



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO. E004 OF 2021

SAW.....APPELLANT

VERSUS

WNB.....RESPONDENT

(Being an appeal from the Ruling and Order of N.N Barasa in

Webuye Divorce Cause No. E003/2020 delivered on 19/1/2021)

JUDGEMENT

This appeal has its roots in Webuye Law Courts where the appellant filed contemporaneously with the plaint dated 24th October, 2020, an application of even date mainly seeking;

1. That this honourable court be pleased to issue interim orders granting custody of the minor children; JB aged 11 years, TB aged 8 years and NB aged 5 years to the applicant pending hearing and determination of this application inter-partes.
2. That this honourable court do issue interim orders granting custody of the minors to the applicant pending hearing determination of the suit.
3. That this honourable court be pleased to order the respondent to maintain the petitioner/issues of the marriage in terms of food, housing/rent/shelter, clothing medical expenses and school fees to the extent that this honourable court shall deem fit and just to grant.
4. Costs of the application.

The appellant (plaintiff in the trial court), the biological mother of the minors deponed that she had been staying with the minors at their matrimonial home in Bukembe and schooling at [Particulars Withheld]

That while attending to a sick child in Eldoret, she came back home to find her home locked ostensibly by the mother-in law and the children taken to the latter's home and apparently on the respondent's instructions.

She deponed that efforts to reach her husband on phone, through the Centre for Restoration of Human Rights and the Children's Officers were fruitless necessitating the suit. That the minors have been left under the care of a herdsboy and therefore facing an imminent risk of being sexually abused. She sought custody of her children.

The application was opposed by the respondent who filed his replying affidavit deponing *inter alia* that he is a military officer who in 2017 was deployed to Somalia on a Military Mission. Before leaving for Somalia, he settled his 3 children and the respondent in their Bukembe home and made a Standing Order to his Bank for remittance of Kshs 20,000/= monthly and other financial concessions in favour of the respondent for maintenance purposes while away on duty.

He deponed that the appellant is a Teacher with a stable income but had in previous occasions ignored to help in the maintenance of the minor but spent her fortune in entertaining herself. That within the 4 months of the respondent's absence, the appellant engaged in an intimate affair with a named Administration Police Officer occasionally spending their nights in the matrimonial home and living on the respondent's money meant for the minors' needs.

Perturbed by the turn of events, the respondent travelled home in May 2017 and found the minors had been sent to the respondent's parent's home so she could spend time with the said Administration Police Officer. At the time, the youngest minor was 1 year old and still breast

feeding. That the appellant would occasionally spend nights away from home leaving the minors under the care of a named neighbour.

It was deponed that with the help of the respondent's parents, the minors have stayed with the respondent's parents and a cousin for over 3 years while attending [Particulars Withheld] Complex and doing well academically and the appellant has been accorded free access to them.

By a ruling on the application, the Learned Trial Magistrate maintained the *status quo* pending the determination of the suit. The appellant was dissatisfied with this order and now appeals to this court on the following grounds.

1. The learned trial magistrate erred in law and in fact in dwelling on irrelevant considerations instead of making judicious and impartial consideration of laid down judicial precedence on issues of interim custody.

2. The learned trial magistrate erred in law and in fact in making an order entrusting custody of children of tender ages to total strangers to the exclusion of the biological parents of the children, which is inimical to the children's emotional nature and development.

3. The learned trial magistrate erred in law and in fact shutting her judicial mind to a consideration of the issue of custody at the interlocutory stage, contrary to law which dictates that the issue of best interest of the children is paramount and must be decided on priority; instead choosing to banish these considerations ostensibly to be canvassed during the main hearing as she did.

4. The learned trial magistrate erred in law and in fact in shockingly ignoring the well-established precedent that custody of minor children should be awarded to the mother, in the absence of exceptional circumstances disentitling the mother from having custody.

Parties disposed of the appeal by way of submissions. The appellant represented by Mr. Wasilwa and Mr. Maloba for the respondent filed their respective submissions.

The appellant submits that the question for determination before the learned trial magistrate was who between the respondent and the appellant ought to be given custody of the minors and not whether it was right or not for the court to intervene and remove the minors from the current place of residence.

That the existence of divorce proceedings signifies existence of irreconcilable differences and where the custody of the issues fall for determination, the principles to be considered as settled by precedence is that unless exceptional circumstances exist, custody should be awarded to the mother.

That the appellant clearly demonstrated she had made efforts to reconcile with the respondent when her matrimonial home was locked by the latter's mother which efforts failed due to non-cooperation by the respondent.

That from the cases of *HGG Vs YP (HCCA 46/2016)*, *NL Vs SL (HCCA 40/2016)* and *S.O Vs LAM (CA 175/2006)*, the principle is that; all other things being equal, children of tender years should be with their mother and where the court gives custody to the father, it is incumbent upon it to make sure that there really are sufficient reasons to exclude the prima facie rule. The cases of *J.O Vs S.A.O (CA 43/2015)* and *Jasbir Singh Rai & 3 Others vs Tarlochan Singh & 4 others (2013) eKLR* were also cited.

Counsel further faults the trial magistrate for vesting the custody of the minors in the hands of strangers; the respondent's cousin, to the exclusion of the biological mother who is capable of providing the emotional and natural support, care in terms of teachings on morals and overall nurturing of particularly girls of tender years.

The respondent on the other hand raised the following issues he deemed pertinent to the appeal.

1. Whether the trial magistrate erred by dwelling on irrelevant considerations instead of making judicious and impartial considerations.
2. Whether the trial magistrate erred by entrusting custody of the minors to total strangers to the exclusion of biological parents.
3. Whether the trial magistrate erred by shutting her mind to the best interest of the children at the interim stage.
4. Whether the trial magistrate ignored precedent where custody of minors is ordinarily granted to mothers.

That for the appellant to succeed in the application, subject of this appeal, she was duty bound to prove that the minors were in distress and the welfare and best interest of the minors would only be served if they are removed from where they currently live. This; he submits was not done.

An application for interim custody, the court must be wary not to delve into the merit of the case at the interim stage. The case of *ANT Vs AMAA (2015)eKLR* was cited in support.

That the trial magistrate's finding that a temporary intervention was likely to interfere with the schooling of the minors hence negatively impacting on them. That the respondent has put up a case for the existence of peculiar circumstances warranting the court to deviate from the general principle and as such it is not in the best interests of the minors to shuttle between the parent's residences. The case of *DOO Vs JAO (2015) eKLR* has been cited.

Determination

The appellant, SAW, a teacher by profession is the respondent's wife, a Military Officer. They were married under the provisions of the Marriage Act Cap 150 in a ceremony conducted in Mombasa on 26th February, 2009. There are 3 issues of the marriage, aged 11, 8 and 5 years respectively as at October 2020 when the suit was filed in the trial court, 2 girls and 1 boy.

This appeal is a contest over interim custody of the minors who are currently residing with their father, the respondent. The dispute as can be discerned from the pleadings is that the appellant commenced Divorce proceedings in the trial court and in the interim sought custody of the minors pending the determination of the cause.

The trial magistrate in determining the application observed that since the minors are school going, a temporary intervention is likely to interfere with the schooling hence negatively impacting on their right to education.

When dealing with matters concerning the child, recourse is to be sought in the provisions of Article 53 of the Constitution, 2010 which provides-

1. Every child has the right-

(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.

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

Section 83 (1) of the **Children's Act, 2001** outlines the guiding principles when making a determination related to the custody of a minor. One such factor to be taken into consideration is the best interests of the minor.

It would therefore be a relevant factor guiding this court when making the orders in this appeal.

The respondent argues that the minors have been staying with his parents and his cousin while studying at a school known as [Particulars Withheld] Complex and performing well. The appellant on the other hand asserts her right as a mother to be with the minors.

An allegation was made by the respondent that the appellant would occasionally leave the children with a neighbour overnight whenever she spent the night away.

No effort was made by the appellant to dispute this fact but asserted her unassailable right to have custody of the minors. She however states that the minors are left in the care of a herds boy and facing imminent danger of being sexually assaulted. She has however placed no material on record to prove this fact.

The substantial question in this appeal is whether, given the circumstances of the case, the court can interfere and grant the appellant custody of the minors despite having stayed with their father for the past 4 years.

This court notes that the prayers sought in that application are interim in nature. There is no dispute that statute and the principles laid down by case law dictate the mother being granted custody unless exceptional circumstances exist to warrant a deviation from the normal.

In **J.O. Vs S.A.O. (2016) eKLR** and having regard to exceptional circumstances, the court held:-

“There is a plethora of decisions by this Court as well as the High Court that in determining matters of custody of children, and especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother, because mothers are best suited to exercise care and control of the children. Exceptional circumstances include: the mother being unsettled; where the mother has taken a new husband; where she is living in quarters that are in deplorable state; or where her conduct is disgraceful and/or immoral.”

This court is of the opinion that there is no conclusive definitive list of what should be considered exceptional circumstances. Such circumstances are to be inferred from the peculiar facts of each case. While considering the existence of exceptional circumstances, the court must bear in mind that the primary consideration is the best interests of the minor. This; the court must not lose sight of.

The exceptional circumstances advanced by the respondent herein are that the appellant has in various occasions left the children unattended by her, leaving the minors under the care of a neighbour when she spends the night out, she has in the past refused to help in the maintenance of the children, the children are already enrolled in a new school and that the appellant was engaged in intimate relationship with a named Administration Police Officer.

In determining therefore whether to vary the orders of the learned trial magistrate, this court must strike a balance between the rights of the parents to their children and while at it, consider the best interests of the minors.

No report from the many departments dealing with the welfare of the children was placed before the court so the court could ascertain the welfare of the children in the residence where they have been since 2017 and whether in the circumstances, there is need to move them.

The orders sought are in the interim pending the conclusion of the divorce cause which is yet to be heard. This court is cognizant of the fact that when the cause is finally heard and determined, the result will go either way as regards who shall take custody of the minors between the parents.

In a bid not to disrupt the environment where the children have called home for the past over 3 years, this court is reluctant to interfere with the orders of the trial magistrate which is hereby upheld.

This being a family matter, each party shall bear own costs.

DATED AT BUNGOMA THIS 25TH DAY OF JUNE, 2021

S.N. RIECHI

JUDGE