



REPUBLIC OF KENYA

High Court at Mombasa

Civil Appeal 3 of 2012

B. M. APPELLANT

VERSUS

S. M. M. RESPONDENT

RULING

1) There is no doubt that, as held by the Court of Appeal decision in Republic v. Attorney General & Another (2006) 1 KLR 219, “**ex parte orders, by their very nature, are provisional and can be set aside by the Judge who granted them but if the Judge who granted leave cannot sit for one reason or the other then another Judge would be perfectly entitled to hear the application to set aside the grant of leave for the jurisdiction is available to all the Judges or the superior court.**”

See also Craig v. Kanseen (1943) 1 ALL E.R. 108.

2) I find myself in similar circumstances when I have been asked by the Respondent’s application dated 1st October 2012 to stay and set aside orders issued by the Resident Judge in this matter on 28th September 2012 as well as my own orders of 1st October 2012 regarding the production of the children of the parties to this appeal before the court and the school to which they shall attend, pending the hearing of the appeal.

3) The applicable principle of law in this application is that set out in the Court of Appeal decision of AN v. MN (2006) 1 KLR G & F 65 that: -

In all matters of custody of children the welfare of the children is to be give paramount consideration and usually the custody of children of tender years should be with the mother.”

The principle has statutory underpinning under section 4 of the Children Act Cap 141 in the following terms: -

“s.4 (3). All judicial and administrative institutions, and all person acting in the name of these institutions, where they are exercising powers conferred by the Act shall treat the interests of the child as the first and paramount consideration to the respect that this is consistent with adopting a course of action calculated to: -

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

(b);

(c)

(4. In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity.

Supplementary to the right to the promotion of a child's best interests is the **“right to live with and to be cared for by the parents” under section 6 (1) of the Act.**

4) The Children's Court by its order of 26th September 2012 directed that the children of the parties remain at Lukenya Academy, Machakos, and an order which aggrieved the appellant leading to the present appeal. In the plaint before the children court CC No. 652 of 2012, the Appellant as Plaintiff had sought the custody of the children, maintenance away among other reliefs.

5) The Appellant complains that the Children Court failed to consider that the children who are of tender years, aged 8 and 6, respectively, with the latter still bed-wetting required the emotional support and care of the mother. The Appellant therefore sought by Notice of Motion in the appeal that the children be returned to the mother and to the Busy Bee School at Mombasa and that for that purpose the Lukenya Academy releases the children for production before the court.

6) The prayer for the return of the children to the Busy Bee School, Mombasa was granted *ex parte* on the 28th September 2012, along with further orders that the Lukenya School releases the children and that the matter placed for further hearing before the Family Division on the 1st October 2012. When the matter came up before me, in the presence of both parties, a Preliminary Objection on the principle of sub-judice was argued by the Respondent's counsel on the basis of an alleged previous suit before the Children's Court, case No. 117 of 2007. I reserved the ruling for the 9th October 2012 and directed, in the meantime, that the Respondent complies with the orders of the court of the 28th September 2012. I considered that an order under section 6 of the Civil Procedure Act is no bar to interlocutory applications. See **Mulla on the Code of Civil Procedure 16th Ed. (2001) pp. 150-1.**

7) On the 1st October 2012, the Respondent filed the present application for stay of the orders of the court made on the 28th September 2012 and the 1st October 2012 with reference to the return of the children to the Busy Bee School and for their production before the court on 9th October 2012. The principal argument of the Respondent is the Lukenya Academy School is the best school for the children as it offers international curriculum and a neutral ground for the development of the children against the background of their parents' separation, and that it is in the children's best interest to receive such education. The Respondent further complains that the Appellant took the children to the Respondent's place of work at a petroleum facility and abandoned them there without regard to the danger that the action exposed the children to.

8) The Appellant reiterated her contention that the children of tender years, one of whom was bed-wetting, required the emotional support and care of the mother. As regards the school, the Appellant pointed out that the Lukenya Academy School had by its Head-teacher's letter dated 22nd September 2012 (Annexure **BM 1** to her affidavit of 4th October 2012) confirmed that **“the school system of education is local i.e. 8-4-4”**, and that it was therefore no better than the system at Busy Bee School.

9) I have considered the submissions by the parties and I find that the issue is whether the court will set aside or stay the *ex parte* orders issued by the court on 28th September 2012 and on 1st October 2012 in furtherance thereof.

10) (1) As the orders of 28th September 2012 granted *ex parte* by the court effectively gave the relief sought in the appeal without hearing the Respondents, the same are set aside *ex debito justitiae* to afford the Respondent an opportunity to be heard on the appeal.

(2) Having now heard the parties on this application, I consider that the Respondent's efforts in seeking the best education and a neutral ground for his children is commendable demonstration that he has the interest of the children in mind. However, I also take the view that at the children's tender ages, their psychological development and socialisation is of great moment and it cannot be left even to a **'neutral'** educational institution when the mother is available, able and willing to give the children the emotional support and care necessary.

(3) As the wishes of the children are also of primary consideration in application for custody of children, and in accordance to the right of the children under section 4 (4) of the Children Act **"to be accorded an opportunity to express [their] opinion, and that opinion to be taken into account as may be appropriate"**, I direct that the children will attend court on a date to be fixed in consultation with parties for the purpose of establishing the preference and opinion of the children on the matters in dispute as relates to them, before a further order is made.

11) Accordingly, for the reasons given above, I make the following orders on the Respondent's application of 1st October 2012 and give related directions/orders as follows: -

1) The ex parte orders of 28th September 2012 are set aside ex debito justitiae, along with the order of 1st October 2012 in furtherance thereof.

2) The Respondent will produce before the court, on a date to be fixed in consultation with the parties, the two children subject of these proceedings for the hearing in chambers of their wishes, opinion, and preference on the issues in dispute.

3) The determination as to where the children will undertake schooling shall be made upon hearing the children before the court.

4) Pending hearing of the appeal, interim custody of the children is granted to the Appellant jointly with the Respondent and each may visit the children at school.

5) Ruling on the Preliminary Objection raised by the Respondent shall be on 15th October 2012.

6) Costs in the cause.

Dated and delivered this 9th October 2012.

EDWARD M. MURIITHI

JUDGE

In the presence of:

Mrs. Kipsang for the Appellant

Mr. Kiume for the Respondent

Miss Linda - Court Clerk