REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CHILDREN CIVIL APPEAL NUMBER 7 OF 2019

EWT.....APPELLANT/APPLICANT

=VERSUS=

EMT.....RESPONDENT

R U L I N G

1. Before me is the Notice of Motion dated 13th December, 2019 brought under Certificate of Urgency of Hari Gakinya Advocate of the same date.

The application seeks orders:-

a) THAT this Honourable Court be pleased to certify the application to be of utmost urgency and the same should be heard on priority basis and service be dispensed with in the first instance.

b) THAT pending hearing and determination of this application interpartes, this Honourable Court be pleased to stay the ruling and sentence by Hon. LIMO B. BENJAMIN delivered on 11th December 2019 and all its consequential orders.

c) THAT pending hearing and determination of this appeal inter-partes, this Honourable court be pleased to stay the execution of the ruling and sentence entered against the application the ruling dated 11th December, 2019 and all its consequential orders.

d) THAT costs of this application be provided for.

On the grounds set on the face of the application;

i. **THAT** the Appellant application is the biological mother of the subject of the proceedings herein.

ii. **THAT** the Appellant/Applicant has been sentenced to serve 30 days in prison without having been given an opportunity to be test the evidence and or defend herself.

iii. **THAT** if the stay is not granted the application will be rendered nugatory.

iv. **THAT** the Applicant has an arguable appeal with very high chances of success.

v. **THAT** the applicant appeal raises very pertinent issue of the procedure of proof of the offenses created by the Children's Act.

vi. **THAT** the Applicant is ready to abide by the condition given by this Honourable court.

The application is supported by the affidavit of Elizabeth Wangari Thuita sworn on 13th December, 2019 and annextures thereto. The same is opposed by the respondent. Ephantus Maina Thigah's affidavit sworn on 16th December, 2019.

2. When the matter came before me on 13th December, 2019 I declined to grant **exparte orders** sought and instead directed that the application be served and be heard inter-partes on 17th December, 2019. Mr. Gakinya argued the application for the applicant, Mr. Onyancha and Mr. Mbuvi argued for the respondent.

3. The appeal, and the application for stay pending its hearing and determination was provoked by the orders of *Hon. Limo B. Benjamin SRM* on 11th December, 2019, where, citing the provisions of **Section 84** as read with **85** of the **Children Act**

"84. Restriction on removal of a child where applicant has provided home for three years

(1) Where an application for a custody order in respect of a child made by the person with whom the child has, at the time the application is made, had his home for a period, whether continuous or not, of three years, no person shall be entitled, against the will of the applicant, to remove the child from the applicant's custody except with the leave of the court.

(2) Any person who contravenes subsection (1) commits an offence and shall be liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding ten thousand shillings or to both.

85. Return of child taken away in breach of section 80

(1) A court may, on the application of a person from whom a child has been removed in breach of section 84, order the person who has so removed the child to return the child to the applicant and where the child has been removed from the jurisdiction of the court or the Republic of Kenya, make a ward ship order or a production order on such conditions as the court may deem appropriate in the circumstances.

(2) …

(3) …

(4) …

He convicted and sentenced the applicant to thirty (30) days imprisonment.

BACKGROUND

4. From the record before me, and the affidavits filed by each party, this matter is a dispute over the legal, actual custody of EMM aged nine (9) years old. According to the applicant in **Nakuru CM Childrens Court Case Number 190 of 2019 (**the father), he has had custody of the child since 18th April, 2012 when the Milimani Children's Court granted him custody of the child and that he had raised, educated, and provided for the child without any assistance from the respondent/applicant (the mother). That on the 18th October, 2019 the child was removed from her school in Nakuru by the mother and taken to an unknown place. That prompted him to report the matter to the police vide OB No. 104/18/2019 Nakuru Central Police Station and to file the matter before the children's court vide the plaint dated 22nd October, 2019 where he seeks orders:-

i***) An order that legal and actual custody of the said child be granted to him.***

ii) That he provides shelter, food, clothing, education, health and all other needs of the minor.

iii) That he be awarded costs of the suit.

In his **plaint** at **paragraph 4** he avers that:-

"The said subject was at all times in the custody of the plaintiff pursuant to a court ruling entered on 18th April, 2012 in Nairobi Court. Court Case Number 289/2012 Elizabeth Wangari Thuita v Ephantus Maina Thigah". At paragraph 10 he avers that there are no other pending proceedings in any court save for Number 289 of 2012 which has since been dismissed."

5. In the Memo of Appeal filed on 13th December, 2019 the appellant/applicant sets out the following grounds:-

*1. **THAT** the trial Magistrate erred in law and in fact by sentencing the appellant on a criminal offence without following due process under the criminal procedure code.*

*2. **THAT** the learned Magistrate erred in law and in fact by not allowing the appellant to defend herself in the process where the court became the investigator and prosecutor and the judge.*

*3. **THAT** the learned Magistrate erred in law and in fact by sentencing the Appellant before pronouncing the conviction and giving the appellant a chance to mitigate the sentence.*

*4. **THAT** the learned Magistrate erred in law and in fact by convicting the Appellant of an offence other than contempt of court with civil proceedings.*

*5. **THAT** the learned Magistrate erred in law and in fact by not considering that the Respondent has been in contempt of court orders for the last 8 years.*

*6. **THAT** the learned Magistrate erred in law and in fact by not considering first the appellant has a young child of 13 months whose best interest is also important and who needs her mother.*

*7. **THAT** the learned Magistrate erred in law and in fact by failing to apply his mind to the circumstance of the case jurisdiction and allowing himself to be moved by the Respondent in an unjudicious way.*

6. In his oral arguments Mr. Gakinya argued that the appellant/applicant was not given a chance to mitigate, that she was not found to be in contempt of any orders as there was no mention of such. That this was an old dispute where court orders had been disobeyed. Secondly that the applicant had an arguable appeal which will be rendered nugatory unless the orders of stay of the sentence are granted. That it was not denied by the appellant/applicant that she had the child in her custody. That she had been denied access for the last seven (7) years and it was also in the best interest of the child for the child to be with her mother. That the mother had not transferred the child out of her school, neither had she said the child would not attend school. In addition that the issue of the child having been taken from the school had been reported to the school, for police action yet the appellant/applicant had already been convicted.

That the appellant applicant had another child aged thirteen (13) months, who was still breast feeding but who was not staying with her in prison. That this was a matter that could be settled through an agreement.

7. Mr. Mbuvi and Mr. Onyancha opposed the application as a baseless appeal that the trial court had considered the issue of **Section 84 Children Act** and had acted according to law. That the minor had all along been in the custody of the respondent all the time. That she was sitting exams and was uprooted from a classroom that no one knows the whereabouts of the child. That the appellant was ordered to produce the child and by the time of arguing the application had not done so. That respondent had sourced the 23rd and 24th December for the child to sit exams. That what was before me was about the appellant, but theirs was about the minor, her education and her health. That the child had missed school for thirty (30) days, and was under medication for a fracture. That the court did not know the health of the minor. In his rejoinder Mr. Gakinya submitted that the whereabouts of the child were known. The Children Officer Nakuru East Sub County also joined in to support the application for the production of the child and made a different application that we child be released to the Director of Children Services for the Director of Children Services to place the child in a children home so that the child could be availed to attend exams.

8. I have carefully considered all the submissions before me. The issue is whether the application for stay has merit. I have been urged to find that the same has no merit because the sentence meted is predicated on the law and the magistrate followed the proper

procedure that what is at stake here is the welfare of the minor.

9. I cannot close my eyes to the other issue here. ***The custody battle between the two (2) parents which is pivoted on the best interests of the child***

10. Let me begin by saying that court orders are not made in vain. They must be obeyed at all times. Parties cannot choose which orders to obey and which ones not to obey, every person is equal before the law.

11. The liberty of any person ought not to be taken away from him/her without due process.

12. **Section 84** of the **Children Act**, falls under **Part VII on custody and maintenance.** It must be read in context and given its plain meaning, it begins by saying;

"Where an application for a custody order in respect of a child made by the person with whom the child has at the time the application is made had his home…"

Question is, at the time the child is said to have been uprooted from school, was there any application for a custody order by the applicant" Answer" No. The record is clear that it is after the alleged 'uprooting' that the respondent herein filed the suit in the lower court seeking the legal and actual custody of the child. Clearly therefore **Section 84** envisages a situation where there is pending before the court an application for custody order. This was the same thought that was expressed by *Achode J* in **FFM v OA [2015] eKLR;**

"**The provisions of Section 84 Children Act would require that the applicant herein, had made an application for custody orders in respect of the minors…"**

By the time the child was removed from school, the provisions of **Section 84** were not in play, the issue regarding the custody of that child was not before the court, the court was not seized with the issue of the child, otherwise that part that states; "*Except with the leave of the court*" would be superfluous. On this point alone the applicant has arguable appeal against the ruling and sentence of 11th December, 2019.

The 2nd limb of this application cannot be escaped. Where is the child" What is the status of that child" In **Mathew Chepkwony & Another v Paul Kemei Kiprono [2007] e KLR** *Justice Ibrahim* (as he then was) cutting the English Case of **Hadkinson v Hadkinson [1952] All ER Vol 2 P 567** at **568** *Romen J*

"…. It appears from me that this is the kind of case in which the ordinary rule should be applied in all its strictness. Disregard of an order of the court is a matter of sufficient gravity whatever the order may be. Where, however, the order related to a child the court is (and should be) adamant in its observance… such an order is made in the interest and welfare of the child and the court will not tolerate any interference with or disregard of its decision on these matters. Least of all will the court permit disobedience of an order that a child shall not be removed outside its jurisdiction."

13. These are strong words. They apply equally upon the applicant and upon the respondent. The respondent lays claim to the child relying on orders issued in **Nairobi Children Case Number 289 of 2012** which the claims was dismissed.

14. It is not disputed that the respondent first took the child then an infant from the applicant without her consent, leading to orders from case in Kikuyu by C. A Otieno dated 14th February, 2012 that the child be "rescued from the father (the respondent) and be returned to the mother (the applicant)."

15. In his ruling the *Hon A. Mwicigi* , having taken into consideration the appropriate issues granted him temporary custody. For the avoidance of doubt ,I find it necessary to quote his words :

"The other case considered the basic rule that children of tender years should be in the custody of their mother unless the mother divests herself of such right.

It is no doubt that at the time the defendant took up custody of the minor issue her health had deteriorated. The question is whether the health had deteriorated because of the plaintiff's neglect. This must be established in evidence so that the court can determine whether she has divested herself of the right to custody. I reiterate that the rights of parents are secondary however to the best interest of the child. To ascertain whom between the two is best suited to have the custody of the child I will require that they provide evidence to conclusively determine the issue. I direct that the matter be set down for trial.

In the interim the status quo shall be maintained. The defendant will have interim custody care and control of the minor to complete the treatment plan and checkup for the minor as that is in the child's best interest.

The plaintiff will have supervised access to the child to avoid a situation where the medication of the child is discontinued to her detriment. This shall be on alternative weekends and be supervised by the children department or provincial administration owing to the acrimony between the parties. The orders of maintenance be determined at the hearing of the suit.

Order to issue accordingly."

The matter was set down for hearing to determine full custody. It was never heard. Further orders issued in **Civil Appeal 89 of 2012** where *Kimaru J* gave orders on 8th April, 2014 access by the appellant (father) on school holidays. It is not clear what the lower court file was in Nakuru in 2012 to warrant the appeal. In any event it appears that the appellant (the father) never complied with *Justice Kimaru's* orders.

The parties were before the children court Nairobi in November, 2014 and orders were issued on 8th December, 2014 whereby the plaintiff was granted access on alternative weekends. The matter was to be heard inter partes on 12th February, 2015. That does not seem to have been done.

16. The parents herein must wake up to the fact that this child has a right to a quiet enjoyment of her childhood. That includes the love care and attention of both her parents who are alive. Hence I must tell them in no uncertain terms! This circus must stop. Everyone here is violating his child's right to quiet enjoyment of her childhood. The right to being a child is not some ping pong ball to be played between the parents in the field that the courts have become from them. It is not acceptable.

17. No parent has a superior right over the child. The child has a right to be cared for by both parents. Those are the words of **Article 53** of the **Constitution Section and sections 6** and **23** of the **Children Act**. The issue must be determined once and for all.

18. The parents and the extended family have the primary duty of securing her welfare and safeguarding her rights. They need to have this conversation as the courts cannot be the panacea to the issue. There must be good faith and commitment to the best interest of the child.

19. Having said the foregoing I find as follows;

Orders:

1. That the ruling and sentence issued in Children's Court no 190 of 2019 on the 11th December 2019 be and is hereby stayed pending appeal. Appellant applicant to be released forthwith from custody.

2. The Appellant is granted temporary custody of the child during the remaining period of the school holidays on condition that she complies with the orders herein below.

3. The appellant applicant to produce the child at Melvin Jones Lions Academy on Monday the 23rd of December and Tuesday the 24th of December to sit her end of term exams as has been arranged by the respondent her father and his counsel. In default warrant of arrest to issue.

4. In relation to no. order 3 above: A production order in terms of s. 114 of the Children Act to issue for the child addressed to any person who may be concealing the child; the appellant applicant specifically, and her parents and other relatives generally.

5. The Children Officer Nakuru East to supervise these orders and be present at school during the sitting of the exams to ensure the welfare of the child is safeguarded.

6. The child be returned to the father on the 5th of January 2020 before 2:00pm for purpose of preparing for school. The parents to agree on the venue.

7. During the school holidays the mother to enable the phone access to child to speak to her father and other siblings she may have had in his home.

8. The parents to discuss issue of access during school term/ the same be determined by the court.

9. The matter be mentioned before the Children Court on 30th January 2020 for any other directions.

10. Order be served on the Children Officer.

Dated, delivered and signed at Nakuru this 20th day of December, 2019.

Mumbua T. Matheka

Judge

In the presence of

CA Edna/Martin

The two parents, their relatives

Mr. Gakinya for the applicant

Mr. Onyancha for the respondent