



REPUBLIC OF KENYA



KENYA LAW
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GKA v INM (Civil Appeal E017 of 2022) [2023] KEHC 17884 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17884 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA**

CIVIL APPEAL E017 OF 2022

PJO OTIENO, J

MAY 26, 2023

BETWEEN

GKA APPELLANT

AND

INM RESPONDENT

*(Being an appeal from the Order of Hon. H. Wandere, SPM in Kakamega
CM's Court Children Case No. 2 of 2016 dated 23rd February 2022)*

JUDGMENT

1. The litigation leading to this appeal was initiated on the 25/01/2016. In it the mother, GKA sought the custody of two minors, PK and IV then aged 6 and 3 years respectively, from the father. The two minors were out of the three children born out of a marriage between the parties.
2. It was pleaded in the plaint that the parties married in Church on 31.12.2008 and separated in December 2015. While they were so separated, the Appellant contended before the trial Court that, the Respondent went to her sister's house where she was leaving with the children and took the two children without consultation with the Appellant.
3. When served with the pleadings, the Respondent filed a statement of defence in which he admitted having taken the children but denied being cruel to the Appellant; denied being irresponsible and asserted having taken the children with the consent of the Appellant and that he had no intention to transfer the children to a different school. It was then asserted that the Appellant has no capacity to take care of the children on her own and that the Respondent was employed and deployed to work in Western Kenya and not Nairobi.
4. Even though the issues for determination were filed by the Defendant way back on 16.5.2018 by the 23.2.2022, more than six years later, the hearing of the matter had not commenced and thus no evidence had been tendered towards the determination of the dispute. The matter was however referred to Court Annexed Mediation by which a Mediation Settlement Agreement was filed in Court. By that



Settlement, parties agreed that:-The defendant shall pay school fees for the children.The defendant shall buy school uniforms.The defendant shall pay half of the rent.The defendant shall avail his NHIF for the children’s medical expenses.The defendant shall buy clothing for his children.The plaintiff shall cater for the food of the minors.The plaintiff shall buy books for the children.The plaintiff shall pay half of the rent.The plaintiff shall avail her medical cards for children’s medical bills.The defendant shall have unlimited access to the minors.

5. The Court considers the Settlement agreement to have shared parental responsibility and given to the Respondent unlimited access to the children. Even if made pursuant to mediation, once signed by both, its terms became binding as contract between the parties and none would at will resile from its obligations.
6. A reading of the record show that that Settlement has not been challenged nor set aside. It remains binding. On the 23.2.2023, the record show that Mr. Mbaka appeared before Court, it is not clear how the date was taken, and requested that his client, the Respondent, gets access to the children during school holidays which was due to commence on 4.3.2023 and terminate on the 25/4/2022. That request was acceded to by the trial Court hence the current appeal. In that order, the trial Court ordered that the Respondent gets custody of the children from 4.3.2022 to 21.3.2022 and thereafter, the Appellant to take over.
7. The Order appealed against was not a final or determinative one. It was merely interlocutory to give temporary and determinate custody to the father to the children. The Court considers it one of the orders which attracts no appeal as of right but could be challenged with leave of the Court. There is no evidence that any leave was ever sought nor obtained. On that basis this appeal ought not have been entertained for it is improperly before the Court.
8. However, even on the merits, the Court’s philosophy is that it is in the best interest of a child to have the comfort and access to both parents as much as possible unless it be demonstrated that a parent is irresponsible or would expose the child to danger or harmful environment. In this case, nothing harmful has been alleged or demonstrated to have been capable of visit upon the children. In any event the Order even though made exparte, gave to the father temporary custody of seventeen (17) days out of the school holiday of sixty one (61) days. In that Order the mother would enjoy the custody of the children for over forty (40) days during the school holidays only, over and above the school days.
9. It is the determination of the Court that that order was the kind every Children’s Court is entitled to make in order to achieve its overriding objectives and in the employment of its inherent powers generally and as reserved by Rule 7 of the General Rules and Regulations, then in force.
10. It must be appreciated that while responsibility of the parents must be equal, the rights to access the children is equally important to be equal. In the opinion of the Court, the Order issued on the 23.2.2022 portends no prejudice to the children but rather, on the face of it, qualifies as intended to serve the best interest of the child. It would deserve no reversal.
11. In addition, by the time this appeal came up for hearing and determination, the period the father was to have the children had long passed and it would serve no meaningful purpose to purport to set it aside. To the Court this appeal has served the parties no efficacious purpose but has unduly delayed the determination of the residue of dispute on the merits. I find the appeal to have no merits and its thus dismissed. Let parties go back before the Children Court to have every pending matter in the case determined on priority basis and within twelve (12) months from today.
12. Each party shall bear own costs.

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 26TH DAY OF MAY 2023.



PATRICK J. O. OTIENO

JUDGE

In the presence of:-

No appearance for the Appellant

No appearance for the Respondent

Court Assistant: Polycap

