



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 176 OF 2010

IN THE MATTER OF THE CHILDRENS ACT 2001

AND

IN THE MATTER OF AN APPLCIATION FOR DIVORCE AND LEGAL CUSTODY OF A.Z

A.A.....APPELLANT

VERSUS

V.O.....RESPONDENT

RULING

The appellant **A.A** has approached the seat of justice by way of a memorandum of appeal dated 29th day of October 2010 and filed on 1/11/2010.

On the appeal, the appellant anchored an interim application by way of notice of motion. It is brought under Article 53 of the constitution, Section 3 and 3A of the Civil Procedure Act chapter 21, Order XLI Rule 4 of the Civil Procedure Rules Section VI, 80, 83, 87 and 88 of the Children’s Act and all enabling provisions of the law. Five reliefs are sought :-

(a) Spent

(b) That pending the hearing and determination of this application inter partes, there be an order of stay of execution of the orders of the lower court issued on the 25th October 2010 in Kisumu Children's cause No 45 of 2010.

(c) That pending the hearing and determination of this application inter partes the custody of the minor A.Z. be given to the applicant and the police officers stationed at Oyugis police station do assist in the execution of this order.

(d) That pending the hearing and determination of this appeal, the Honourable court be pleased to grant an interim order vesting the actual custody of the minor to the appellant with reasonable access and visitation rights to the Respondent.

(e) Cost of the application be provided for.

The grounds in support are set out in the body of the application and these are summarized as:-

- **The appellant/applicant is the biological mother of the subject infant A.Z.**
- **The subject A.Z. is a baby hardly 2 years old and needs to breast feed, attend clinic and is in need of the motherly care and care provisions by the appellant/applicant.**
- **That it is in the best interests of the said child that it be in the care, control and custody of the said mother.**
- **That genesis of the complaint is because the Respondent has barred the appellant/applicant from accessing the said child.**

The supporting affidavit contains the narrative history of the dispute relating to the subject child and then reiterates the grounds in the body of the application and for purposes of the record only the following have been stressed :-

- **The appellant/applicant as the biological mother of the child has knowledge that the child was born on 24/1/2009 as per the content of the birth notification documents.**
- **Vide paragraph 3, that she left the respondents home for her parent's home for the reasons given.**
- **Vide paragraph 4, thereof that she had left with the child which was later on abducted from her house by the Respondent.**
- **Vide paragraph 5, 6,7,8,9,10,11,12 and 13 that by reason of the afore said abduction of the minor, she reported the matter to the police station and while investigations were still going on is when she was served with papers in the lower court case to which she had no time to respond before adverse orders were made against her and the child. It is her contention that in view of the age of the child, the same should be given to her custody, care and control with access to the father.**

- **That she has never denied the father access but he is the one denying her access to her own child.**
- **Vide paragraphs 14, 15, 16 and 17 that the best interests of the child tilts in her favour. That she has always been a good mother and will continue being so.**

The replying affidavit of the respondent is not traced on the record but the appellant / applicant response to it is by way of a further affidavit deponed on the 29th day of November 2010 and filed on the 30th day of November 2010 and the following have been stressed:-

- **Vide paragraph 3, 4, 5 and 6 that it is not true that the Respondent has been catering for the needs of the said minor child, her parents paid her fees, reiterates that the Respondents abducted the child from an attendant Beatrice Adhiambo who has been helping her out with the child, denies allegation that the child when abducted was in need of health care and that she was cohabiting with a 3rd party.**
- **Vide paragraphs 7, 8,9,10,11,12,13 and 14 that it is not true that the child was sick and the appointment documents are false and a fabrication, denies attempting to change the child's names, that when they went to get the minor they found it locked up in a house and had to get the assistance of the police in order to access the said child, still maintains that she is the best suited person to have custody of the minor.**
- **It is her contention that the Respondent has not been providing for the child and does not have the interests of the minor at heart as he has not been providing for the said child.**
- **Vide paragraphs 15, 16,17,18,19 and 20 that she is not a student, she is employed hence in a position to provide for the minor child adequately.**

The further affidavit for the Respondent is deponed on the 4th March 2011 and filed on the 4th day of March 2011. The salient features of the same are as follows :-

- **That he is incapable of abducting his own child.**
- **Maintains the child was sickly and duly neglected and abandoned.**
- **The applicant was forcefully helped by police to take the child away from the Respondent.**
- **Maintains the child was sick.**
- **That the child no longer breast feeds.**
- **That the name of the child has been changed to Z.A.**
- **That the applicant has been staying in the home of a named 3rd party for the last 3 months prior to the coming to court.**
- **Denied locking the child up in a house.**

- **He is in a position as a father to provide medical attention.**
- **That the Respondents first wife is ready and willing to take care of the child.**
- **He is a teacher with reasonable earnings and can sustain the said child. Denies the applicants assertion that she is employed and maintains that she is a house wife with no earnings. That the best interests and welfare of the child will best be served by the father who is in gainful employment being granted its custody.**

Before filing of the submissions and in an interim y measure parties recorded a consent on the 31/3/2011 along the following lines:-

By consent:

- 1. The Respondent will have access to the minor child which will be exercised by picking the minor on Friday at 4.00 p.m. or thereabout from the appellants home and returning the minor to the appellants home on or before 4.00 p.m. on Monday effective 1/4/2011.**
- 2. Upkeep of the minor to be shared equally between the appellant and the Respondent. Details to be worked out by the parties with the assistance of their counsels.**
- 3. Mention 5/5/2011 for submissions.**

Submissions for the appellant/applicant are dated 4th May 2011 and filed on 16th day of May 2011. A perusal of the same reveals that they reiterate the content of the supporting documents and then goes further to stress the following in a summary form.

- The child is a child of tender years and by reason of this, the only person who should be vested with the custody of the said child is the mother.
- The court is urged to believe the assertions of the applicant that the Respondent has not been providing for the said child.
- Contends that if the father is given custody the mother will not have access to the said child.
- That applicant has never been in good books with the Respondents elder wife and yet the Respondent left the said child with her.
- The court is urged to be guided and to apply the principle of case law cited to the court.
- That the Respondents elders' wife has not filed an affidavit of willingness to take care of the child and for this reason custody should not be granted to the mother.
- The court is also urged to apply international principles of the situation herein.

The case law relied upon is the case of **GITHUNGURI VERSUS GITHUNGURI (1981) KLR 598** where the court of appeal laid down the following guide lines.

1. The order awarding custody to the father is set aside and substituted with an order giving legal custody of the two infant daughters to their mother.
2. The trial judge in this case made a wrong decision since the custody of young female children should be granted to the mother unless there are exceptional circumstances. In this case there are no exceptional circumstances shown to justify depriving the mother of her natural right to have her children.
3. The trial judge rightly, correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the child but misdirected himself by not finding that the rule was in favour of the mother.
4. The rule is that the mother should normally have custody of children of tender years and where the court gives it to the father it is incumbent on it to make sure there really are sufficient reasons to exclude the prima facie rule.

The case of ELIJAH WAINAINA MIRA VERSUS MARY MUTHONI NG'ANG'A decided by Rawal J on the 2nd day of October 2008. At page 3 line 4 from the above, the learned judge made the following observations:-

“ As regards the issue of custody is concerned it is not disputed that since 11 May 2005, the daughter has been under the care and custody of the Respondent and the Respondent also agreed during his cross-examination that he did not mean to say that the Respondent was an irresponsible mother. Moreover the child is a female child of very tender age and I cannot give her custody to the petitioner and this without hesitation I do grant the custody, care and control of Virginia Wainaina to the Respondent with unlimited access to the Petitioner which could be varied if the circumstances do require such order.

The case of MEHRUNNISSA VERSUS PARVEZ (1981) KLR 547 also a court of appeal decision where the court held vide holding No. 4 that:-

(4) That custody of a child of tender years should always be a mothers' right except where she has through her own misconduct divested herself of such right. That other than being an accepted principle under Mohamedan law, it is also in the best interests of a child of tender age to be with his mother who has greater affection for him than any other person including the father who in this case had not even sought custody.

Further under holding that the first and paramount consideration is the welfare of the child and vide holding that neither the right of either party arising out of Mohamedan law or common law is a paramount consideration in deciding questions of custody nor does it take precedence over the welfare of the child.

The Respondent submissions are dated the 3rd day of May 2011 and filed the same date. The following have been stressed:-

- The dispute is between the parents of the child.
- The court has been called upon to decide who of the two will be best suited to have the interest of the said child at heart and then award him/her with the care and custody of the said child
- Concedes that the general rule as set out by case law some of which have been submitted by the appellant is that the best interests of a child of tender years lies with the mother as opposed to the father but with a rider that if it can be shown that there are exceptional circumstances to warrant removal from the maternal custody then the father will be granted custody.
- The court needs to inquire whether there are exceptional circumstances herein justifying the removal of the child from the mothers' custody to that of the father and whether the lower court erred when it made orders placing temporary custody in the father pending hearing and determination of the case.
- That the facts that the Respondent father placed before the lower court were as follows:-
 - The applicant was the biological father of the subject child, both him and the child had been subjected to cruelty, the mother has engaged in adultery and in the process subjected the child to psychological stress, the respondent has deserted the matrimonial home and no longer lives with the applicant, the Respondent has also neglected the child hence putting her in intolerable sufferings she is also making attempt to hide or conceal the child by renaming it from AZ to ZA.
 - That the lower court considered those factors when granting temporary custody to the father and the court should be guided by the same when determining the issue of custody herein.
 - They contend there are exceptional circumstances herein listed as follows:-
 - (a)The appellant/applicant neglected the child in breach of its rights under Article 53 of the constitution.
 - (b)The mother is also guilty of denial of identity of the child by reason of an attempt to change the names.
 - (c)Subject the child to the adultery being perpetuated by the applicant mother.
 - (d)And neglect of the child.

On case law the court has been urged to be guided by the principle in the case of **IMANSIT SINGH AMRIT VERSUS PAPINDER KAUR ATWAL NAIROBI HCCC NO. 6 OF 2009** decided by Onyancha J on the 1st day of July 2009. At pages 24-25 the learned judge quoted with approval the following case law:-

JOYCE MUTHONI GITHUNGURI VERSUS STANLEY MUGUNA GITHUNGURI (SUPRA). At page 25 line 4 from the top the case of **BCS (AN INFANT) (1958) IA11ER 783** Thus:-“ I only say this, the prima facie rule (which is now quite clearly settled is that other things being equal children of this tender age should be with their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure there really is sufficient reasons to exclude the prima facie rule....”

At line 10 from the top the case of **WAMBUA VERSUS OKUMU (1970) EA 578** Thus:-

“ I do not think it can be controverted that in the absence of exceptional circumstances, the welfare of a female infant aged 4 years demand that the infant be looked after by his mother rather than its putative father.

Then at line 4 from the top the judge went on to conclude:-

“The conclusion I make from the cited cases and others not cited which have applied the above principle is that children of tender age should as a rule be given to the mother rather than the father. If however the court finds that in a given case, there are exceptional reasons why the custody cannot be given to the mother, it can give the custody to the father. Such exceptional reasons in my understanding must be in the best interests or welfare of the child”

At page 32 line 6 from the top the court went on to make the following observation:-

“The ability of the parents to provide and care for A.S.A. is among other factors to be considered in the issue as to who should be given custody. However it is my understanding that the fact that one of the two parents is in a better financial or material position to give the child a better start in life than the other does not give the first one a prior claim for custody. It is more the happiness of the child, not the material prospects which this court would be concerned with. Obviously however a party’s financial position has not been ignored entirely. It follows that if a party is so poor that he/she cannot provide a home for the child or children, this in itself might be sufficient reason to refuse him/her custody as was stated in RE STORY (1961) 2 I.R 328, 345-346 AND IN REEF – (1969) 2CH.238 the same principle was Restated that:- “ a parent who can offer a child good accommodation must other things being equal have the edge over one who cannot....”

At home here in Kenya the court in the case of **S.O. VERSUS L.A.M. (2009) EKLR 6** put the same principle thus:-

“It is now a considered view that an order awarding custody to on employed mother of the child who has no means of a getting reasonable accommodation for the child, will not

be in the best interests of that child unless provisions are made for accommodation, more so if the father of the child, as the appellant herein is able to provide such accommodation for him... It is of course that by a side wind the mother will benefit from the provisions of housing that is because the court comes to the conclusion that the interests of the child demanded that he live with his mother. The order for payment of rent flows from the order awarding the respondent the care and control of the child..."

At page 35 line 6 from the top. It is stated thus:-

“ A child of tender years is described under section 2 of the children’s Act afore said as “ a child under the age of 10 years”. This means that to me that A.S.A. who is presently 13 years old is not a child of tender years who will strictly be affected directly by the above tender age rule. A part from this from the evidence, it has been established that he is mature, intelligent and understanding. Furthermore he is a male child like the plaintiff is male. The child wishes were his own and could not be disregarded.

This court has considered the afore set out rival arguments as well as legal principles of law applicable and it proceeds to make the following findings on the same:-

1. The child is hardly 3 years old and for this reason she falls into the category of children defined by the children Act No. 8 of 2001 as children of “tender years”.
2. When deciding whether to grant the orders of stay pending appeal or not this court is enjoined by the afore said principles to bear in mind the cardinal and guiding principle that the best interests and welfare of the said child is of paramount consideration and that inconvenience and or convenience of the disputing parents does not count towards the final orders.
3. That by reason of the child being of a tender age, and being a female child the most likely candidate to be considered for custody , care, and control orders is the mother unless if there are exceptional circumstances disentitling the mother from exercising her natural right of nurturing her child or children.
4. Case law from the court of appeal as well as the Superior Court on exceptional circumstances have stated vide the case of **S.O. VERSUS L.A.M. NAI. CA NO. 175 OF 2006** to be conduct which is disgraceful such as her immoral behavior, drunkenness habit, bad company etc. Rawal J added another voice in a decision decided on 12th day of May 2006 in the case of **SOSPETER OJAAMONG VERSUS LINET AMONDI OTIENO NAIROBI HCCC NO. 31 OF 2004** where the learned judge stated that such conduct is one **“showing that the mother is hopeless and is incapable of looking after the said child”**.

5. The disqualifying factors disentitling the mother to a custody order put forward by the Respondent are those that were placed before the lower court namely that of neglecting the child, abandoning the child, causing the child psychological trauma by living in adultery with a married 3rd party and that of being unemployed. The appellant /applicants response to them was a denial. These having formed the basis of the appeal it is best for this court to avoid interrogating their merits at this interim stage, and leave these for the appellate court to deal with when it will have the record of the lower court proceedings before it. For now it is enough to state that these require to be established and for this reason there has been no proof of the existence of the disentitling factors.

6. The position in law is that both parents enjoy equal parental responsibility on the one hand, and on the other hand the subject child has fundamental right to enjoy equal parental responsibility from both parents, which parents both qualify to apply for a custody, care and control order with the exception of the caveat placed by the case law principle of “**exceptional circumstances**”.

7. Considering what this court has stated in number 1-6 above, the best interests and welfare of the child subject of these proceedings dictate that both parents will have interim custody but care and control will be given to the mother with the father having reasonable access.

For the reasons given in the assessment , the court grants stay of the lower courts orders issued on 25/10/2010 pending the hearing and the determination of the appeal herein on the following terms:-

(a) Both the appellant/applicant and the Respondent/Respondent herein will have joint custody of the minor child A.Z.

(b) The appellant/applicant who is the biological mother will have the care and control of the said minor.

(c) The Respondent father will have access on two fronts.

(i) On the first front, since he is a father he will access the child every fortnight as per the arrangement vide the consent order of 31/3/2011.

(i) On the second front, during the school holidays, the Respondent father will have access to the child continuously for half the school holidays either at the beginning of the holidays or the close of the holidays whichever is convenient.

(ii) On the 2nd front, the minor is to be picked on the Friday of either the start of the holiday or the start of the second half of the holiday at 4.00 p.m. from the appellant /applicant home on a Friday and be returned to the same appellant/applicant home on the next Monday at the end of the half of the school holidays at 4.00 p.m. as the case may be.

(d) The arrangement in (c) above is necessary to ensure that the child’s rights in section 6 of the children’s Act No. 8 of 001 and Article 53 of the current Kenyan

constitution are protected and to enable the child have equal opportunity to know and bond with both parents equally.

(e) Upkeep and general maintenance of the child is on equal basis. Details of these are to be worked out by both sides with the assistance of their counsels.

(f) In line with the principle in section 24 of the children's Act No. 8/2001 and article 45 of the current constitution each party will bear own costs.

(g) There will be liberty to apply to either party.

(h) The appellant to process and ready the appeal for disposal within 90 days from the date of the reading of the ruling in line with the requirements of the Act on speedy disposal of such matter.

Dated, signed and delivered this 23rd day of September 2011.

R.N. NAMBUYE

JUDGE

RNN/aao



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