

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 25 of 2013

SON.....

APPELLANT

VERSUS

EAO.....

RESPONDENT

RULING

The dispute between the Appellant and the Respondent is in respect of the custody of VAAO, a child who is aged about 9 years. The uncontroverted facts of this application are that the Appellant and the Respondent were previously husband and wife before they were legally separated. After their separation, the custody of the child remained with the Appellant. The Appellant has lived with the child since 2009. On 3rd April 2013, the Children’s Court (Hon. C.A. Ocharo – PM) delivered her judgment in Nairobi Children’s Court Case No.18 of 2009 by which she removed custody of the child from the Appellant and gave the same to the Respondent. The Appellant was aggrieved by this decision and has duly filed an appeal to this court. Contemporaneous with filing the appeal, the Appellant filed an application pursuant to the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules** (among other orders) seeking orders of this court to stay the execution of the judgment of the Children’s Court pending hearing and determination of the appeal. The application is supported by the grounds stated on the face of the application and the annexed affidavit of the Appellant. The application is opposed. The Respondent swore a replying affidavit in opposition to the application.

At the hearing of the application, this court heard oral rival submissions made by Mr. Mungla for the Appellant and by Mrs. Mbanya for the Respondent. This court has carefully considered the said submission. It also had the benefit of reading the pleadings filed by the parties herein in support of their respective opposing positions. This also had occasion to read the judgment of the Children’s Court. The issue for determination by this court is whether the Appellant made a case for this court to grant him stay of execution of the judgment of the Children’s Court pending the hearing and determination of the appeal. Both counsel agree that in determining this application this court shall be guided by the provisions of **Section 4(3)** of the **Children Act** that requires this court, in its decision, to treat the interest of the child as of first and paramount consideration to the extent that this is consistent with the course of action that is calculated to safeguard and promote the right and welfare of the child and to secure for the child such guidance and correction as is necessary for the welfare of such child and is in the public interest.

As stated earlier in this ruling, the Appellant has had the actual custody of the child since 2009 from the time he was separated from the Respondent. While not delving on the merits or otherwise of the appeal, this court holds that the Children’s Court could only remove the actual custody of the child from the Appellant if it was established that the best interest of the child was being not being taken care of by the Appellant. In its judgment, the Children’s Court noted, after interviewing the child, that the child loved both her parents and that there were no issues of concern raised regarding her actual custody with the Appellant. What seems to have influenced the court in awarding custody of the child to the Respondent is the fact that the child, being a girl-child, should ideally be in the custody of the mother.

However, in the circumstances of this application, the court appears to have overlooked the provisions of **Article 53(1)(e)** of the **Constitution** that grants the right to a child to have parental care and protection which includes equal responsibility of the mother and father to provide for such child. The court seems to have ignored the fact that the actual custody of the child for the past four or so years has been with the

Appellant. The general principle is that is applied in such circumstances is that custody of the child ought not to be removed from the parent having actual custody unless it is established that the environment under which the child is being brought up is not conducive and is inimical to the best interest and welfare of the child. In the present application, prima facie, it was apparent that the Appellant has given the best environment in the circumstances for the child to grow up in. The Appellant is taking care of the educational needs of the child. He has provided a home for the child. The Respondent on the other hand, lives with her parents. There was no overriding reason why actual custody of the child was removed from the appellant and given to the Respondent. The best interest of the child was not taken into consideration by the Children's Court.

In the premises therefore, this court holds that the Appellant established sufficient cause for this court to stay the order of the Children's Court granting the custody of the child to the Respondent. The actual custody of the child is restored to the Appellant with immediate effect pending the hearing and determination of the appeal. The child shall be returned to Braeside School to continue with her education. The Respondent shall be entitled to unlimited but reasonable access to the child and in particular access to be on alternative weekends and half of the school holidays. There shall be no orders as to costs

DATED AT NAIROBI THIS 2ND DAY OF MAY, 2013

L. KIMARU

JUDGE