PKA v MSA (Civil Application 285 of 2009) [2009] KECA 414 (KLR) (20 November 2009) (Ruling) (with dissent - JG Nyamu, JA)

P.K. A v M.S.A [2009] eKLR

Neutral citation: [2009] KECA 414 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 285 OF 2009

SEO BOSIRE, DKS.AGANYANYA & JG NYAMU, JJA

NOVEMBER 20, 2009

BETWEEN

PKA ..... APPLICANT

AND

MSA ..... RESPONDENT

(Application for stay of judgment and decree of the High Court of Kenya at Nairobi (Onyancha, J) dated 1st July 2009 in HCCC NO. 6 of 2009)

Principles to be applied by an appellate court when determining applications for stay of execution of judgments and decrees in matters concerning children

The court was asked to stay the judgment and decree of the trial court which had awarded the respondent sole custody of the child and only allowed the applicant restricted visitation. The court held that the principles to be applied in such an application were that the applicant had to first show that his appeal or intended appeal was arguable. Secondly and in addition, that unless he or she was granted either a stay or injunction as the case could be, his appeal or intended appeal, if eventually successful, would be rendered nugatory. Further, the child's possible wishes and best interest were of paramount importance. As the applicant had not satisfied the nugatory requirement, the application was disallowed. In the dissenting opinion, the court applied the overriding objective principles under section 3A and 3B of the Appellate Jurisdiction Act and held that it was in the best interests of the child to allow the application and vary the trial court's decision.

Reported by Moses Rotich

Civil Practice and Procedure *- stay of execution - application for stay of execution of the judgment and decree of the High Court pending appeal - matters which an applicant was required to establish to the satisfaction of the court - where the applicant sought to stay the execution of an order of the High Court granting the custody of a child to the respondent father, granting the applicant mother visitation rights and restraining the applicant from withdrawing the child from the jurisdiction of the court - where the effect of an order of stay would not be to reverse the orders of the High Court but to return the parties to the situation they were before the orders - principles*

applicable to the grant of an order of stay of execution in matters relating to children, including custody of children, before the Court of Appeal - whether the Court of Appeal would grant an order of stay of execution under the circumstances - Court of Appeal Rules, rule 5(2)(b) and 42.

Family Law *– children - custody and maintenance - court having awarded the father sole custody of the child - mother getting four hour's visitation right - appeal against the custody decision - applicable principles - what were the principles to be applied by an appellate when determining an application for stay of execution of judgments and decrees in matters concerning children - Children Act No 8 of 2001, section 4(2).*

Brief facts

The matter was an application for stay of execution of the judgment and decree of the superior court brought under rules 5(2)(b) and 42of the Court of Appeal Rules. The matter before the appellate court related to the custody of a child of about 13 years of age, who with the consent of the applicant, PKA, had been living with her estranged husband, the respondent, one MSA. The superior court in a ruling on a custody matter had awarded the respondent sole custody of the child and only allowed the applicant restricted visitation. The applicant came to court seeking two substantive orders; that the court issue a stay of the decree in the superior court pending appeal and that pending the hearing and determination of the intended appeal, the court be pleased to allow the applicant to enjoy equal access to the child. The superior court in that custody matter, had granted the respondent father sole custody of the child in a matrimonial dispute while granting the mother access of 4 hours a week. It was against that decision that the application for stay of execution was filed in the superior court.

Some of the grounds for the application were that in awarding the respondent sole care and custody of the child the superior court had based its decision on a number of factors including the factor that the respondent was rich while the applicant was poor with no record of employment, and that the nature of the issues before the court clearly showed that the intended appeal would be rendered nugatory.

Issues

What were the principles to be applied by an appellate when determining an application for stay of execution of judgments and decrees in matters concerning children?

Held

Per Bosire, JA

1. The instant application was brought under rule 5(2) (b) of the Court of Appeal Rules. The court in a matter under that rule exercised original and discretionary jurisdiction. In dealing with a matter under that rule, the court was not handling the appeal of the parties. Often times the court in exercising its powers under that rule had reminded itself of the danger of expressing a concluded opinion on any issue. Whatever views the court expresses were on a *prima facie* basis only bearing in mind that any view expressed might embarrass the bench which would eventually hear the appeal on the matter. It was in clear and exceptional cases that a concluded view could be expressed. The rationale was not difficult to understand. At the interlocutory stage the court may not be having the full facts and circumstances before it.
2. The principles guiding the court in such an application were that the applicant had to first show that his appeal or intended appeal was arguable. Secondly and in addition, that unless he or she was granted either a stay or injunction as the case could be, his appeal or intended appeal, if eventually successful, would be rendered nugatory.
3. Before it delivered its judgment, the trial court interviewed the child and acted, in part, on what the child told him in reaching a decision on the child's custody. By talking to the child in confidence, the trial judge, was guided by the provisions of section 4(2) of the Children Act, Act No. 8 of 2001, and according to the record of the application all parties and their respective advocates consented to that approach.

4. The power of the court under rule 5(2)(b) of the Court of Appeal Rules was principally conservatory. In the instant matter, the court was dealing with a child, whose interests the court had to safeguard. The circumstances of the instant case were peculiar. The court was dealing with a child who, in two or so years was going to be beyond the jurisdiction of any court in the country on the question of custody. He was not a child of tender age. The parties as indicated earlier, by consent, allowed the child to remain with the respondent on specified terms. That was not a case in the court's view, in which the success of the applicant's appeal or intended appeal would be rendered nugatory unless a stay was granted.

Per Aganyanya, JA

1. Before an order of stay could be granted the applicant to show firstly that he/she had an arguable appeal, in other words, that the intended appeal was not frivolous; and secondly that refusal to grant an order of stay would render the appeal, if it eventually succeeded, nugatory. Further, being an application relating to a child under the age of 18 years his possible wishes and best interest were of paramount importance.
2. The Court of Appeal could not stay the superior court judgment unless there was impending danger which called for such stay on an interim basis. The superior court granted various orders including the custody of the son named ASA to the respondent, visitation rights to the applicant for 2 hours each on Wednesdays and Fridays and an injunction to restrain the applicant from withdrawing the son from the jurisdiction of the superior court.
3. An order of stay was intended to maintain the position as it was before the order against which the stay was intended was made or in other words to maintain the *status quo* as it existed then. But from the record of the superior court the subject of the instant application, the said child previously lived with the respondent and it seemed that the order of stay sought, if granted would not be of any benefit to the applicant as it will still restore the child to the custody of the respondent.
4. As to visitation rights, the record showed previously it was agreed on a 50-50 basis but that the superior court varied that as aforesaid although it gave no reasons for the variation. However, it if any further variation order was to be made then that would be dealt with during the hearing of the appeal. Otherwise dealing with it at the interlocutory stage would amount to involving the court in the merits of the intended appeal. The instant court had no power to do that at that early stage.
5. With respect to the order for injunction which was issued by the superior court, it was the respondent who had the custody of the child and the applicant denied in the superior court that she had any intention of removing him from the jurisdiction of the court. That order could not be stayed at the instant stage. That then left the issue of visitation rights as an arguable point on appeal whose variation, could only be determined on appeal unless the applicant opted to go back to the superior court for it.
6. The child was 14 years and years were moving. The superior court did not ignore the applicant completely over visitation rights and it could be said at the instant stage that her basic rights over the child ASA had been infringed to call into play a variation order by the instant court at the instant stage. Such interests were taken into account, albeit, partly. Also the issue of visitation rights and custody appear interrelated and would feature prominently during the hearing of the appeal and it was only at that stage that those issues would be adjudicated upon and determined.
7. It was a legal requirement that the twin principles stated herein before must both be demonstrated before an order of stay could be granted. In the instant application only one of them, the arguability of the appeal, had been demonstrated but not the nugatory aspect.

Dissenting opinion

Per Nyamu, JA

1. The appeal was not frivolous as was evident from the draft memorandum. On the second requirement, the applicant had in the unique circumstances of the case satisfied the second requirement. The appeal

was likely to be rendered nugatory should a stay order be denied on the basis that the court had no power to grant such an order.

2. It was common ground that the applicant had been given limited access to the child and obviously the effect of that was that should she ultimately succeed in the intended appeal her right to parental care would have been lost, never to be recovered again whereas the child was 13 years and obviously at the formation stage at least for another five years and it was not known when the intended appeal would be heard.
3. It had not been conclusively shown that the applicant could not be trusted with the right of equal access. In fact one of her complaints in the intended appeal was that the views of the child towards her could have been coloured or exaggerated by the respondent who had had a greater share of access to the child. For the same reason unless a proper conservatory order was made the entire appeal was likely to be rendered nugatory.
4. Every day which passes without the issue of access being addressed meant that the appeal would progressively be rendered nugatory. One of the parent's rights were irretrievably being eliminated by the passage of time, never to be redeemed. The nugatory aspects of the intended appeal were so clear and overwhelming that perhaps there was no a better case which had that aspect so loudly crying out for all to see. As had been repeatedly stated in some of the past decisions of the instant court, liberty once lost can never be recovered.
5. The right to family life was intertwined with the right of access to one's child and both were basic human rights and were also indivisibly tied to the right to life. Basic rights though often categorized were in fact indivisible.
6. The instant matter involved the exercise of basic human rights by all the three affected parties and even in the interim period, it would be in the interest of the child, apart from any proof of abusive relationships, that the child benefited without any gap from the development of good relationships with both his parents. The contesting parties had shared the common ground that the child who was the subject matter of the application and whose overriding interest should prevail in every court including the instant court was exceptionally intelligent and gifted. It followed therefore if equal access to both parents was given and he was left to exercise his right of choice of who to see and when he could be trusted to make his own independent choices. There was nothing to stop the instant court upon hearing the appeal on merit reversing that equality. Varying the order in order to allow that was what would be in the best interest of the child pending appeal.
7. The other reason to vary the order of access was that under sections 3A and 3B of the Appellate Jurisdiction Act, the instant court had been statutorily mandated when it was exercising any power under the Act or rules or interpreting the Act or the rules under the Act, to do so guided by the overriding principle. That provision allowed the court to break from the past and boldly free itself from any procedures, rules, precedents or technicalities likely to hinder it from attaining the objective by doing what was fair and just in every situation before it. The pillars of the overriding principle were fairness, justice, proportionality and proper use of courts' resources. Proportionality entailed giving the parties before the court equal footing and ensuring there was equality of arms as between the parties as far as was practicable. According equal access achieved the aims of fairness, justice and proportionality.

8. Some of the principal aims of the overriding objective included;
    1. acting justly in every situation before the court;
    2. placing the parties on equal footing as far as was practicable;
    3. reducing delay and cost of litigation; acting with the principle of proportionality in view;
    4. designing suitable procedures to suit speedy and efficient delivery of justice;
    5. allocating the resources of the court which included the right of equal hearing (equality of hearing); and,
    6. ensuring that the principle of equality of arms was adhered to.
9. Varying the order accorded with the above aims. Giving equal rights of access to the child as interim relief were the special demands of the application based on the principles of justice and fairness in the instant case. Any past jurisprudence which purported to suggest that it would be wrong to interfere with the superior court's orders or to give or design a suitable interim measure in order to achieve the overriding objective must be gradually reviewed to accord with the ends of justice in each case. Liberty was no respecter of time or space it was endowed on people by God to be enjoyed all the time and without gaps except when the public good demanded otherwise. For those reasons, the applicant was entitled to an appropriate interim order.
10. In the result, an order for stay on terms that the respondent retained the right of custody but both parties to have equal rights of access to the child with the proviso that both parties were placed under a duty to co-operate with the court to ensure that equality including respect for the right of the child to choose where and when to associate with each of the parents, would be granted.
11. As there existed a matrimonial home, it would constitute the focal point for the exercise of that right of access for both parents as far as was practicable. The respondent was restrained from removing the child outside the jurisdiction of the courts. There shall be liberty to any party to apply to any judge of the superior court except the judge who presided over the subject matter of the instant appeal. Such liberty to included designing a suitable schedule of visits and any variation of that order provided that such variation was exercised in the best interest of the child, should the circumstances change before the hearing of the appeal. The costs of the application to abide the outcome of the intended appeal.

Application disallowed.

Orders

Each party to bear own costs.

Citations

Cases

Kenya

1. *Kihoro, Wanyiri v Kona Haudhi Ltd* Civil Appeal 168 of 2009; [2009] eKLR - (Explained)
2. *Silverstein v Chesoni* Civil Application 189 of 2001; [2002] KECA 287 (KLR); [2002] I KLR 867 - (Explained)
3. *Yusuf Subwani Opido v Republic* [2009] eKLR - (Explained)

Zimbabwe

Makomberedze v Minister of State (Security) [1987] LRC 507 - (Explained)

Australia

U v U [2002] HCA 36; 211 CLR 238; 76 ALJR 1416; 191 ALR 289; (2002) FLC 93–112; 29 Fam LR 74 - (Explained)

Statutes

Kenya

1. Children Act (cap 141)section 4(2) - (Interpreted)
2. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rule 5(2)(b); 31; 42- (Interpreted)

Advocates

Mr. Ahmendnasir Abdullahi
Mr. Ochieng Oduol

RULING

Ruling of Bosire JA

1. Regrettably in this matter we were unable to come to a unanimous decision. I have had the advantage of reading in draft the rulings of Aganyanya JA and Nyamu JA. On the basis of the settled principles which guide this court in an application under rule 5(2)(b) of this Court's Rules, which the matter before us is, I agree with the reasoning and conclusions reached by Aganyanya JA. I would only add a few words of my own.

2. As I stated earlier the matter before us is an application under rule 5(2)(b) of the *Court of Appeal Rules*. The court in a matter under that rule exercises original and discretionary jurisdiction. In dealing with a matter under that rule, the court is not handling the appeal of the parties. Often times the court in exercising its powers under that rule has reminded itself of the danger of expressing a concluded opinion on any issue. Whatever views the court expresses are on a *prima facie* basis only bearing in mind that any view expressed might embarrass the bench which will eventually hear the appeal on the matter. It is in clear and exceptional cases that a concluded view may be expressed. The rationale is not difficult to understand. At this interlocutory stage the court may not be having the full facts and circumstances before it.

3. Aganyanya JA as also Nyamu JA, set out the principles which guide the court in an application as the one before us. The applicant must first show that his appeal or intended appeal is arguable. Secondly and in addition, that unless he or she is granted either a stay or injunction as the case may be, his appeal or intended appeal, if eventually successful, will be rendered nugatory. I am prepared to assume, that the applicant's appeal or intended appeal is arguable although, I am not sure I agree with the applicant's counsel, Almed-Nasir Abdullahi, when he submitted before us that it was improper for the trial judge to have heard the child whose custody is in issue here behind closed doors.

4. The matter before this court relates to custody of a child of about 13 years of age, who with the consent of the applicant, PKA, has been living with her estranged husband, the respondent herein, one MSA, for a long time. Section 4(2) of the *Children Act*, Act No 8 of 2001, directs that:-

> "In all actions concerning children whether undertaken by Public or Private social institutions, courts of law or legislative bodies, the best interest of the child shall be a primary consideration."
>
> And subsection (4) of the same section provides:-
>
> "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"

5. Before he delivered his judgment the trial judge (Onyancha, J) interviewed the child herein and acted, in part, on what the child told him in reaching a decision on the child's custody. By talking to the child in confidence, the trial judge, was guided by the above provision, and according to the record of the application all parties and their respective advocates consented to that approach.

6. It is also important to note that the applicant wants us to vary the order of the trial Judge granting the applicant limited access to the child. But that is a power exercisable at the hearing of an appeal.

7. Rule 31 of the *Court of Appeal Rules* provides:

> "31. On any appeal, the court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings to the superior court with such direction as may be appropriate, or to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs."

8. We do not have a similar provision for applications. The power of the court under rule 5(2)(b), above, is principally conservatory. I do not lose sight of the fact that we are dealing with a child, whose interests the court has to safeguard. The circumstances of this case are peculiar. We are dealing with a child who, in two or so years is going to be beyond the jurisdiction of any court in this country on the question of custody. He is not a child of tender age. The parties as indicated earlier, by consent, allowed the child to remain with the respondent on specified terms. This is not a case in my view, in which the success of the applicant's appeal or intended appeal will be rendered nugatory unless we grant a stay. I would only recommend that any appeal filed relating to the child should be given a priority date.

9. In the circumstances I agree that the application dated September 23, 2009, fails and accordingly it is dismissed on terms proposed by Aganyanya JA.

Ruling of Aganyanya, JA

This application filed herein on September 23, 2009 under rules 5(2)(b) and 42 of the *Court of Appeal Rules* seeks the following orders, namely:-

> ...
>
> That the honourable court be pleased to issue an order staying the decree and judgment of the superior court issued on July 1, 2009 by the Honourable Justice DA Onyancha in High Court Civil Case Number 6 of 2009 pending the hearing and final determination of the intended appeal.
>
> That pending the hearing and determination of the intended appeal, the court be pleased to allow the applicant to enjoy equal access to the child.
>
> That the respondent do pay the costs of the application.

2. The grounds on the face of the application in support of the same are as follows:

   (a) The honourable Justice DA Onyancha through a judgment he delivered on July 1, 2009 granted the respondent herein the sole custody and care of the parties herein sole child to the respondent.

   (b) The court in awarding the respondent sole care and custody based its decision on a number of factors including the factor that the Respondent is rich while the applicant is poor with no record of employment, that the applicant has on one occasion smacked the kid, and that the child had expressed preference to stay with the father during a session the Judge had a one to one meeting with the child.

   (c) The court was persuaded to award custody of the child to the respondent by a one to one session the Judge had with the child in total exclusion of the parties and their advocates. This conduct on the part of the Judge was most prejudicial to the applicant herein and invalidate in

toto the entire proceedings. The procedure of a Judge having a private session with a witness in absence of their lawyers is unknown to our laws and goes against the adversarial Justice system.

(d) The court made too many assumptions all against the applicant and batched up the respondents case on its own motion. For instance the court without the benefit of a medical expert reached the bewildering conclusion that the respondent who has recovered from drug addition will not go into a relapse. The respondent went to a alcohol and drug rehabilitation centre in Britain in the past and the court failed to warn itself of the living danger a relapse poses to the child.

(e) The judgment is patronizing and appear to reprimand the applicant for the stand she has taken in the case.

(f) The court failed to appreciate the fact that the long period of time the child stayed with his father might have led to the child been (sic) coached in relation to the favourable evidence he gave in support of the respondent's contention.

(g) The Judge failed to contextualize the best interest of the child in the light of the peculiar facts of the case. He over relied on the evidence given by the child.

(h) The applicant is grossly aggrieved by the said decision.

(i) The court based its judgment entirely on speculation and conjecture. The Judge whenever he could not base his decision on a factual issue went out of his way to supplement through speculation and assumptions. For instance this was the case when the court analyzed the real motive behind the aborted criminal prosecution against the applicant.

(j) The court was absolutely biased against the respondent. A clear case is at page 63-64 of the judgment. Knowing that he will deliver a judgment for the dissolution of the marriage two days later, the Judge creates an impression that he is not aware of the same and speculates on the same. Even on the speculation he builds a case for the respondent and destroys the applicant's case

(k) The Judge heard two cases involving the parties herein simultaneously and delivered the judgments on 1st and 3rd July, 2009. In the matrimonial case the judgment was 51 pages. In the child custody case, the judgment was 74 pages. Both were in favour of the respondent. The Judge does not make cross-reference and makes no mention of the (sic) either case in the other. It is the applicant's contention that the Judge should have disqualified himself, and his omission to cross-reference must be a clear case of bias against the applicant.

    (i) The tenor of the superior court's judgment clearly shows that it is a simple demolition of the applicant's case by the honourable Judge rather than a vindication of the respondent's assertion. The court was clearly biased against the applicant.

(l) The applicant has lodged a notice of appeal against the decision of the superior court.

(m) The applicant has an arguable appeal with an overwhelming chance of success.

(n) The nature of the issues before the court clearly show that the intended appeal will be rendered nugatory if the orders the applicant seeks are not granted at this stage.

3. There is also an affidavit in support of the application sworn to by the applicant on the same date. Apart from introductory remarks, the averments in the said affidavit are almost similar to the grounds set out on the face of the application. The respondent swore a replying affidavit in which he stated that

the intended appeal is not arguable nor will it be rendered nugatory if the stay order is not granted. He stated further that the application is intended to reverse the order of the superior court, which cannot be done at this stage. The application was fixed for hearing before us on October 29, 2009 when Mr Ahmednasir Abdullahi, learned counsel for the applicant submitted in favour of it and referred to the complaint relating to the evidence of the child taken in absence of the parties and their lawyers and said this procedure was unknown to the law. He also referred to the bias the Judge had against the applicant in awarding the custody of the child on the basis of material wealth. He also complained about the short visitation rights accorded to the applicant. These grounds, counsel stated, show that the applicant has an arguable appeal. On the nugatory aspect, counsel submitted that the order made by the Judge was an enslaving one and that if the order of stay is not granted the appeal will be useless since time that passes, it being of the essence, has no payable damages.

4. Mr Ochieng Oduol, learned counsel for the respondent opposed the application and stated that there was no arguable appeal. According to him the applicant applies for a total reversal of the superior court judgment which the court has no jurisdiction to do at this stage; neither is it within the power of this court to reverse visitation rights while dealing with the application for stay. He stated that if the applicant was dissatisfied with the visitation order she should have gone back to the superior court for a variation of that order. As to the evidence given by the child in camera, counsel stated that this was agreed upon by counsel for both parties and that since it is important to consider the capacity of a party to provide for the child, his/her means was crucial. Counsel also submitted that there was no complaint against the respondent but that custody was given on the basis of legally defined perimeters. He stated that the child in issue in the application was 14 years old and the quality of his life in terms of his education and health cannot be gambled with. His rights were guaranteed as the respondent was a responsible parent.

5. On visitation rights, he stated that the evidence adduced was taken into account including psychological abuse. The child was found to be intelligent and mature and that he could not be coached and the Judge exercised, his discretion properly in granting visitation rights' order. He submitted further that any contrary order of access could be disruptive and not in the best interest of the child.

6. I have perused the application, the grounds on the face thereof and the averments in the supporting and replying affidavits. I have also perused the draft memorandum of appeal. I am of the view that most, if not all, the contents of the grounds set out on the face of the application, the supporting affidavit and the draft memorandum of appeal are interrelated and geared towards the determination of the appeal which I am unable to deal with at this stage. But I am also aware of the principles to be demonstrated before an order of stay can be granted. They are for the applicant to show firstly that he/she has an arguable appeal, in other words that the intended appeal is not frivolous and secondly that refusal to grant an order of stay will render the appeal, if it eventually succeeds, nugatory. I am also aware that this being an application relating to a child under the age of 18 years his possible wishes and best interest are of paramount importance - see section 83(1)(d) and (j) of the *Children Act of 2001*. The applicant sought stay of the decree and judgment of the superior court. No decree has been drawn in the matter yet and I do not believe this court can stay the superior court judgment unless there is impending danger which calls for such stay on an interim basis. It is true the superior court granted various orders including the custody of the son named ASA to the respondent, visitation rights to the applicant for 2 hours each on Wednesdays and Fridays and an injunction to restrain the applicant from withdrawing the son from the jurisdiction of the superior court. An order of stay is intended to maintain the position as it was before the order

against which the stay is intended was made or in other words to maintain the status quo as it existed then. But from the record of the superior court the subject of this application, the said child previously lived with the respondent and it seems to me that the order of stay sought, if granted will not be of any benefit to the applicant as it will still restore the child to the custody of the respondent.

7. As to visitation rights, the record shows previously it was agreed on a 50-50 basis but that the superior court varied this as aforesaid although the Judge gave no reasons for this variation. However, it is my view that if any further variation order was to be made then this will be dealt with during the hearing of the appeal. Otherwise dealing with it at this stage will amount to involving the court in the merits of the intended appeal. This court has no power to do this at this stage. As regards an order for injunction which was issued by the Judge, it is the respondent who has the custody of the child ASA and that the applicant denied in the superior court that she had any intention of removing him from the jurisdiction of this court. This order cannot be stayed at this stage. This then leaves only the issue of visitation rights as an arguable point on appeal whose variation, I feel can only be determined on appeal unless the applicant opts to go back to the superior court for it.

8. On the nugatory aspect counsel for the applicant said:

> " Stay is necessary because every time that passes has no payable damages."

9. It is true the child is 14 years and that years are moving on but I am mindful of the fact that the Judge's order did not ignore the applicant completely over visitation rights and I cannot say as of now that her basic rights over the child ASA have been infringed to call into play a variation order by this court at this stage. Such interests were taken into account, albeit, partly. Also the issue of visitation rights and custody appear interrelated and will feature prominently during the hearing of the appeal and it is only at that stage that these issues will be adjudicated upon and determined.

10. It is a legal requirement that the twin principles stated herein before must both be demonstrated before an order of stay can be granted. It is my view that in this application only one of them, the arguability of the appeal, has been demonstrated but not the nugatory aspect. In the circumstances, I would dismiss this application but as the parties are husband and wife I would order each to bear his/her own costs thereof.

Ruling of Nyamu, JA

1. This is an application dated September 23, 2009 brought under rules 5(2) b and 42 of the *Court of Appeal Rules*.

2. It is an application for stay of execution of the judgment and decree of the superior court (Onyancha, J) dated and delivered on the July 1, 2009 in HCCC No 6 of 2009.

3. The background facts which gave rise to this application constitute a very short story. Before the proceedings in the superior court the applicant was the wife of the respondent and the marriage was blessed with only one child aged 13 years. Within a span of 3 days the superior court gave two major judgments touching on the future of the family. On July 1, 2009 following an application seeking maintenance and custody of the only child of the marriage (Onyancha, J) in HCCC Rule 6 of 2009 delivered a judgment against the applicant the effect of which was to grant the sole custody and care of the child to the respondent. And on July 3, 2009 in Matrimonial Cause Number 122 of 2006 the same court (Onyancha, J) delivered another judgment dissolving the marriage between the applicant

and the respondent and dismissed the applicant's cross-petition. The application seeks a stay as regards the first judgment in HCCC 6 of 2009.

4. The applicant has sought two substantive orders:-

> " That this honourable court be pleased to issue an order staying the decree and judgment of the superior court issued on July 1, 2009 (Onyancha, J) in High Court Civil Case Number 6 of 2009 pending the hearing and final determination of the intended appeal.

That pending the hearing and determination of the intended appeal, the court be pleased to allow the applicant to enjoy equal access to the child."

5. The application is anchored on 15 grounds:-

a) The honourable justice Mr DA Onyancha through a judgment he delivered on 1st July 2009 granted the respondent herein the sole custody and care of the parties herein sole child to the respondent.

b) The court in awarding the respondent sole care and custody based its decision on a number of factors including the factor that the respondent is rich while the applicant is poor with no record of employment, that the applicant has on one occasion smacked the kid, and that the child had expressed preference to stay with his father during a session the judge had a one to one meeting with the child.

c) The court was persuaded to award custody of the child to the respondent by a one to one session the judge had with the child in total exclusion of the parties and their advocates. The judge in the judgment refers extensively to this meeting in which the child alleges that his mother had assaulted him and that he makes a preference to his father in the custody battle between the parties. This conduct on the part of the judge was most prejudicial to the applicant herein and invalidates in toto the entire proceedings. The procedure of a judge having a private session with a witness in the absence of their lawyers is unknown to our laws and goes against the adversarial justice system.

d) The court made too many assumptions all against the applicant and batched up the respondent's case on its own motion. For instance the court without the benefit of a medical expert reached the bewildering conclusion that the respondent who has recovered from drug addiction will not go into relapse. The respondent went to an alcohol and drug rehabilitation centre in Britain in the past, and the court failed to warn itself of the likely danger a relapse poses to the child.

e) The judgment is patronizing and appear to reprimand the applicant for the stand she has taken in the case.

f) The court failed to appreciate the fact that the long period of time the child stayed with his father might have led to the child been coached in relation to the favourable evidence he gave in support of the respondent's contention.

g) The judge failed to contextualize the best interest of the child in the light of the peculiar facts of the case. He over relied on the evidence given by the child.

h) The applicant is grossly aggrieved by the said decision.

i) The court based its judgment entirely on speculation and conjecture. The judge whenever he could not base his decision on a factual issue went out of his way to supplement through

speculation and assumptions. For instance this was the case when the court analyzed the real motive behind the aborted criminal prosecution against the applicant.

j) The court was absolutely biased against the respondent. A clear case is at pages 63-64 of the judgment. Knowing that he will deliver a judgment for the dissolution of the marriage two days later, the judge creates an impression that he is not aware of the same and speculates on the same. Even on that speculation he builds a case for the respondent and destroys the applicant's case.

k) The judge heard two cases involving the parties herein simultaneously and delivered the judgments on 1st and 3rd of July 2009. In the matrimonial case the judgment was 51 pages. In the child custody's case, the judgment was 74 pages. Both were in favour of the respondent. The judge does not make cross reference and makes no mention of the either case in the other. It is the applicant's contention that the judge should have disqualified himself, and his omission to cross reference must be a clear case of bias against the applicant.

l) The tenor of the superior court's judgment clearly shows that it is a simple demolition of the applicant's case by the honourable judge rather than a vindication of the respondent's assertion. The court was clearly biased against the applicant.

m) The applicant has lodged a notice of appeal against the decision of the superior court.

n) The applicant has an arguable appeal with an overwhelming chance of success.

o) The nature of the issues before the court clearly show that the intended appeal will be rendered nugatory if the orders the applicant seeks are not granted at this stage.

6. During the hearing, the learned counsel Mr Ahmed Nasir represented the appellant while the learned counsel Mr Ochieng Oduol, represented the respondent.

7. The applicant's counsel in his submissions relied fully on the contents of the affidavit in support of the application sworn by the applicant on September 23, 2009. Mr Nasir contended that access of 4 hours a week given to the mother in the challenged judgment within which to remain in contact with an only child was unfair and inadequate. He further submitted that in the intended appeal the applicant shall contend that the superior court did take the evidence of a child of tender years in a manner contrary to law and in particular contrary to the rules of natural justice. He pointed out that in the appeal he shall highlight situations in which the superior court made findings not based on evidence to demonstrate bias in favour of the respondent; inclined in favour of the respondent on the basis of his superior financial position and therefore made the respondent's means the main determinant including the nationality of the applicant and alleged criminal proceedings against the applicant. He concluded his submissions by stating that all in all the limited access given to the applicant was not in the interest of the child and that the revelation in the judgment that the court felt bound by the lower court's order on the right of access was highly contentious.

8. On whether or not the appeal was likely to be rendered nugatory if stay order was not granted, he submitted that the four hours a week allocated to the mother represent a shackling and enslaving order and the limited hours had great impact on the quality and quantity of life the applicant should rightly share with the child by virtue of being the mother. He emphasized that as a result of the superior court's order the applicant would not see the child on weekdays would share no meals, night movie or temple with an only child and this in turn means for a long time both the quality and quantity of life between child and mother would be unfairly curtailed. He illustrated the point by stating that if the appeal took another 5 years to be determined the child shall have reached the age of majority and for this reason the appeal which is principally centred on the right of access would be rendered nugatory. The

learned counsel also contended that since the respondent as of now has a greater access to the child, this superior right of access would in turn, result in a one sided effect on the child's upbringing. He wound up his submissions by stating that the application was bubbling with arguable points and reiterated that the evidence of a child should not have been taken behind closed doors and on this he relied on the case of *Yusuf Subwani Opido v Republic* (2009) eKLR and that, in the application, the applicant was articulating a legal right and a basic human right hence the need to have a conservatory order which puts both parents' rights on an even scale, pending appeal as the application involved the balancing of the proposals on custody from both parents since there was more than money in the triangular relationship between the parents and the child. By way of analogy, Mr Nasir stated that reliance on the Australian case of *U v U* by the respondent was not based on good law since the provisions set out in the Children Act were different from those prevailing in Australia and even in the case of the European Union the relevant European Convention allows the recording of the private inquiry so as to satisfy the requirements of natural justice and the provisions of section 75(3) of the *Children Act*. He concluded that the proceedings were therefore in breach of natural justice and of statute law as well.

9. On his part Mr Oduol stated that the court was being asked to trace a well trodden path of ascertaining whether the intended appeal was arguable and whether it could be rendered nugatory by the failure to grant stay. Concerning these twin requirements he relied on the other often cited case of *Chesoni v Silverster*[2002] I KLR 869. Mr Oduol stressed that the intended appeal was not arguable and that the order sought in the application would constitute a reversal of the order of the superior court even before the hearing of the actual appeal on merits. He submitted that such a step would be unnecessary since any of the parents was at liberty to apply to the trial judge to vary the order. In his submissions the learned counsel highlighted that unreasonableness was not one of the grounds for the grant of orders under rule 5(2)(b) of this Court's Rules; that the judgment of the trial court was based on sound legal principles set out in the Children Act and that under section 4 of the Act the overriding principles concerning the best of interests of the child include the right of education under section 7, religious education under section 8, and the rights to health care under section 9; that the challenged judgment was based on evidence which was tendered before the trial judge in court; that the Children Act constitutes the domestication of an International Convention on the Rights of the Child, and in this regard on the challenge that the judge recorded the evidence of the child behind closed doors he relied on the Australian case of *U v U* (2002-2003) CLR 238 and submitted that the judge was entitled to do what he did in order to ascertain the wishes of the child pursuant to the Children Act and for this reason the court was entitled to undertake an inquisitorial procedure in taking the evidence and that the inquisition was undertaken by consent of counsel for the parties; and further that the Children Act allowed the taking of evidence; that the so called reliance on the means of the respondent as a determinant in granting custody was exaggerated because the court was legally entitled to inquire into the means of the parties so that the best interests of the child of 14 years are ascertained including the quality of life which included education and medical needs; that these needs were being taken care of by the respondent and that it was common ground that the child was very gifted and intelligent and therefore incapable of being influenced and there was no evidence of neglect against the respondent but the same could not be said of the applicant since there were allegations of both physical and psychological abuse and therefore the order of custody proceeded on legally defined parameters so as to attain the best interest of the child; that the fact that the order by the lower court had subsisted for three years without complaints constituted good evidence of the suitability of the challenged order; that there was no evidence of couching by the respondent and all the judge did was to believe the respondent's version in accordance with the requirements of the Children Act and finally that the appeal would not be rendered nugatory since the superior court order was based on very sound principles which are unlikely to be upset on appeal.

10. I have carefully considered the submissions of counsel as outlined above. Concerning the first requirement on whether the appeal is arguable I find that it is not frivolous as is evident from the draft memorandum and the submissions as outlined above. Obviously I cannot at this stage pronounce on the merits of any of the contentious issues but they cast a long shadow on the need to do justice to the parties even at this stage. On the second requirement, I hold that the applicant has in the unique circumstances of this case satisfied the second requirement. The appeal is likely to be rendered nugatory should a stay Order be denied on the basis that the Court has no power to grant such an order.

11. It is common ground that the applicant has been given limited access to the child and obviously the effect of this is that should she ultimately succeed in the intended appeal her right to parental care would have been lost, never to be recovered again whereas the child is now 13 years and obviously at the formation stage at least for another five years and it is not known when the intended appeal will be heard. It has not been conclusively shown that the applicant cannot be trusted with the right of equal access. In fact one of her complaints in the intended appeal is that the views of the child towards her could have been coloured or exaggerated by the respondent who has had a greater share of access to the child. For the same reason unless a proper conservatory order is made the entire appeal is likely to be rendered nugatory. On this aspect, I am in full agreement with the submissions of the learned counsel Mr Ahmed Nasir. He has persuasively submitted that every day which passes without the issue of access being addressed the appeal would progressively be rendered nugatory. I agree that of one of the parent's rights are irretrievably being eliminated by the passage of time, never to be redeemed. I could not agree more. The nugatory aspects of the intended appeal are so clear and overwhelming that I cannot think of a better case which has this aspect so loudly crying out for all to see. As we have repeatedly stated in some of the past decisions of this Court, liberty once lost can never be recovered. One of the cases which illustrate this principle is that of *Wanyiri Kihoro v Kona Hauthi Ltd* CA Nai 168 of 2009 (unreported) where this Court delivered itself thus:-

> " It is clear to us it would not be right to place a value on liberty because it is priceless."

.....

12. The same ruling continued:-

> " This Court has in a line of authorities, held that where an applicant might lose his liberty the second test is satisfied."

13. In my opinion the right to family life is intertwined with the right of access to one's child and both are basic human rights and are also indivisibly tied to the right to life. Basic rights though often categorized are infact indivisible. Thomas Jefferson 3rd President of the United States said:-

> " The God who gives us life gives us liberty at the same time."

14. Just as the above quote was approved in the case of *Makomberedze v Minister of State* [1987] LRC 507 I approve it in this ruling.

15. In assisting me to determine whether the intended appeal might be rendered nugatory and without in any way adjudicating any point in the intended appeal since this matter involves the exercise of basic human rights by all the three affected parties, even in the interim period, it would be in the interest of the child apart from any proof of abusive relationships, that the child benefits without any gap from the development of good relationships with both his parents. The contesting parties have shared the common ground that the child who is the subject matter of the application and whose overriding interest should prevail in every court including this Court is exceptionally intelligent and gifted. It

follows therefore if equal access to both parents is given and he is left to exercise his right of choice of who to see and when he can be trusted to make his own independent choices. There is nothing to stop this Court upon hearing the Appeal on merit reversing this equality. In my view varying the order in order to allow this, is what would be in the best interest of the child pending appeal. The other reason why I incline to vary the order of access is that under sections 3A and 3B of the Appellate Jurisdiction Act, this Court has been statutorily mandated when it is exercising any power under the Act or rules or interpreting the Act or the rules under the Act, to do so guided by the overriding principle. I believe that this provision allows us to break from the past and boldly free ourselves from any procedures, rules, precedents or technicalities likely to hinder us from attaining the objective by doing what is fair and just in every situation before us as a Court. The pillars of the overriding principle are fairness, justice, proportionality and proper use of courts' resources. Proportionality entails giving the parties before the court equal footing and ensuring there is equality of arms as between the parties as far as is practicable. In my view according equal access does achieve the aims of fairness, justice and proportionality.

16. Some of the principal aims of the overriding objective include; acting justly in every situation before the court; placing the parties on equal footing as far as is practicable; reducing delay and cost of litigation; acting with the principle of proportionality in view; designing suitable procedures to suit speedy and efficient delivery of justice; allocating the resources of the court which include the right of equal hearing (equality of hearing) and finally ensuring that the principle of equality of arms is adhered to. In my view, varying the order as I am likely to do, accords with the above aims. Giving equal right of access to the child as interim relief is what in my opinion are the special demands of the application based on the principles of justice and fairness in this particular case at this particular time. In my view any past jurisprudence which purports to suggest that it would be wrong to interfere with the superior court orders or to give or design a suitable interim measure in order to achieve the overriding objective must at this time and age be gradually reviewed to accord with the ends of justice in each case. Liberty is no respecter of time or space it was endowed on us by God to be enjoyed all the time and without gaps except when the public good demands otherwise. For the above reasons I would rule that the applicant is entitled to an appropriate interim order.

17. In the result I would grant an order for stay on terms that the respondent retains the right of custody but both parties to have equal right of access to the child with the proviso that both parties are placed under a duty to co-operate with the Court to ensure this equality including respect for the right of the child to choose where and when to associate with each of the parents. As there exists a matrimonial home, it will constitute the focal point for the exercise of this right of access for both parents as far as is practicable. The respondent is restrained from removing the child outside the jurisdiction of the courts. There shall be liberty to any party to apply to any judge of the superior court except the judge who presided over the subject matter of this appeal. Such liberty to include designing a suitable schedule of visits and any variation of this order provided that such variation is exercised in the best interest of the child, should the circumstances change before the hearing of the appeal. The costs of this application to abide the outcome of the intended appeal.

18. Notwithstanding the above, I bow to the majority ruling and orders shall issue as per the rulings of my learned brothers Bosire & Aganyanya, JJ.A.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER, 2009.

S.E.O BOSIRE

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR