



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO.16 OF 2019**

**WWM.....APPELLANT**

**VERSUS**

**JMM (Suing as the father to KMM).....RESPONDENT**

**JUDGMENT**

1. This is an appeal arising from the whole judgment of Hon. Thomas T. Nzioki (SPM) delivered on 28/03/2019 in Siakago SPMCC No.12 of 2017.

2. The respondent herein filed a suit by way of plaint in the Children's Court at Siakago seeking custody of their female child born on the 9/04/2015; the appellant filed a Defence and Counterclaim seeking orders for full custody of the minor, upkeep and shared parental responsibility;

3. After a full trial the trial court dismissed the appellants counterclaim and awarded custody of the minor to the respondent; the appellant was allowed custody during weekends, school holidays and public holidays;

4. The appellant being aggrieved by the decision instituted this Appeal and cited twelve (12) grounds of appeal which are summarized as follows;

(i) The trial court failed to appreciate the appellant's testimony occasioning a miscarriage of justice; and it failed to consider the appellant's submissions and authorities; and erred in dismissing the appellant's counterclaim;

(ii) The trial court erred in finding the existence of exceptional circumstances which the respondent had not proved; and erred in finding that it had been proved that the appellant was unsuitable to have legal custody of the subject child; that there was no sufficient evidence to deny the appellant custody; and failed to appreciate the standard of proof in children's civil suits hence arrived at an erroneous finding;

(iii) The trial court erred in concluding that it was in the best interest of the child to award custody of a child of tender age to the father; the trial court failed to correctly apply the principle of "best interest of the child"; the decision negated the child's constitutional right to protection under Articles 45(1),53(1)(b)(c)(d)and (e) and 53(2) of the Constitution 2010;

5. At the hearing hereof counsel for the parties were directed to canvas the appeal by filing and exchanging written submissions which are summarized hereunder.

**APPELLANT'S SUBMISSIONS**

6. The appellant submitted that the lower court erred in finding that the respondent had proved exceptional circumstances; the appellate court should consider the best interest of the child and disregard the side shows of the past petty encounters of husband and wife as between the appellant and respondent; the alleged drinking problem of the appellant was based on hearsay; no witness was called to prove these allegations; the appellant was not mentally incapacitated to be unable to care of the minor; and there was no indication that the appellant was cruel to the minor;

7. The respondent had remarried and the current wife who could not be a suitable substitute to the appellant; the appellant is ready and willing to take up her responsibilities as a mother;

8. It was trite law that the custody of a child of tender age will always be granted to the mother unless there were exceptional circumstances; the appellant cited and relied on numerous authorities on the issue of exceptional circumstances; **JKW vs MAA (2015) eKLR** where it was held the mother of a child of tender years should have custody unless special circumstances are established to disqualify the mother from

getting custody of such child; **Wambua vs Okumu (1970) EA 578; Karanu vs Karanu (1975) EA 18; Martha Olale& Anor vs Jackson Obiera C.A.16 Of 1979 and G vs G (2008) 1KLR;**

9. The trial court erred in concluding that the it was in the best interest of the child that custody of the child be awarded to the respondent; the minor was never brought before the court to express herself to court as to her best interest;

10. The interest of the child in terms of education and health are well taken care of and the appellant relied on Section 4(2)(3) and (4) of the Children's Act and Article 53(2) of the Constitution on the best interest of the child;

11. The key factor to consider was the age of the child; and at a certain stage in the female child's life there are personal issues the child will need to confide and discuss with the mother; that the minor who is female is best suited to be in the custody of the mother; case law relied on **Civil App. No.170 of 2013 EAO vs SON (2014) eKLR;** and **Divorce Cause No.34 of 2002 B vs M** where it was held the ages of the children dictated that they live with their mother unless found that she was hopelessly unable to take care of them;

12. In conclusion the appellant submitted that the trial court had applied wrong principles of law in finding that the respondent had proved exceptional circumstances; and that there was no sufficient evidence to deny the appellant the custody of the child; and prayed that that the appeal be allowed and the entire decision of the lower court be set aside; and the appellant be awarded costs.

### **RESPONDENT'S SUBMISSIONS**

13. In response the respondent opposed the appeal and submitted that the trial court considered the appellant's testimony before making its final decision; and applied the correct law in the judgment issued on the 28/03/2019;

14. The concept of exceptional circumstances was set out in the case relied on by the respondent of **JO vs SAO (2016) eKLR;** that the appellant's unbecoming behavior of engaging in drinking sprees in the presence of the minor; and abandoning the child in the car at a carwash in Kivaa Market fell within the category of exceptional circumstances which allow a court to depart from the rule that custody of children of tender age should be awarded to the mother because mothers are best suited to exercise care and control of the children;

15. The trial court was satisfied that the respondent had proved on a balance of probabilities that the appellant should not be granted custody of the child;and that the respondent be awarded custody;

16. The best interest of the child as set out in Article 53(2) of the Constitution 2010 and Sections 4 and 83(1)(j) of the Children Act had been catered for adequately by the respondent; and these facts were confirmed by the Principal Children's Officer Mbeere South Sub-County report; which report was taken into consideration by the trial court before it made its final decision;

17. The respondent's remarriage was taken into consideration by the trial court and it concluded that the new wife would assist the respondent and the house-help in taking care of the child;

18. The trial court rightfully dismissed the appellants counterclaim as it found that the appellant had failed to justify her irrational behavior and cruelty towards the minor;

19. To set aside the judgment would be a negation of the child's fundamental rights as envisaged both in the Constitution 2010 and the Children Act; and would be a grave miscarriage of justice prejudicing the child's welfare;

20. The respondent urged the court to dismiss the appeal with costs to be borne by the appellant.

### **ISSUES FOR DETERMINATION**

21. After reading the parties respective rival written submissions this court has framed the following issues for determination;

(i) Whether the respondent proved the existence of exceptional circumstances to warrant departure from the general rule;

(ii) Whether it was in the best interest of the child that custody be awarded to the respondent.

(iii) Whether the trial court erred in dismissing the appellants' counterclaim against the respondent.

### **ANALYSIS**

22. The Court of Appeal in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123;** the Court held that the duty of an appellate Court is to evaluate and re-examine the evidence adduced in the trial court in order to reach an independent conclusion;

#### **Whether the respondent proved the existence of exceptional circumstances to warrant departure from the general rule;**

23. The appellant in her ground of appeal contends that it was not conducive to the child's welfare particularly one of tender age and in the absence of proof exceptional circumstances that custody be granted to the respondent father;

24. It is not disputed that the subject child is of tender years and is aged four (4) years; and that there are legions of decisions that have held that in the absence of exceptional circumstances the welfare of a female infant aged four (4) years must be taken care of by the mother as opposed to the father; case law cited **JO vs SAO (2016) eKLR**;

25. In this instance the trial court granted the custody of the subject child to the respondent who is her father rather than to the infant's mother, the appellant herein; the court record reflects what appears to be the exceptional circumstances that the trial court took into consideration when making this decision to depart from the general rule; and it reads as follows;

***'There is evidence that on the 14<sup>th</sup> May, 2017 the mother abandoned the child with the plaintiff. This is evident from the Plaintiff and Affidavit filed in Nairobi and reproduced above. During cross-examination the mother concedes sending "sms" messages to the plaintiff threatening to abandon the child out of frustration that he was not supporting her.'***

26. The applicable law on the guiding principles to be applied in making custody orders is found at Section 83(1)(j) of the Children Act which reads as follows;

1. In determining whether or not a custody order should be made in favour of the applicant, the court shall have regard to:

(i) The best interest of the child.

27. The record reflects that the appellant conceded that she was in the habit of threatening the respondent that she would abandon the child; and indeed carried out the threat at Kivaa Market when she abandoned the child in the respondent's car at the carwash; the act of abandonment and admission by the appellant is also contained in the report of the Sub-County Children Officer – Yatta dated 27/11/2017;

28. This court notes that the trial court took into consideration the abominable and disgraceful conduct of the appellant and in its judgment spelt out the reasons that warranted going against the general rule;

***'.....I take the view that in the present case there exist exceptional circumstances that militate against granting the mother custody of the child KMM as is the prima facie rule. The exceptional circumstances are manifest in the disgraceful conduct of the mother who abandoned the child with the plaintiff.'***

29. In the circumstances this court is satisfied that the respondent proved the existence of exceptional circumstances and is satisfied that the trial court took into consideration the exceptional circumstances and this court finds no option but to uphold the trial court's findings that warranted its departure from the general rule that custody of a child of tender years should always be granted to the mother;

30. This ground of appeal is found lacking in merit and it is hereby disallowed.

**Whether it was in the best interest of the child that custody be awarded to the respondent.**

31. The appellant urged the appellate court to consider the best interest of the child and disregard the side shows of the past petty encounters of the respondent and herself;

32. The applicable law on the best interest of the child as set out in Article 53(2) of the Constitution of Kenya 2010 and Sections 4(2)(3) of the Children Act; the court record reflects that when considering the best interest of the child the trial court set out and referred to the above provisions of law in its judgment; it also relied on the Report filed by the Principal Children's Officer Mbeere South Sub-County and was satisfied that the minor had been catered for adequately by the respondent;

33. It is noted from the judgment that the minor had been '**enrolled in school. The father is working close to the home and is assisted by a wife and a house help to take care of the child.**'; it is also noted that the trial court utilized the social inquiry reports by the children officer in determining the best interest of the child; and that the report had indicated that the minor had adjusted to the environment;

34. For the foregoing reasons this court is satisfied that it is in the best interest of the child that custody remain with the respondent; and finds that the trial court did not apply wrong principles of law when arriving at its finding on the best interests of the minor and finds no good reason to interfere with the trial court's finding;

35. This ground of appeal is found lacking in merit and it is hereby disallowed.

**Whether the trial court erred in dismissing the appellant's counterclaim against the respondent**

36. The appellant filed a Defence and Counterclaim dated the 12/09/2018; therein the appellant pleaded for the custody of the minor and prayed for the dismissal of the respondent's suit and prayed for orders inter alia that;

**(1) The defendant be given full custody of the minor herein.**

**(2) ...**

**(3) ...**

(4) ....

(5) *Any other orders the court may deem fit for the best interest of the minor.*

37. Upon perusal of the issues pleaded by the appellant in the counterclaim it is apparent that it involves the same issue of custody over the same minor;

38. By dint of the admission by the appellant of threats to abandon the child coupled with the actualization of the threat the trial found in favour of the respondent proceeded to dismiss the counterclaim;

39. Upon making a finding on custody and the best interest of the child this court is satisfied that the trial court rightfully dismissed the appellants counterclaim against the respondent; and finds no reason to interfere with the trial courts dismissal of the appellant's counterclaim;

40. This ground of appeal is found to be lacking in merit and it is hereby disallowed.

#### **FINDINGS & DETERMINATION**

41. From the foregoing reasons this court makes the following findings and determinations;

(i) This court finds that the respondent proved the existence of exceptional circumstances to warrant the departure from the general rule;

(ii) This court finds that it was in the best interest of the child that custody be awarded to the respondent.

(iii) This court finds that the trial court rightfully dismissed the appellants counterclaim against the respondent;

(iv) The appeal is found lacking in merit in its entirety and it is hereby dismissed.

(v) This being a family matter each party shall bear their own costs of the appeal.

Orders Accordingly.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 25<sup>TH</sup> DAY OF MARCH, 2021.**

**HON.A.MSHILA**

**JUDGE**