IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, G.B.M. KARIUKI & MURGOR, JJ.A.

CIVIL APPLICATION NO. 170 OF 2013 (UR 118/2013)

BETWEEN

E A O……...……..APPLICANT

AND

S O N.....RESPONDENT

(***An application for stay of execution under Rule 5(2)(b) of the Court of Appeal Rules pending the filing, hearing and determination of an intended Appeal from the Ruling and/or Orders of the High Court of Kenya at Nairobi (Kimaru, J) given on the 2nd day of May 2013*** *in* ***HCCA NO. 25 OF 2013)***

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RULING OF THE COURT

We have before us a notice of motion dated 16th July, 2013 filed under Rule 5(2)b of this Court's Rules. The same emanates from Hon. Kimaru J's Ruling dated 2nd May 2013 in which he restored actual custody of the child (VAAO) to the respondent (S O N) after the Children's Court in Nairobi Children's Court Case No. 18 of 2009 gave the said custody to the applicant (E A O). The same court gave both parties herein joint legal custody with the respondent being granted *"unlimited but reasonable access"* to the child. The respondent was allowed access on alternate weekends and half of the school holidays.

In arriving at these orders, the learned magistrate appreciated the paramount principle in children matters which calls for consideration of the best interest of the child when dealing with all issues concerning a child's welfare. He also made the following finding which we find important to recapitulate.

"V is a girl aged about 9 years. This is a child of tender years as defined in the Children Act. Ordinarily, such a child ought to be in the mother's custody unless there are exceptional circumstances that would persuade the court to rule otherwise… It is clear that there are certain issues that the plaintiff is not able to deal with…"

The learned magistrate went on to make other findings to the effect that:-

"Apart from the financial needs of a child, there are other duties that a parent has toward the child such as guidance and counseling. The defendant being the mother to this child has the primary duty to guide this child socially taking into account the child's age and sex."

Being dissatisfied with the above ruling and consequential orders thereof, the respondent moved to the High Court vide High Court Civil Appeal No. 25 of 2013 and simultaneously filed the notice of motion dated 26th April 2013 in which he sought a stay of the execution of the said decree. That application was heard by Kimaru, J. who gave the impugned orders of stay. Custody of the child was in effect restored to the respondent and the child who had physically been handed over to the applicant was returned to the respondent. The applicant is now seeking a reversal of that process to enable the child to be returned to her custody as the filing and determination of the intended appeal against that ruling is awaited.

In support of the notice of motion at Bar, the applicant has filed a twenty eight paragraph affidavit and attached several annexures. She has in the said affidavit given the history of the matter. She assails the learned Judge's ruling basically on the ground that as the child's biological mother, she has the primary right to raise her child. She has also deposed that the child is at the stage where she needs a mother to counsel and guide her as she goes through puberty, a task which the respondent being male is ill suited for. She has also raised the issue of the respondent not being the biological father of the child and asked this Court to draw its conclusion after considering the change in the respondent's conduct in respect to the late Dante who was not his biological child after his marriage to the applicant failed . It is the applicant's contention that now that the respondent is aware that he is not Vanessa's biological father, he could change his attitude towards her, and further that his motive of insisting on custody of a girl child who is not his biological daughter is suspect.

She entreats us to find that it would not be in the best interests of the child to order that she be raised by the respondent herein particularly at this critical and impressionable stage of her life.

In his oral submission before us, Mr. Odera, learned counsel for the applicant passionately pleaded his client's case reiterating the contents of her supporting affidavit and urged us to find that it is in the best interests of the child for her custody to be restored to her mother.

He cited **Article 9** of the International convention on the rights of the child which is mirrored by **Section 6(1)** of our **Children's Act**. There is no dispute indeed that a child has a right to live with both it's parents unless it is bad for the child, or not in it's best interest. Where parents are separated as in this case, then the Court should grant the child access to both parents – unless again it is not good for the child.

In opposition to the notice of motion, Mr. Mungla, learned counsel for the respondent told us that there was no order capable of being stayed as *"the horse has already bolted"* meaning that the impugned orders have already been executed. He was reminded however, that even in the respondent's case before the High Court, the child had already been handed over to the mother physically before the respondent filed his application for stay, yet that did not stop the learned Judge from granting the orders of *"stay"* which actually translated to restoring the child's physical custody to the respondent. According to Mr. Odera, the respondent cannot therefore be allowed to *"preach water but drink wine"*. Mr. Mungla submitted that the issue of whether the child was the respondent's biological father was neither here nor there as she was born within the subsistence of the Luo customary marriage between the parties herein.

He submitted that it could not be in the best interests of the child to remove her from Braeside School where she is said to be in her last year of primary school. He also submitted that the respondent was more grounded financially and would, therefore, be in a better position to take care of the child. We were also implored to find that the respondent's place of abode in Kilimani area offered a more conducive atmosphere for the child's growth as compared to the applicant's home in[particulars withheld], where she lives with her mother. He concluded that he was relying on **Article 53** of the **Constitution of Kenya 2010** and **Sections 82** and **83** of the **Children's Act**.

The law in this area is actually not disputed. It is common ground that in determining custody of the child, this Court must be driven by what is in the *"Best interests of the child"*. This is the same principle the learned magistrate invoked in removing the child from the custody of the respondent and placing her in the custody of the applicant.

It is the same principle the learned Judge cited in reversing the said position. It is the same principle both parties herein are anchoring their positions on. So then, what is in the best interests of VAAO ?

This Court must not lose sight of the fact that we are dealing with an appeal in respect of an interlocutory order of the High Court. We are not therefore, charged with the task of conclusively determining the issues that are likely to be raised in the intended appeal. We cannot also usurp the jurisdiction of the High Court and determine the issues of custody before the said court renders its judgment and gives conclusive orders to that effect.

Our task at this point in time is to consider the material before us and make a finding on two issues. Firstly, whether the intended appeal by the applicant herein is arguable; and secondly whether, if the orders sought are not granted, the intended appeal were it to succeed would be rendered nugatory. To that extent, this is a 5(2)(b) application like any other. The uniqueness however, is that in this case, we are dealing with the life of a child and her wellbeing. All the parties in court agree that the paramount consideration should be *"the best interest of the child"*. Their understanding or application of what this "*best interest*" entails is what has brought them before us. Each party is defining the said principle and circumstances of the case to suit their case.

As stated earlier, we must eschew making any conclusive definition of what the ultimate best interests of VAAO are at this stage, however tempting that might be.

We nonetheless do not agree with Mr. Mungla that the horse has already left the stable and there is therefore, nothing to stay. If that were the case, then the child would still be in the applicant's custody as decreed by the learned trial magistrate.

In any event, the Court appreciates that the subject matter of this application is a child; who is still alive and capable of being restored to either parent, and not an inanimate property which can be said to have dissipated or which is not recoverable in the same state it was in when the impugned order was made.

From the foregoing analysis, it is evident that each party including the two courts below have applied different considerations in determining what is in the best interests of the child herein. That in itself is indeed an arguable point on appeal. We need not say more on arguability. It is trite law that a party needs to only establish one arguable point in an application made under **Rule 5(2) (b)** of the **Court of Appeal Rules**. We have no doubt that the intended appeal is arguable.

On the second limb on the nugatory aspect, we are of the view that this is a matter that should be considered within its own peculiar facts and circumstances. If VAAO gets into that stage of a girl's life where she definitely needs counseling and guidance from her mother, and she has no trusted female she can confide in, the psychological trauma she could be subjected to is irreversible. Thereafter, were the court to restore her back to her mother's custody, it would be too late. Such a situation would be avoided if she is restored to her biological mother. We appreciate that she is said to be living with her father's fiancée who could be at hand to give her necessary counsel and support, but in our view the father's fiancée cannot be a suitable substitute for the child's mother particularly when the mother is available and willing to take up her responsibility as a mother. There is no evidence placed before us to even remotely suggest that the applicant is an unfit parent.

We need not say more. We find and hold that the applicant has satisfied the requirements of **Rule 5(2)(b)** of the **Court of Appeal Rules** for her application to succeed.

We allow prayer No. 2 of the notice of motion. We do not find it expedient to grant prayer 3 as it would be in the child's best interests that the suit before the High Court be determined once and for all and not be suspended in limbo indefinitely.

We also order that the child be released to the applicant forthwith and that she remain in her custody pending the hearing and determination of the intended appeal. The said appeal be filed and served within 90 days from the date hereof.

Costs of the Notice of Motion will be in intended Appeal.

Delivered and dated at Nairobi this 21st day of February, 2014.

W. KARANJA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

REGISTRAR