



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 36 of 2012

MAURICE MAIKO ACHOCHI APPELLANT

AND

VENNY KWAMBOKA MORURI RESPONDENT

***(Being an appeal from the judgment and decree of Hon. P.L. Shinyada, SRM, dated
and delivered on 29th February, 2012 in Original Kisii CM Children's case No.30 of 2010)***

RULING

Introduction

1.The subject matter in this case is a child aged two (2) years or thereabouts. Initially this was a children's case at the Chief Magistrate's court being Children's Case No.30 of 2010 in which the learned trial magistrate therein awarded custody of the child to the Respondent. Being dissatisfied with the said judgment and decree dated and delivered on 29th February 2012 the appellant lodged this appeal by which he seeks to have the judgment of the lower court set aside and be substituted with an order granting custody of the subject to the appellant with a right of access to the Respondent.

Facts and Evidence

2.The appellant is the father of the child while the respondent is the mother. The parties are not married and do not live together. The

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Appellant's case is that respondent abandoned the child when he was aged three (3) months in or about the month of June 2010 with strangers in a hair saloon where the child was rescued by one Pauline Rabuto (PW3) who brought him back to the applicant's home. That the respondent has been cruel to the child even during the times the appellant and respondent tried to live together as husband and wife, to the extent that she even refused to breast feed the child and sometimes spent nights away leaving the child with the appellant.

The Application

3. Pending hearing and determination of the appeal herein, the appellant filed the Notice of Motion dated 23rd April 2012 praying for orders that:-

1) Spent.

2) Pending hearing and determination of this application inter partes, an interim order of stay of execution of the judgment and decree in Kisii CMCC Children's Case No.30 of 2010 be granted.

3) Pending hearing and determination of the appeal herein, an order of stay of execution of the judgment and decree in Kisii CMCC Children's case No.30 of 2010 be granted.

4) Costs of this application be in the cause.

4. The application is premised on the grounds set out on the face and is also supported by the applicant's affidavit sworn on 23rd April 2013. In

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essence the applicant is saying that unless the order of stay is granted as prayed, the child who has been in his custody since the age of three (3) months is likely to be traumatized by being plucked from a familiar environment at the applicant's home and planted in a strange and unfamiliar environment where the respondent and her lover were. The applicant also says that the respondent had never looked back since she dumped the child in a hair saloon at three (months) and that it would therefore be in the interests of the child to maintain the status quo until the appeal is heard and determined. Interim order of stay was granted on 27th April 2012 and the same were extended by consent of the parties on 17th May 2012 pending hearing and determination of the application.

5. From an analysis of the facts and evidence, the issue that arises for determination is whether or not the applicant has met the threshold of the conditions for granting of a stay order as set out under **Order 42 Rule 6 (2)** of the **Civil Procedure Rules, 2010**. The rule requires an applicant seeking stay of execution pending appeal to satisfy the court on the following:-

a) That substantial loss may result to the applicant unless the order is made; and

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b) That the application for stay has been made without undue delay; OR

c) That such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant. It is to be noted that all the above conditions are to be satisfied and not just one of them.

The Submissions

6. In the submissions dated 11th June 2012 and filed on behalf of the appellant on 12th June 2012 by the firm of Asati & Company Advocates, it is contended that to remove the child from its familiar environment will cause the child trauma and that the applicant himself will suffer substantially if he must each weekend travel between Kisii and Molo where the Respondent lives. The applicant also contends that the application has been brought without unreasonable delay and that the applicant is ready and willing to abide by any conditions that this court may impose for the granting of the orders sought.

7. Finally, counsel prays that the Respondent's Replying and Supplementary Affidavits sworn on 19th May 2012 and 16th May 2012 respectively be expunged from the record for having been filed way out of time and without leave of the court.

8. The Respondent's submissions were filed on 6th August 2012 through the firm of Minda & Co. Advocates. I hasten to add that the

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Respondent's submissions and the law cited in support are not strictly speaking in support of the application but of the entire appeal. The court is not, at this stage determining the appeal, but only the application for stay.

Findings and Conclusions

9. After carefully considering the background of this case, the submissions and the law, I am persuaded that the applicant has made out a case for the orders sought. It is not in dispute that the child herein has been under the care and custody of the applicant from the age of three (3) months to date. The record confirms, and it is not disputed by the Respondent that the trial court called for the child and confirmed that the child was in good health. It is also not disputed that the distance between the places of abode for the applicant and the respondent is vast and in my humble view, travelling that distance over the weekends would not only cause hardship to the young child but also to the applicant. The first condition for stay of execution has therefore been fulfilled.

10. As regards the second condition, it is clear that this application was brought without undue delay. This fact remains uncontroverted by

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the respondent. Thirdly, the applicant has confirmed that he is ready and willing to abide by any conditions that this court may impose for the due performance of any decree or order that may be issued on appeal.

11. For the above reasons, I allow the Notice of Motion dated 23rd April 2012 and order as follows:-

1) There shall be a stay of execution of the judgment and decree in Kisii CMCC Children's Case No.30 of 2010 dated 29th February 2012 pending hearing and determination of this appeal.

2) The applicant shall deposit into court within the next fourteen (14) days the sum of Kshs. Fifty Thousand (Kshs.50,000/=) only being security for costs of the appeal.

3) The costs of this application shall abide the outcome of the appeal.

4) The appellant shall proceed to compile, file and serve the Record of Appeal within thirty (30) days from the date hereof.

5) In default of (2) above the stay order granted herein shall lapse.

12. It is so ordered.

Dated and delivered at Kisii this 09th day of May, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mrs. Sagwa (present) for Appellant

Mr. Moracha for Minda for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.

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