



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MARAGA & M'INOTI, JJA.)

CIVIL APPLICATION NO. NAI. 266 OF 2013 (UR. 194/2013)

BETWEEN

N. O. B.APPLICANT

AND

A. A. O.RESPONDENT

(Application for stay pending appeal from the ruling and order of the High Court of Kenya at Nairobi (Kimaru, J.) dated 17th September, 2013

in

H.C.C.C. NO. 48 OF 2010)

RULING OF THE COURT

Introduction

1. The Motion before us is not only taken out under Rule 5 (2) (b) of this Court's Rules, but also on several provisions of the "Children Act, the inherent powers of the Court and all other enabling provisions of the law," seeking the following orders:

"2. That there be stay of the ruling and orders issued by Justice Luka Kimaru on 10th September, 2013, carried in the substantive ruling and order of 17th September, 2013, pending the hearing and determination of this application.

3. That this Honourable Court be pleased to stay and or vary the order of Justice Luka Kimaru given on 10th September, 2013, carried in the substantive ruling and order of 17th September, 2013 pending the hearing and determination of this appeal.

4. That this Honourable Court do direct that R. be at liberty to access his father, the Appellant, as per the terms of the judgment of Justice Nambuye of 12th July, 2011.

5. That this Honourable Court do enforce the right of the child R. to education in accordance with the terms of the Judgment of Justice Nambuye.

6. *That this Court be pleased to order a production for the child R. to confirm his wellbeing and health and for an interview to evaluate his reasonable ascertainable wishes, at the earliest opportunity possible.*

7. *That this Honourable Court do take cognizance and adopt the professional counsellor's reports on the state and effect of the transition of the child from the custody of the Appellant/Applicant to that of the Respondent and do direct that the child be allowed to complete his counseling and psychologist therapy sessions.*

8. *That this Honourable Court do issue a mandatory order restoring the child to his usual and familiar environment, pending completion of his counselling and therapy and pending the putting in place by the Respondent proper and structured transitional mechanisms for the comfort and wellbeing of the child.*

9. *That the Court be pleased to order any other relief that may be deemed to be in the best interests of the child."*

2. The applicant is Mr. N.O.B who was represented before us by learned counsel Mr. S. Gitonga instructed by M/S R.W. Mbanya & Company Advocates on record. The Respondent, Mrs. A.A.O was represented before us by Mr. E. Ongoya, instructed by the Advocates on record M/S A.T. Aluoch & company.

A short background to the application is pertinent.

Background.

3. N.O.B and A.A.O were statutorily married but their marriage ran into problems in 2008 when they started accusing each other of cruelty and adultery. They started living separately though they remained married. Before trouble struck, they had a baby boy R. (the child) in July, 2006 who, at the age of two years was left with N.O.B (the father) as A.A.O (the mother) went off for further studies in Europe. When she returned after one year, she took possession of R. without the consent or knowledge of the father but he rushed to the Children's court and obtained injunctory orders. They battled over the child before the Children's Court until August, 2010 when the court made orders in favour of the father granting him full custody.

4. The mother appealed to the High Court and on 12th July, 2011, that court, Nambuye J. (as she then was) allowed the appeal and reversed the orders of the Children's court. In a raft of 17 court orders anchored on the welfare of the child, the court gave the custody, care and control of the child to the mother and made further elaborate provisions relating to his education, food, clothing, access by the father, psychological welfare, the process of handing over the child from the father to the mother and joint counseling sessions for the parents and the child. Among the orders made was the following order:

"14. There will be liberty to apply to either party if need be."

5. There was no appeal against the judgment of Nambuye J. Instead the father went back to the High Court for review of the judgment on the grounds, *inter alia*, that he and the mother had resumed cohabitation by the time the judgment was delivered, but the mother took off with the child soon after the judgment; that the judgment was illegal and unconstitutional because it caused trauma to a child by separating him from the father after living together for five years; and that granting custody to the mother would seriously affect the child emotionally and cause stunted growth. The mother opposed the application contending that she had fully complied with the orders of Nambuye J. which remained unchallenged.

6. In a considered Ruling delivered on 20th January, 2012, Lenaola J. dismissed the application for review stating in part as follows:-

“What part of the judgment is the applicant uncomfortable with? There is no advantage granted to the respondent save that of daily care and control of the child. What part of that order impacts on the Welfare of the child when the learned Judge also made certain orders to ensure that the child adjusts to his new circumstances? In any event, each of the parties has equal access and I see no justifiable reason to change those orders.

Lastly, I came into this matter quite late in the day but I have taken time to read the entire file and all I can say is that Nambuye J’s judgment, from where I sit, is solid in law and fact and while I am not sitting on appeal over it, I would have given the same orders had I heard the appeal.

If any advice is needed, parties should not use the minor as a pawn to vent their frustrations over their vanquished love but should channel their joint affection towards making his upbringing as comfortable as possible.”

7. Despite the caution by Lenaola J. the parents appear to have continued to play ping pong with the life of the child and there were several side shows along the way, including one of alleged kidnapping of the child and forcible repossession by the father. On 17th July, 2013, Musyoka J. delivered a ruling in which he observed that there was a spirited effort made by the father, through various tactics, to delay, disobey or evade the orders of Nambuye J. which had become final after the dismissal of the review application. The Judge issued an order containing a timetable for handing over the infant by the father to the mother in terms of the orders issued by Nambuye J. The hand-over was to be completed by 29th August, 2013 and the case was set down for mention on 2nd September, to confirm compliance. The father did not comply.

8. The matter fell on Kimaru J. on the mention date to supervise the handing over on 10th September, 2013, but the father sought the Judge’s disqualification from the case for alleged bias. Kimaru J declined to disqualify himself and made the following orders:

“1. THAT the court will not recuse itself from this matter reasons to be given on 17th September, 2013 at 2.30 p.m.

2. THAT the orders of 3rd September, 2013 be complied with in full.

3. THAT the child must be handed over to the mother.

4. THAT the OCPD Kilimani to supervise compliance.

5. THAT this must be done today by 2.30 p.m.

6. THAT the respondent is barred from accessing the child for three (3) months pending further order of this court because he is a negative influence to the child.

7. THAT leave to appeal granted.

8. THAT stay is refused.”

9. On 17th September, Kimaru J. delivered his considered ruling and gave reasons for declining to disqualify himself and made a further order that the father *“shall be at liberty to make an appropriate application to the court after three months has (sic) elapsed so that the court may consider whether he is in appropriate state of mind to be entrusted with visitation rights”*. The Learned Judge also reprimanded counsel for the father, Mrs. Mbanya, for what he observed was her negative influence or advice to the father who had persistently disobeyed court orders. Aggrieved by those orders, the father filed a notice of appeal on 30th September, 2013 and subsequently, this motion on 3rd October, 2013.

10. Despite the filing of the motion and before it was heard and determined, the father returned to the High Court on 14th November, 2013 and filed a Chamber summons seeking the following orders:-

“2. THAT the honourable court be pleased to order that parties revert back to the terms of the judgment of Justice Nambuye of 12th July, 2011 as per clause 1 to 10 and clause 14 of the said Judgment.

3. THAT the honourable court do grant leave to the applicant/respondent to access the child R. as per the terms of the judgment of Justice Nambuye of 12th July, 2011 pending the hearing and determination of this application.

4. THAT the honourable court do restrain the parties to this suit from removing the child R. out of the jurisdiction of the court without written permission from the other and or leave of the court.

5. THAT this honourable court be pleased to order any other relief that may be deemed to be in the best interests of the child.”

Those are essentially the same orders that would have been sought since July, 2011 when the parties were given leave to apply by Nambuye J.

Submissions of counsel.

11. Learned counsel Mr. Gitonga sought to persuade us that all the orders listed above were capable of grant at this interlocutory stage. That is because, in his view, the applicant had a good appeal with high chances of success and if the orders were not granted as sought, the intended appeal would be rendered nugatory. He referred to the grounds upon which the motion was based and asked us to peruse the entire history of the matter.

12. On the other hand, learned counsel Mr. Ongoya submitted that the application was a non-starter. In his view, prayers 4, 5, 6, 7 and 8 cannot be granted under **Rule 5 (2) (b)**. The only relevant prayers under that procedural provision were prayers 2 and 3, but they seek stay of events that have already passed. He submitted that the High court was seized of the matter and had made orders after observing the applicant which orders are yet to be executed. This Court, in his submission, has no tools to evaluate the applicant the way the High Court is able to do. The application was therefore not meritorious.

13. In response, Mr. Gitonga virtually conceded that prayers 4 to 8 may not be capable of grant at this stage but argued that the applicant had no other forum to apply for access to the child. He insisted that the application was well grounded on **Rule 5 (2) (b)** for grant of stay.

Analysis and disposition.

14. We have considered the application and the submissions of counsel. As correctly stated by Mr. Gitonga, in order to succeed in an application under **Rule 5 (2) (b)**, the applicant has to show, firstly, that there is an arguable appeal, not necessarily one that will succeed, even on one issue. Secondly, he must show that if the orders sought are not granted, then the intended appeal, if successful, will be rendered nugatory. Both must be clearly established for the court to exercise its discretion in favour of the applicant in a judicious manner.

15. It is clear in our minds that prayers 4 to 8 of the application are incapable of grant under **Rule 5 (2) (b)**. The prayers are also not interlocutory in nature as they are a mixture of execution proceedings of the judgment of Nambuye J. and other matters which require oral evidence tested in cross examination before the orders can be granted. We suspect that is the reason why provisions of the **Children Act** and other amorphous provisions of the law are cited in aid. It is either the Children’s court or the High Court which are better suited to consider such prayers and we decline to do so. The prayers are struck out.

16. As for the prayers for stay of execution which are within the purview of **Rule 5 (2) (b)**, **prayer 2** seeks stay pending the hearing of the application and is not for grant since the application has already been heard. The remaining **prayer 3** seeks a “*stay or variation of the order given on 10th and 17th September, 2013*”.

The prayer itself is rather confusing. Firstly, the notice of appeal on which the application is predicated and which is exhibited with the application, refers only to the decision or order made on 17th September, 2013. Secondly, there are eight (8) items contained in the Order issued on 10th September, 2013 and it is not clear in respect of which of those items a stay or variation order is sought. Thirdly, there is no provision for variation of an order under **Rule 5 (2) (b)** as the only prayers thereunder are “**stay of execution, an injunction or stay of any further proceedings**”. The prayer for variation is therefore misplaced.

17. Assuming without deciding that the relevant order is the one dated 10th September 2013 which is reproduced above, then the application is overtaken by events since the child was handed over to the mother and three months have long expired since the order was made. Courts do not make idle orders or orders in vain and we are not about to start. The prayer is not for grant.

18. It seems to us on the above analysis that the application has no legs to stand on. We also entertain grave doubts about the arguability of the intended appeal, but will give the benefit of doubt to the applicant on that issue. Will the success of the intended appeal be rendered nugatory? We answer this in the negative.

19. We are perturbed in this matter that the two parents have for the last six years played Russian roulette with the life of a young child. While they pretend to be God’s gift to the child and swear themselves hoarse as they file the numerous applications respectively filed so far in court, they are oblivious to the rights of this child which are protected by international instruments, our own Act of Parliament and our Constitution, 2010. All these legal fences were ably analysed by Nambuye J. (as she then was) whose judgment remains unchallenged and binding on the parents up to date. The pretence that the applicant has no other remedy for seeking access to the child is as hollow as the pretence to care for the child. The applicant has already filed an application to enforce the Nambuye Judgment. That judgment gave either party the liberty to apply. If the intended appeal succeeds, the applicant will still have the judgment of Nambuye J to enforce. It will not be rendered nugatory. The only impediment may be that the enforcement of the Nambuye judgment may have to await the finalization of the intended appeal. It is a choice the applicant has to make in the litigation.

For purposes of the application before us, we find no merit in it and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 2nd day of May, 2014.

P.N. WAKI

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR