



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL APPEAL NO. E015 OF 2021**

**AKHIV & JGHIVD.....APPELLANT**

**VS**

**FNK.....RESPONDENT**

*(Being an appeal from the judgment of the Chief Magistrate's Court at Thika,*

*Hon. W. Wambilyanga, (Mr.) SRM dated 26<sup>th</sup> January, 2021*

*in Children's Case No. 36 of 2019)*

**JUDGMENT**

1. This is an appeal from Thika Children's Court. Before that Court, MHIV the father of the children filed a suit against FNK the mother of the children. The father and mother were by then divorced. After the decree absolute was issued in the divorce case, the parents entered into parental responsibility agreement dated 5<sup>th</sup> October, 2016 (hereinafter the first agreement). The parents entered into a second agreement dated 19<sup>th</sup> June, 2019. The father, by his action before the Thika Children's Court, sought two prayers, namely:-

**(a) Custody, care and control of the minors be given to the plaintiff (the father).**

**(b) A declaration that the plaintiff can renew the children's passports and freely travel with the minors out of the country for vacation without the written consent of the defendant (the mother).**

2. The Children's court by its judgment of 26<sup>th</sup> January, 2021 ordered, amongst other orders that the mother and father do have joint custody of the two minors, with each parent having the children for one week. That is a parent would have custody for one week then surrender the children to other parents for one week, and so forth.

3. The father was aggrieved by that judgment and hence this appeal. In this appeal the father faulted the trial court in setting aside the second agreement; in failing to take cognizance of the mental and psychological well-being of the mother; and in failing to grant the father right to travel to Netherlands with the said children.

**ANALYSIS**

4. I must begin by acknowledging, as stated on behalf of the mother, that this appeal before this Court was ill prepared. The learned counsel for the father prepared an incomplete record of appeal. This has led this Court to rely wholly on the trial court's record, in its file.

5. The other comments I wish to make is reprove the learned counsel for the mother for filing very emotive and abusive submissions where he has demeaned the character of the father. Those statements were not wholly supported by the evidence adduced before the trial court.

6. This appeal relates to custody dispute over two children of the marriage. As stated before, the children's parents were divorced. The first born of those two children is a girl, **AK**, born on 31<sup>st</sup> January, 2010. The second born is a boy (**JG**) born on 10<sup>th</sup> July, 2011.

7. The parents entered into a parental responsibility in the first agreement dated 5<sup>th</sup> October, 2016. By that agreement, the parents agreed to have joint custody over the children of the marriage. The children, under that agreement were to reside with each parent weekly on an alternating basis. The parents also agreed to share holidays and vacation time with the children. The father was to carter for the children's

education needs. By the second agreement dated 19<sup>th</sup> June, 2019 the parents agreed that the father would henceforth solely have full custody of the children. It is that second agreement the father sought its enforcement by filing the action before Thika Children's Court.

8. I have considered the trial court's judgment. After analysing the jurisprudence of custody cases of children of tender years, the trial court analysed the second agreement and surmised as follows:-

***“In a nutshell, the court is convinced that the agreement dated 19/6/19 was entered through duress is not in the best interest of the minors herein. There is no way that an agreement that basically separates a mother (who isn't a threat to the children) from her children can be in those children's interest. The same will be disregarded by the court.”***

9. The children were as at the date of the trial court's judgment 11 and 10 years old respectfully. **Section 2** of the Children's Act defines "child of tender years" as one who is under the age of 10 years. It follows from that definition that the children of the marriage were not children of tender years. That notwithstanding, **Article 53** of the Constitution provides that the child's best interest are the paramount importance of every matter concerning the child. The constitution in that sense provides that no parent has superior right for custody of the children of the marriage, over the other. This is particularly so where such assumed superior right would interfere with the welfare of a child.

10. My consideration of the evidence adduced before the trial court shows that the mother unilaterally surrendered to the father her right to joint custody of the children. It is that surrender that led to the second agreement being drafted.

11. Although the mother submitted that the father besmirched her character by alleging she had mental health problems, which the father said interfered with her remaining with the children and although the mother maintained she was entitled to custody of those children; I find that the mother had a burden of proof proving that she that she indeed was fit to have the custody of the children. The father could not be expected to prove the mental health of the mother. That issue of the mother's mental health having been raised by the father, it behoved the mother to disprove it. The mother bore the evidential burden to show that her mental health would not impede her ability to care for the children when they were under her custody.

12. The mother in evidence and by her pleadings stated that she surrendered custody of the children following a motor vehicle accident which she was involved in on 23<sup>rd</sup> April, 2019. I have examined the police abstract, presumably of that accident exhibited by the mother. The accident occurred at 4.30 hours of the morning of 23<sup>rd</sup> April, 2019. Where was the mother driving to or from that hour when she had young children to care for? The father in his pleadings and affidavit evidence stated that the mother was drunk when the accident occurred. The mother did not respond to that allegation.

13. Moreover, it is not clear what the mother meant when she said that she was recovering from the effects of the said accident when she was coerced to accede to the second agreement. That statement was contrary to the police abstract produced by the mother. That abstract stated **“non injury Road Traffic Accident.”** The mother obviously was not injured during the accident. The question that begs an answer as I consider this matter is, why then did the mother surrender custody of young children to their father and willingly signed an agreement granting the father sole custody. It is most usual for a mother having custody of her children to surrender such custody.

14. Although the jurisprudence of custody cases is that custody of young children should be granted to the mother it needs to be borne in mind that custody will not be granted where such a mother will not contribute to the child's welfare. I am in agreement with the trial court's finding that the welfare of children is not measured by the party who is more able to provide money or physical comfort for the children. The welfare of children means more than ability to provide for the child but must mean consideration of whether the child is likely to suffer harm whether physical or emotional. In this case, the uncontroverted evidence is that the mother surrendered custody of the children to the father and the father stated, and it was not denied, that the mother in surrendering them to their father told the children she was no longer their mother.

15. In my judgment, I need to be satisfied that non recognition of the second agreement would be for the welfare of the children. Considering the paramount consideration of all decisions involving children is the best interest of the children, I will accede to the appeal before me but will grant the mother limited visitation rights.

#### **DISPOSITION**

16. The trial court's judgment of 26<sup>th</sup> January, 2021 is hereby set aside and is substituted with the following orders:-

**(a) MHIV the father is granted full custody, care and control of the children AK and JG.**

**(b) The mother FNK shall have access to those children every first week-end of every month, from Friday evening to Sunday afternoon.**

**(c) The father MHIV is hereby granted permission to travel out of Kenya with the children AK and JG and such travel shall be taken with two weeks' written notice to the mother FNK.**

**(d) There shall no order for costs in this appeal.**

**JUDGMENT, SIGNED DATED AND DELIVERED AT KIAMBU THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2022.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant: Maurice

For Appellant: - N/A

For Respondent: - N/A

**COURT**

Judgment delivered virtually.

**MARY KASANGO**

**JUDGE**