REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE 10 OF 2005

H.S.S ....…………...….……….APPLICANT

F.A.M.…………………..………… RESPONDENT

JUDGEMENT

F.A.M, the Applicant/Respondent and mother of the child, **S.S**, who was born in June 2002, seeks in her application by Notice of Motion dated 13th January 2012 an order that, pending the hearing and determination of the appeal, this court be pleased to grant *"a stay of the order and Ruling delivered on 15th December 2011 by the Honorable Justice D. K. Maraga in its entirety."* The grounds on which the application was made include the grounds (i) that the learned judge granted the Respondent who is the father of the said child access to the child for two of the child's entire vacations and (ii) that the child's name be changed to the original name of S.K.S, and (iii) that the court did not consider the child's wishes to establish whether the child wishes to stay with the father who is the Respondent, over the school holidays.

The Application was supported by the Applicant's affidavit sworn on 13.1.2012 and by the further affidavit sworn on 10.2.2012 by her.

The application was opposed by the Respondent who filed a replying affidavit sworn by him on 30.1.2012.

When the application came up for hearing before me on 23.2.2012, **Mrs. Kalsi**, the learned advocate for the Applicant, urged the court to grant the orders sought. She urged the court to stay the order for change of the child's name and for custody during school vacations.

On his part, **Mr. Oyatta**, the learned counsel for the Respondent, opposed the application and relied on his client's replying affidavit. In Mr. Oyatta's view, the Applicant was seeking reversal of the learned Judge's orders. He contended that stay, if granted, would have the effect of reversing the orders. He pointed out that para 10 of the Judge's ruling gave visitation rights. It was Mr. Oyatta's further submission that the Applicant was in effect seeking review of the learned Judge's orders. In his view, there is nothing to be stayed or reviewed. The child, he said, is aged 9 years and the Respondent as her father had not seen her for 3 years and it was in the interest of the child's welfare that the Judge's orders be obeyed.

I have duly perused the application and the affidavits in support and against the application. I have also considered the submissions made by both counsel.

The orders that are sought to be stayed were made in this court by Justice Maraga, then a Judge of

the High ‘court, on 15.12.2011. The stay sought is said to be “pending the hearing and determination of the appeal filed herein ....” and is pegged on Order 42 of the Civil Procedure Rules. The pending appeal was filed in 2005 against the orders of the Children’s Court. There is no appeal against the orders made on 15.12.2011 by Justice Maraga. In effect, therefore, the Application, though for stay, is in reality an application for review as there is no appeal pending in relation to Justice Maraga’s orders of 15th December 2011. Order 42 of the Civil Procedure Rules on which the application is premised does not apply. To the extent that the application seeks stay of the orders under Order 42 (supra) and in absence of an appeal on those orders, the application is misplaced.

But even if the application were to be treated as properly instituted, it is my finding that it does not disclose merits to warrant the orders sought. For stay to be granted in a matter involving a child and the provisions of the Children Act it must be demonstrated that the orders, unless stayed, would be detrimental to the welfare of the child. As I stated on 16.2.2012 in my ruling in RPM V PKM H.C.D.C. 154 of 2008, in considering stay under the Children Act, the parameters are different from those obtaining in matters captured by the criteria set in Rule 6(1) & (2) of Order 42 of the Civil Procedure Rules. The Judge’s orders of 15th December 2011 which have aggrieved the Applicant have not been shown, in my view, to be harmful or detrimental to the welfare of the child. I find no basis for invoking the court’s inherent powers to order stay.

If the application is treated as an application seeking review, the court can if it finds it appropriate, and if the circumstances of the case justify it, and guided both by the overriding objective stipulated in Section 1A of the Civil Procedure Act, Cap 21, and the principles applicable in the exercise of the Court’s inherent power to do justice to the parties, deal with it notwithstanding that it is not clearly founded on the order for review.

In matters pertaining to the Children Act, it must be shown that the orders sought to be reviewed shall impact negatively on the welfare of the child unless they are reviewed appropriately. It must be demonstrated that the welfare of the child will be undermined or adversely affected. It is the duty of the court in dealing with such matter to ensure that the wrangles and/or altercations between the parents are not allowed to affect or impact negatively on the life of a child and further that a parent does not use the child to hit out at the other spouse. A child is not a rug doll to be tossed this way and that and it is the duty of the court to ensure protection of the child at all times.

I have examined carefully the averments in the affidavits of both parties. I am satisfied that the orders sought should not be granted either on the basis of the application for stay or on the basis of review. I decline to grant the application. I dismiss with no order as to costs.

Dated at Milimani Law Courts Nairobi, this 5th day of July . 2012

G.B.M. KARIUKI, SC
JUDGE

COUNSEL APPEARING

Mr. D. Oyatta Advocate, of Oyatta & Associates for the Respondent

Ms I. Kalsi Advocate, of Judy Thongori & Co. Advocates for the Applicant

Mr. Kugwa – Court Clerk