



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

FAMILY APPEAL NO. 12 OF 2020

IN THE MATTER OF THE CHILDREN ACT NO.8 OF 2001

IN THE MATTER OF AAS AND ASA (MINORS)

BETWEEN

GMM.....APPELLANT/APPLICANT

VERSUS

SAS.....RESPONDENT/RESPONDENT

RULING

1. By a plaint dated 4th April 2018, SAS filed Tononoka children's case No.107 of 2018 against his wife GMM seeking physical and legal custody of the minors herein born on 15th January 2014 and 14th May 2016 respectively. He claimed that their mother (applicant) was in the habit of frequently running away from their matrimonial home thus abandoning them in his hands. That at times the mother (hereafter the appellant) would run away with the children thus interrupting their studies in the name of settling personal scores.
2. On her part, the defendant (appellant) filed her defence and counterclaim dated 14th June 2018 denying the allegations and instead sought full custody of the children. Upon hearing the case, the court pronounced itself through its judgment dated 25th Nov.2019 thus granting joint legal custody to the parents and actual custody, care and control to the mother(defendant/appellant) and unlimited access to the father(plaintiff/respondent) whenever he was in Nairobi and during school holidays. Both parties were ordered to share children's needs equally.
3. Later, vide an application dated 3rd August 2019, the respondent moved the trial court seeking orders restraining the appellant(defendant) from taking the children from his [Particulars withheld] home and that the judgment thereof granting actual custody of the children to the mother(appellant) be reviewed in his favour. The application was based on the grounds that the appellant had totally denied him access to the children both physically and on phone contrary to the court order and that she was in the habit of locking children in the house while she went out until wee hours in the night. Further, that the appellant had neglected the children by not providing basic needs like snacks thus forcing teachers to keep calling him for provision. That she had stopped children from attending Madrassa despite them being Muslims.
4. In his affidavit in support of the application sworn on 3rd August 2020, he claimed to have reported to the children officer Embakasi who found the children unattended and locked up inside a house. That the children were living in deplorable conditions in a single roomed house. He attached a letter from the children officer Embakasi office dated 18th March 2020 authored by somebody initialled as SCCO who purported to have confirmed that he/she accompanied the respondent to a house where the children were locked inside a house unattended hence allowed the respondent to take the children to Mombasa.
5. In her replying affidavit of 19th August 2020, the appellant denied allegations of neglect and instead accused the respondent of the same by refusing to provide for the children. She disputed denying the respondent access to the children. She alleged that the letter claimed to be from Embakasi children office was a fabrication as on the date the children officer visited their house she had taken one of the children to the hospital. She claimed that the respondent had taken the children without court's leave hence contempt of court. However, by a letter dated 15th September 2018, (see page 178 of the R.O.A) the Embakasi children officer one Susan Ouma confirmed to be the officer who visited the appellant's house on 17 March 2020 and found the children unattended and several beer bottles and condoms scattered on the ground.
6. Having heard both parties, the court pronounced itself on 16th November 2020 wherein it reviewed the judgment and gave actual custody of the children to the respondent on account of exceptional circumstances. The court found the two children officer's reports presented in court were convincing and that the appellant had failed to cross examine the children officer over the same reports. The court however granted her unlimited access to the children during April and August holidays and half of November December holiday.

7. Aggrieved by the said ruling, the appellant filed a memorandum of appeal dated 26th May 2021 challenging the entire ruling. Having given directions, parties agreed to canvass the appeal by way of written submissions. Meanwhile, the court was confronted by an application dated 25th May 2021 and filed on 26th May 2021 by the appellant seeking leave of the court to allow her adduce additional evidence by way of an affidavit. The application was based on grounds set out on the face of it and an affidavit sworn by the applicant on 25th May 2021 in which she averred that in overturning and reviewing its judgment, the court relied on a forged letter allegedly obtained from prince of peace school which was full of lies against her.

8. That upon approaching the said school, they disowned the said letter thus prompting her to report to the DCI who upon conducting forensic analysis found the letter to be a forgery. That the court was misled and therefore relied on false exceptional circumstances to deny her custody of the children. The forensic report was attached as the new evidence that could not be available at the time the ruling was made hence necessary that the same be admitted to enable the court arrive at a just decision

9. In reply, the respondent filed a replying affidavit on 9th July 2021 stating that; the appellant's advocates are not properly on record as they did not comply with Order 9 rule 9 of the civil procedure rules by seeking leave to come on record after entry of judgment; no basis had been laid to connect the new evidence with these proceedings and the record of appeal; there is no evidence on how the intended evidence was accessed and whether anybody has been charged with forgery; the alleged forged letter is not part of the record of appeal and that it was not at all a subject of deliberation in the application nor considered by the trial court to review the judgment;

10. The court having directed parties to canvass the application first before the main appeal, counsel agreed to file written submissions.

11. Despite giving the appellant's counsel humble time to file his submissions, none was filed. However, counsel for the respondent filed his on 12th October 2021 reiterating the averments contained in the affidavit in support. Mr. Anaya contended that the appellant's advocates are improperly on record having failed to seek leave of the court. In support of this proposition counsel placed reliance in the case of Brigdes Exploration Limited Vs Stephen Karanja(2019)Eklr

Analysis and determination

12. I have considered the application herein, response thereto and submissions by counsel for the respondent. The only issue for determination is whether the applicant has met the threshold for admission of new evidence.

13. Pursuant to Section 78(1) (d) of the Civil Procedure Act, this court has the discretion to take new evidence or to direct new evidence to be taken. Whether to admit or not to admit additional evidence on appeal is purely a matter of discretion by the appellate court while bearing in mind that no evidence whose value is crucial in the just determination of a matter should be shut out and that such evidence could not have been obtained by reasonable diligence before and during the hearing. See Dorothy Nelima Wafula versus Hellen Nekesa and Paul Fredrick Nelson (2017) e KLR.

14. The principles governing admission of new evidence have also been succinctly captured in the case of Mohamed Abdi Mahamud Vs Ahmed Abdullahi Mohamed and 3 others(2018) e KLR where the court stated that ;

“Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

- (a) The additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
- (b) It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
- (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
- (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
- (e) The evidence must be credible in the sense that it is capable of belief;
- (f) The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- (g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
- (h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;
- (i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.
- (j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up

omissions or patch up the weak points in his/her case.

(k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

15. Before I endeavour to address the main issue at hand, I wish to comment on the issue raised by the respondent that the appellant's counsel has no capacity to represent the appellant before obtaining leave. Before me is an appeal and not a continuation of proceedings from the lower court. An appeal is purely an independent suit to which order 9 rule 9 does not apply. If it were in the same trial court, then, the said rule would have applied. Therefore, there was no need for the appellant's counsel to seek leave to appear.

16. Turning to the main issue, the applicant is alleging that the learned magistrate reviewed her judgment based on the existence of special circumstances enunciated in a forged letter from the prince of peace school where the children were schooling. From the application dated 3rd August 2020 and the reply thereof, such letter was not mentioned anywhere. Further, from a careful perusal of the record of appeal, such letter does not appear. Better still, the learned magistrate did not base her review orders on the alleged letter.

17. The question is, of what relevance is the introduction of such letter and the forensic report thereof to these proceedings. The pending appeal will squarely deal with issues raised in the application culminating to the impugned ruling and the consequential orders. That letter shall be relevant in the intended criminal case but not in this case. The trial court basically relied on the averments of the respondent and two letters from Embakasi children office to arrive at the conclusion that the appellant had neglected the children hence reviewed the orders. There is no mention of any school letter in her ruling. The said letter is therefore a deflection from real issues.

18. As stated in Mohamed Abdi case (supra), the alleged school letter is not relevant to this case. It is needless to allow additional evidence which will distract the court from real issues in controversy and that is, whether there were sufficient exceptional circumstances to warrant variation or review of the orders. That aspect shall aptly be canvassed in the main appeal. Accordingly, I do not find any merit in the application and the same is dismissed. Costs shall be in the cause. Mention on 10th February, 2022 for further directions regarding the hearing of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17TH DAY OF DECEMBER, 2021

J.N.ONYIEGO

JUDGE