



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. E005 OF 2021**

SMM.....APPELLANT

**VERSUS**

LNN.....RESPONDENT

*(Being an Appeal from the Ruling of the Senior Resident magistrate's court at Tononoka*

*Children's court Honorable V.J. Yator delivered on 25<sup>th</sup> January, 2021).*

**JUDGMENT**

1. Vide a plaint dated 9<sup>th</sup> August, 2017, LNN filed Tononoka Children's case No 265 of 2017 against her husband SMM seeking; actual custody of the child with limited access to the defendant; monthly maintenance at a sum of Ksh 25,000, Ksh 5,000 as medical cover plus, payment of school fees.
2. From the record, the child was originally placed under the father's custody vide a ruling delivered on 7<sup>th</sup> September, 2017 pursuant to a Notice of Motion dated 9<sup>th</sup> August, 2017. This was after the court found that the plaintiff was in the habit of abandoning the child in the hands of the defendant (father). The order was to be in force pending hearing and determination of the suit. Before the hearing of the main suit, the plaintiff was held in custody at Shimo la Tewa after assaulting the defendant.
3. However, after the release of the plaintiff from custody, she moved the court vide an application dated 3<sup>rd</sup> April, 2019, seeking actual custody of the child to revert back to her now that she was free. She also claimed that the child was suffering while in the hands of the step mother who physically assaulted her while living together back upcountry in Makueni yet the respondent (appellant) was staying in Likoni Mombasa.
4. After hearing the application, the court delivered its ruling on 3<sup>rd</sup> June, 2019 thus granting actual custody of the minor then 2 ½ years old temporarily for a period of 6 months to the mother. The court also observed that being a child of tender age the mother who had allegedly reformed was the right parent in order of priority to take actual custody of the child.
5. On 19<sup>th</sup> August, 2019 through a court initiated "mediation" process, parties arrived at a consent that;
  - a. **The mother to continue having actual physical custody with the father having access from Saturdays to Sunday.**
  - b. **The father is free to travel with the child to his rural home at least twice a year as long as he stays with the child during his stay up country; father to provide maintenance at Ksh 3,000 per month which was to reduce to Ksh 2000 upon the child joining school; the respondent not to leave with the baby without prior arrangements with the mother; father to pay school fees and the orders to be reviewed come 2021.**
6. Through another application dated 24<sup>th</sup> September, 2019, the defendant (appellant) sought actual custody of the minor on the ground that the plaintiff (respondent) had abandoned the baby at their rural home yet she was staying in Likoni. The application was allowed exparte on 25<sup>th</sup> November, 2019 following the plaintiff's failure to file a response.
7. Aggrieved by the said order, the plaintiff (Respondent) filed a Notice of Motion dated 21<sup>st</sup> September, 2020 seeking to set aside the exparte orders of 25<sup>th</sup> November, 2019. She also sought leave to challenge the application of 24<sup>th</sup> September, 2019.

8. The defendant having failed to respond to this application, the same was allowed ex parte on 9<sup>th</sup> November, 2020 and ex parte orders made on 25<sup>th</sup> November 2019, set aside.

9. By a Notice of motion dated 23<sup>rd</sup> November, 2020, the defendant (appellant) sought custody to revert back to him with reasonable access to the mother. The same was based on the ground that the plaintiff had abandoned the baby thus leaving him under the care of her mother.

10. After hearing the application, the court delivered its ruling on 25<sup>th</sup> January, 2021 observing that there had been allegations and counter allegations thus causing confusion as to who was telling the truth. The court directed that the consent order of 19<sup>th</sup> August, 2019 be obeyed to the letter. The plaintiff was warned against leaving the baby with the defendant (appellant) unless it was over the weekend in default custody to revert to the defendant.

11. Aggrieved by this ruling, the defendant filed a memorandum of appeal on 26<sup>th</sup> January, 2021 citing six grounds of appeal as follows;

**a. That the learned Honourable magistrate erred in law by dismissing the appellant's application dated 23<sup>rd</sup> November, 2010.**

**b. That the learned Honourable magistrate erred in law by entering a ruling for the Respondent/Plaintiff against the Appellant/Defendant as prayed in the suit.**

**c. That the learned Honourable magistrate erred in law and in fact by not considering that the appellant is unemployed.**

**d. That the learned Honourable magistrate erred in law and in fact by not considering the evidence of the appellant.**

**e. That the learned Honourable magistrate erred in law and fact in making the findings which were a total misdirection and legal deviations from the express provision of the law.**

**f. That the learned Honourable magistrate erred in law and in fact as the ruling is not based on the evidence by the parties.**

12. On 15<sup>th</sup> March, 2021, the court admitted the appeal and directed the appellant (defendant) to file and serve a record of appeal.

13. During the hearing, the appellant urged that the learned magistrate did not give him an opportunity to prosecute his application dated 23<sup>rd</sup> November, 2020 and that the court took physical custody of the children from him without considering the report of the children officer Likoni, which recommended that he be awarded actual custody; That the respondent (respondent) is not fit to be awarded custody of the children as she had abandoned them. He contended that he is the one taking care of the children and that the respondent is nagging. He claimed that he was the one who was left with the subject while aged 6 months old and that the respondent does not care about the child.

14. In response, the respondent denied every allegation of inability to look after the subject (child) together with two others who were not sired by the appellant. In essence, she supported the reasoning of the court. She also claimed that when custody of the child was given to him, he abandoned the subject child in the hands of his mother.

15. I have considered the grounds of appeal against the proceedings and pleadings before the lower Court. I have considered oral submissions by both parties. As the first appellate court, I am duty bound to independently re-evaluate, re-examine and re assess materials and or evidence placed before the trial court and arrive at an independent conclusion or determination bearing in mind that I did not have the advantage of seeing or listening to any of the witnesses. See **Mbogo and another vs Shah ( 1968) E.A**

16. Having analyzed the factual background of the proceedings before the trial court, one thing that I find to be clear is that this matter has been characterized and slowed down by numerous and unnecessary applications and counter applications all intended at delaying the determination of the substantive suit which is still pending.

17. From the six grounds cited, I can only discern two issues/grounds for determination namely; whether the applicant was given a hearing to prosecute his application dated 23<sup>rd</sup> November 2020. Secondly, whether the court erred by granting actual custody of the baby to the respondent. From the record, the application herein was filed on 26<sup>th</sup> November, 2020 and then canvassed on 14<sup>th</sup> December, 2020 in the presence of both parties. The record is clear that the appellant did argue his application herein hence was not denied the right of hearing.

18. Further, looking at the ruling, the court did briefly analyze the prayers of the application and the ground upon which it was anchored and the reasons for dismissal. The allegation that the court entered a ruling as prayed in the suit is not correct. Instead, the court emphasized that the consent order entered by parties on 19<sup>th</sup> August, 2019 do remain in force.

19. From the record, the suit is yet to be heard and the final orders made. As correctly stated by the trial court, the consent order has not been set aside and its enforcement is what the court upheld. In any event, an interim custody order is at the discretion of the court to which an appellate court cannot interfere with unless it is manifestly unjust or based on wrong principles of the law which is not the case here.

20. In **Mbogo and another vs Shah (Supra)**, the court underscored the fact that an appellate court should exercise caution when dealing with discretionary powers exercised by the trial court thus stating that;

**“An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge misdirected himself or**

**acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrives at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of discretion of Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of discretion and that as a result there has been an injustice”**

21. In the instant case, the court merely enforced a consent order which has not been set aside to date. If the respondent has disobeyed the consent order, the available option is to seek committal of the respondent to civil jail for contempt of court. A consent order can only be set aside upon proof that it was either obtained through fraud, concealment or misrepresentation of material facts or information, it is illegal or that the same is practically impossible to implement. In my view, the court did properly exercise discretion in making the orders it did.

22. It is worth noting that, the main suit is pending hearing and final determination. It is at that point that parties upon adducing evidence and being subjected to cross examination that the court will conclude whether there are exceptional circumstances to warrant vesting actual custody upon the father. Otherwise, as a general rule custody of a child of tender age is awarded to the mother unless there are exceptional circumstances not to do so. See Sospeter Ojamong Vs Lynette Amondi Otieno and another Civil Appl No 176/2006, HGG Vs VYP (2017) e KLR and MAA Vs A.B.S(2018) e KLR.

23. Since parties are bound by the consent order and the orders complained of were authored by the parties themselves, they should honour the same and then cooperate by expediting the hearing of the main suit without filing unnecessary applications. If the trend continues, the court shall apply punitive measures by ordering a losing party to pay costs whenever he or she loses an application.

24. In view of the above, I do not find any merit in the appeal and the same is accordingly dismissed. This being a family issue, I will spare parties costs and order that each party to bear own costs.

**DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17<sup>TH</sup> DAY OF DECEMBER, 2021.**

**J. N. ONYIEGO**

**JUDGE**