU (1975) E.A. 18 Court of Appeal stated:**

"The substantial question in this appeal is whether or not the Judge was right in giving custody of the children to the father. At the time the application was heard, the daughter of the parties was just over seven years of age, and the son was six years old. The Judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children, but he did not specifically refer to the generally accepted rule that, in the absence of exceptional circumstances, the custody of young children should be given to the mother."

In addition to the above in the case of **ZULEKHA MOHAMMED NAAMAN –V-GHARIB SULEIMAN GHARIB Court of Appeal (Mombasa) C.A. No.1234 of 1997** The Court of Appeal stated; that there was no arising evidence for review and that the physical custody, care and control of the children should be with the mother unless there was compelling circumstances to disqualify her from being awarded the custody.

The court in the matters of stay of execution have a discretion to order stay for sufficient causes if shown by the applicant. The purpose of stay is to ensure that the successful party does not get a barren success but is able to reap the fruits of his judgment, however, if it is shown the applicant has overwhelming chance of success and by refusing to grant stay the appeal if successful would be rendered nugatory; stay ought to be given. In the current application the subject matter is a custody of a minor child, who stays with the applicant. The general accepted rule is that in absence of exceptional circumstances, the custody of a child of tender years should be given to the mother.

In the instant application no evidence has been tendered to show there are compelling circumstances to disqualify the applicant from continuing to be in physical custody, care and control of the minor child. I find unless stay is granted the applicant is going to lose the custody of the child and if the applicant succeeds in appeal it would not be easy to get back the custody of the child. Thus the appeal will be rendered nugatory. The respondent who has never been in custody of the minor child and who is unknown to the child would not be prejudiced to await the outcome of the appeal.

I find it is in the best interest of the welfare of the minor child that his custody be not disturbed pending

the hearing and determination of the appeal, otherwise ordering otherwise would result to substantial loss to the child's welfare. The application has been brought to court without unreasonable delay and as such ought to be granted.

In view of the foregoing the applicant's application dated 14th march, 2013 is granted as follows:-

- 1. *That pending hearing and determination of this appeal, stay be and is hereby granted staying of actual custody of the minor child herein namely M. M. M. aged 4 years old from being in custody of H. M. K. the respondent but to continue to be in the custody of the APPLICANT L. K.***
- 2. *Costs of the application be in the cause.***

DATED, SIGNED AND DELIVERED AT MERU THIS 4TH DAY OF APRIL, 2013.

J. A. MAKAU
JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

- 1. Applicant in person – present**
- 2. Respondent in person – present**

J. A. MAKAU
JUDGE