JTD v AL (Civil Appeal 133 of 2019)
[2022] KEHC 11977 (KLR) (Family) (20 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11977 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL 133 OF 2019

MA ODERO, J

MAY 20, 2022

BETWEEN

JTD ..... APPELLANT

AND

AL ..... RESPONDENT

(Emanating from the orders issued in Nairobi Children's case No 1317 of 2019 (consolidated with CC No 1329 of 2019) by Hon MA Otindo (Ms)(SRM) delivered on October 7, 2019)

JUDGMENT

1. Before this court for determination is the memorandum of appeal dated November 5, 2019 by which the Appellant JTD seeks the following orders:-

    a. The court set aside and or vary the orders in Nairobi Children's case No 1317 of 2019 (consolidated with CC No 1329 of 2019) by Hon MA Otindo (Ms)(SRM) delivered on October 7, 2019.

    b. That the appellant/father be granted custody, care and control of the minors LAD and KJD with reasonable structured and supervised access to the respondent pending the hearing and determination of the lower court suit;

    c. That legal custody of the minors LAD and KJD be granted to the appellant/father with reasonable structured and supervised access to the respondent pending the hearing and determination of the lower court suit;

    d. That the respondent by herself, her relatives, gents, servants and or any other person at the respondent's behest be restrained by court order from attempting to snatch, kidnapping, taking away, threatening the appellant, visiting the appellants place of abode without

permission and or in any way interfering with the appellant's actual custody of the minors LAD and KJD pending the hearing and determination of the lower court suit.

e. That the respondent be compelled to allow the appellant in the company of a friend to access their home being apartment B8, Tottenham Court, Riare close, to pick personal effects, school items and clothes for the children and himself pending the hearing and determination of the lower court suit."

2. The respondent AL opposed the appeal. The matter was disposed by way of written submissions. The appellant filed the written submissions dated December 3, 2021, whilst The respondent relied upon her written submissions dated February 16, 2022.

Background

3. The appellant, (father) and the respondent, (mother) are the biological parents of the two minors herein namely:-

(i) LAD – born on July 9, 2021

(ii) KJD – Born on August 21, 2015

4. The couple got married to each other on July 6, 2011 in the office of the Registrar of Marriages in Nairobi. Due to the marital differences the respondent filed a suit in the Chief Magistrates Court in Nairobi seeking dissolution of the marriage being Divorce Cause No 801 of 2018. Currently the couple live separately.

5. *Vide*, Nairobi Childrens Case No 1317 of 2019, the respondent (mothers) filed an application dated September 23, 2019 seeking the following orders:-

1. Spent

2. Spent

3. That pending the hearing and domination of this application, this honorable court be pleased to vest the plaintiff herein with actual and lawful custody of the minors herein namely; LAD born on 9/7/2012 and KJD born on 21/8/2015.

4. An injunction do issue to restrain the minors from being removed from the Republic of Kenya and jurisdiction of this court or otherwise however from interfering with the welfare and access of the minors by the plaintiff herein pending the hearing and determination of this application.

5. Due to the urgent nature of the matter at hand and the welfare of the minor children involved, the Kenya National Police Service through the Officer Commanding Muthangari Police Station and any other police station in Kenya do assist in enforcement of the order issued herein.

6. That pending hearing and determination of this suit, this honorable court be pleased to vest the plaintiff herein with the actual and lawful custody of the minors LAD and KJD.

7. An interlocutory injunction do issue to restrain the defendant from removing the minors from the jurisdiction welfare and access of the minors by the plaintiff herein pending hearing and determination of this suit.

8. That in any event, the costs of this application be awarded to the plaintiff."

6. Similarly, the appellant (father) *vide* Nairobi Children's Case No 1329 of 2019 filed a notice of motion dated September 25, 2019 by which he sought the following orders:-

    1. Spent

    2. That pending the hearing and determination of this application, the defendant by herself, her relatives, agents, servants and or any other person at the defendant's behest be restrained by a court order from attempting to snatch, kidnapping, taking away, threatening the plaintiff, visiting the plaintiff's place of abode without permission and or in any way interfering with the plaintiff's actual custody of the minors LAD and KJD.

    3. That pending the hearing and determination of this application, the defendant be compelled to allow the plaintiff in the company of friends to access the house being apartment xx,xxx Close, and pick up personal effects, school items for the children and herself.

    4. That pending the hearing and determination of this suit the defendant be compelled to allow the plaintiff in the company of a friend to access their home to pick personal effects, school items for the children and himself.

    5. Spent

    6. That pending the hearing and determination of this suit, Actual custody, care and control of the minors, LAD and KJD to remain with the plaintiff, with structured and supervised access to the father.

    7. That pending the hearing and determination of this suit legal custody of the minors LAD and KJD be granted to the plaintiff with reasonable structured access to the plaintiff/father.

    8. That costs be borne by the defendant."

7. The learned trial magistrate consolidated both files and heard the two applications together. On October 7, 2019 the lower court delivered its ruling on the consolidated applications and made the following orders:-

    1. That the plaintiff/applicant mother is granted the actual custody, care and control of the minors.

    2. That the defendant, father is granted alternate weekend access and unlimited but reasonable phone access during the week.

    3. That legal custody shall be exercised jointly.

    4. That parties to consider undergoing counselling and also taking the children for therapy.

    5. That both parties are respectively restrained from interfering with custody when each of them has care and control.

    6. That the defendant/respondent is restrained from taking away the child out of the country without the express consent of the plaintiff/applicant or leave of the court.

    7. That each party shall bear its own costs of the application."

8. Being aggrieved by the decision of the trial court the appellant filed the instant appeal. *Vide* the memorandum of appeal dated November 5, 2019 the appellant listed twenty three (23) grounds of appeal.

9. As stated earlier the respondent opposed the appeal.

Analysis and Determination

10. This being a first appeal the High Court is obliged to re-evaluate the evidence adduced before the lower court and reach its own conclusion on the same. In *JWN vs MN* [2019] eKLR the court held as follows: -

> "it is settled law that the duties of the first appellate court is to re-evaluate the evidence tendered in the subordinate court, both on points of law and facts and come up with its own findings and conclusions."

11. I have carefully perused the record of appeal filed on November 5, 2019. I have considered the memorandum of appeal as well as the written submissions filed by both parties. The only issue for determination is whether the court ought to allow the appeal and interfere with the interim orders on actual custody of the two minors made by the trial court.

12. At the outset it is of important to note that this is a matter which involves the welfare of minors. The two children who are subject matter of this appeal are aged ten (10) years and six (6) years respectively. In this regard, the court is obligated both under the *Constitution* and the law, to give priority to the 'best interest' of the two children.

13. The *Constitution* of Kenya, 2010 in article 53 (2) provides as follows:

> " A child's best interests are of paramount importance in every matter concerning the child".

14. Section 4(2) and 3(b) of the *Children's Act* echoes the Constitutional imperative as follows:

    (a) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

    (b) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

    (a) safeguard and promote the rights and welfare of the child;

    (b) and promote the welfare of the child".

15. In the ruling of October 7, 2019 the learned trial magistrate awarded actual custody care and control of the two minors to the respondent (mother) but awarded the appellant (father) access over the week-ends as well as unlimited phone access. Legal custody was granted jointly to the appellant and the respondent.

16. The appellant submits that the trial court erred in granting actual custody of the minors to the respondent in view of the fact that sufficient evidence had been tendered to show that the respondent was not a suitable custodial parent.

17. Section 83 (1) of the *Children Act* 2001, provides for the principles, a court ought to take, apply in making a custody order as follows: -

> " 83(1) In determining whether or not a custody order should be made in favour of the applicant, the court shall have regard to—
>
> (a) the conduct and wishes of the parent or guardian of the child;
>
> (b) the ascertainable wishes of the relatives of the child;
>
> (c) the ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;
>
> (d) the ascertainable wishes of the child;
>
> (e) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;
>
> (f) the customs of the community to which the child belongs; (g) the religious persuasion of the child;
>
> (h) whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;
>
> (i) the circumstances of any sibling of the child concerned, and of any other children of the home, if any;
>
> (j) the best interest of the child".

18. The appellant submitted that the trial court erred in relying on the general principle that children of tender years ought to be placed in the custody of the mother.

19. I have perused the ruling dated October 7, 2019 and I note that the trial magistrate cited and relied upon the case of *Sospeter Ojaamong Vs Lynette Amondi Otieno* (2006) eKLR where the Court of Appeal held as follows:-

> " The principles that guided the court in custody of children are that except where exceptional circumstances exist, the custody of such children be awarded to the mother, because mothers are generally best suited to exercise care and control of the children.....The exceptional circumstances would include if the mother is unsettled, has taken a new husband or her living quarters are in a deplorable state."

20. Similarly in the case of *BCS (an infant)* 1958 1 ALL ER it was held thus-

> " ..... the *prima facie* rule (which is now quite clearly settled) is that all other things being equal children of tender age should be with their mother, and where a court gives custody of a child of this tender age to the father it is incumbent on it to make sure there is really sufficient reasons to exclude the *prima facie* rule....."

21. This in our jurisprudence has been the law – that a child of tender age ought to be placed in the custody of the mother who by the fact of her gender is deemed to be a better caregiver for such children.

22. However, I do agree with the appellant that recent jurisprudential developments have disproved this prima facie rule and courts have in recent times departed from the rule. In *JKN vs HWN* [2019] eKLR Hon Justice Joel Ngugi directed that physical custody of the children be shared equally between both parents relying on evidence that the minors preferred to live with their father.

23. The question which then would arise is whether in this particular case there was sufficient evidence to indicate the preferences or the wishes of the two children. Indeed section 83(1) of the *Children Act* does provide that in determining issues of custody a court must give consideration to the "ascertainable wishes of the child".

24. In this case the learned trial magistrate did herself interview the two children. She noted in her ruling as follows: -

> " The court had an opportunity to interview the children and it was my observation that the children especially the elder child seems to have been coached to discredit the plaintiff mother."

25. The trial magistrate went on to conclude as follows:-

.....the children sentiments and wishes especially for the elder child were biased and not reliable."

26. The magistrate found that the sentiments expressed to her by the children were 'biased' and could not be relied upon. This was the observation of the magistrate who saw and heard the children. She was able to observe their demeanor. I have no reason to disagree with her finding that the children appeared to have been "coached" to discredit the mother.

27. It is not inconceivable that in a situation where parents are in the throes of a divorce the children are left uncertain and confused. In such circumstances, it would be impossible to determine what the wishes of the child are. Children always love both parents. It is unfair and is extremely cruel to ask a child to choose between his mother or father. The learned magistrate did in her ruling state that –

> " It is my observation that the parties herein seem to be undergoing the early stages of marital breakup. This early stage obviously come up with high emotions, tempers, hatred of each other. The children are caught in between these particular fights and are likely to be used as the level playing field by each of the parties. Children are always lost and confused on the choice of which parent to impress or follow .....(own emphasis)

28. The trial court also cited and relied on a report dated September 27, 2019 prepared by the Children's Officer. The said report appears at pages 187 – 194 of the record of appeal. The Children's Officer one Ms Winnie Njeri in her report made the following observations:-

    1. The subject are of tender age.

    2. The subjects have been in the custody of the plaintiff until the defendant picked them from their house and took them to unknown location, which we have since established is a fully furnished and serviced apartment in [particulars withheld], without the consent of the plaintiff.

    3. The plaintiff filed for divorce and is still pending in court.

    4. The defendant after moving out of the house they all lived in as a family does not seem to have permanent resident yet.

5. The relationship between the plaintiff and the defendants acrimonious and there is hardly any sensible communication between them.

6. The subjects have been directly and indirectly exposed to physical violence and emotional abuse by the parties. More worrying is that the defendant seems to be constantly badmouthing the plaintiff to the subjects and this has greatly affected the relationship between the subjects and the plaintiff.

7. Both parties are willing and capable of meeting the needs of the subjects. (own emphasis)

29. Finally, the Children Officer made the following recommendations:-

1. Both parties seek for professional counselling from service providers of their choice and at their own costs as soon as possible.

2. Both parties facilitate professional counselling for the subjects from service providers of their choice and at their cost as soon as possible.

3. Forthwith, both parties should desist from exposing the subjects to their differences at all costs and more specifically the defendant should desist from bad-mouthing the plaintiff to the subjects the circumstances of their relationship notwithstanding.

4. The plaintiff is granted custody of the Subjects.

5. The defendant is granted access to the subjects as the court may deem fit.

6. The division of costs towards the maintenance of the subject is left at the discretion of the honorable court.

30. It is manifest from the Children's Officer report that custody of the children ought not to have been given to the appellant at that stage. He had no permanent residence and was noted to have been badmouthing the respondent to her children.

31. Parents who truly love their children should not drag the children into the fights between themselves. This only gives rise to a lost and distressed generation. It is wrong for one parent to badmouth or discredit the other to their children. I do agree with the findings of the Children's officer that the couple need to pursue counselling in order to resolve their differences and to protect their children from further emotional harm.

32. From the circumstance of this case, the observation made by the trial court as well as those of the Children's Officer, I find that it was not possible in the circumstances to ascertain what the true wishes of the children were. The trial court was correct to award actual custody to the respondent.

33. The appellant has also faulted the trial magistrate for according actual custody to the respondent in the face of massive evidence mounted by himself that she was in fact an unfit mother. The appellant relied on the following factors as evidence that the respondent was an unfit mother-

(i) He claims that there was ample evidence to show that the respondent behaved dishonourably in front of the children and this was recorded on audio and video call.

(ii) The appellant also claims that custody should not have been given to the respondent because she is mentally unstable, therefore unfit to have custody of the children.

(iii) The appellant also argues and claims that custody should not have been given to the respondent because she disclosed in her own testimony that she had engaged in extra-marital affairs.

34. I will now proceed to deal with each factor individually.

The appellant argued that he had tendered proof by way of audio and video recordings to show that the respondent had uncontrollable anger issues. That she had threated to harm him and thus may be a danger to the children. The appellant relied on footage from cameras mounted in the home as well as recording he had made of conversations with the respondent.

35. I have perused the ruling of the trial magistrate in respect of these audio/video recordings and i am impressed by her analysis of the same. As pointed out by the Magistrate, a child who is denied the opportunity to do what she wishes by her mother will in many cases refer to said mother as 'mean'

36. The trial magistrate also correctly observed that the court could not rely on one incident to fault the caregiving skills of the respondent. In order to disqualify the respondent as custodial parent, the court needed to see evidence of a pattern of bad or undesirable or harmful behavior. There was no evidence of sustained or continuous erratic and uncontrolled behavior by the respondent. Moreover, the learned trial magistrate observed that the recordings appeared to have been curated to fit the appellants narrative against the respondent. Even the best of parents may have a bad day here and there but this does not make them unfit parents.

37. Additionally, there was no evidence to show that the respondent had actually injured or harmed any of the minors. I find that the learned trial magistrate did not err at all in her findings on this aspect.

38. Secondly, the appellant alleged that the respondent was a danger to the minors as she was mentally ill and had suicidal tendencies. Mental illness is a very serious disorder. It is not a label to be thrown about in so causal a manner.

39. The trial magistrate correctly observed that in the circumstances prevailing in the respondents life her constant fights with her husband and the upcoming divorce it would not be unusual for the respondent to be emotionally distressed. This is not evidence of mental illness. Under the *Mental Health Act* cap 248 Laws of Kenya only a qualified medical practitioner, e.g. a psychiatrist may declare a person to be mentally ill. The appellant has no such qualifications and he did not avail to the court a medical report to prove his allegations. Once again, I agree with the dismissal by the trial court of this unfounded allegation.

40. Finally, the appellant claimed that the respondent was engaging in extra-marital affairs to the detriment of the children. He therefore questioned her moral standing to be awarded custody. This is a couple who have separated. The appellant appears to have an unholy interest in what the respondent is doing with her life. I wonder if the fact that the appellant had relationships with other women would equally raise a question on his moral probity?

41. Firstly, the allegation that the respondent was engaged in 'extra marital affairs' was not proved on a balance of probability. Secondly, the mere fact that the respondent may be engaged in a new relationship does not make her an unfit mother/caregiver. I am in full agreement with the finding of the learned trial magistrate that-

> " However my persuasion is that the appellant ought to have demonstrated that the alleged extra-marital had compromised the welfare of the children. The extramarital behavior per se is not proof of unfitness."

42. I do agree with the above observations by learned trial magistrate. The fact that the respondent may be engaged in a new relationship does not make her an unfit parent. The appellant ought to distinguish

his own insecurities from the welfare of his children. The court is not a moral watchdog. I find no merit in this ground of the appeal and the same is hereby dismissed.

43. Finally, it is important to remember that the orders made by the trial court on October 7, 2019 (which orders form the subject of this appeal) were only interim orders which were to remain in force pending a full hearing and determination of the main suit in the Children's Court. Instead of expending time and energy in prosecuting this appeal the appellant would have been better advised to turn his energies to proving his case in the main suit where final order will be given.

44. In conclusion based on the foregoing I find no merit in this appeal. I am not inclined to interfere with the interim orders made on October 7, 2019. The appeal is dismissed in its entirety. This being a family matter each party shall bear its own costs.

DATED IN NAIROBI THIS 20TH DAY OF MAY 2022.

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MAUREEN A. ODERO

JUDGE