

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 38 OF 2012

C O A.....APPELLANT

VERSUS

P A O.....RESPONDENT

RULING

The application dated 16th October 2012 seeks stay of execution of orders made on 13th March 2012 by Hon.R.A. Oganyo (Mrs), Senior Principal Magistrate in Milimani Nairobi CMCDC No. 338 of 2011. The application is by the appellant.

In the affidavit sworn in support of the application by the advocate appearing for him in the divorce case, it is stated that the appellant had moved with the children to Harare, Zimbabwe, where they are attending school. It has been ordered that the said children be with their mother as they were of tender years. It is this order that the appellant is aggrieved by.

The application was served on the respondent. It is opposed. The respondent swore an affidavit dated 10th December 2012. Her position is that the order of 13th March 2012 was served on the appellant on 30th October 2012, and she has attached documents to support that. She argues that the appellant has not complied with the order of 13th March 2012 although the same was served upon him.

I agree with the lower court that as a general principle children of tender years ought to be with their mother. I do not fault the final order that the subject children be returned to Kenya. My concern is that that order has been appealed against. The appeal pends before this court, and this court is therefore seised of it. This would require that I deal with this application bearing in mind that there is a pending appeal. In deciding this application I must be guided by Section 4(3) of the Children Act, Act No. 8 of 2001, which provides:-

“All judicial and administrative institutions, and all persons acting in the name of these institutions, what they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

c. secure of the child such guidance and conversion as is necessary for the welfare of the child and in public interest..”

The children the subject of these proceedings are with their father in Harare, Zimbabwe. They are said to have been enrolled in school there. They were removed from school in Kenya in October 2011 and enrolled in another in Zimbabwe. The order being challenged requires that they be removed from school again in Zimbabwe and enrolled in another school in Kenya. The order is appealed against, should the appeal succeed after children have already been moved back to Kenya, the appellant will be entitled to move them back to Zimbabwe. This scenario would no doubt go against the spirit of **Section 4(3)** of the Children Act. It would not be in the best interests of the children to keep allow their being moved one school to another.

It is my opinion that the welfare of the children is better served by staying the order made on 13th March 2012 pending hearing and disposal of the pending appeal. I am cognisant of the divorce and children's cases pending at the subordinate court and that the appeal herein is on interlocutory matters.

I allow the application dated 16th October 2012 in terms of staying the order of 13th March 2012 in D.C. No. 338 of 2011. The stay order shall be for six(6) months from the date of ruling within which period the appellant should cause his appeal herein to be heard and disposed of.

Costs shall be in cause.

DATED, SIGNED and DELIVERED at NAIROBI this 8th DAY OF November, 2013.

W. M. MUSYOKA

JUDGE