



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL 13 OF 2017

RAMADHAN ALI ATHMANAPPELLANT

VERSUS

PETER MWINGO CHIRIMA.....RESPONDENT

JUDGMENT

(An Appeal from the Judgement of Hon. L. K. Sindani, Resident Magistrate of 29.3.17 in Tononoka Children's Court Cause No. 158 of 2016)

1. The Appeal herein arises from the judgment of Hon. L. K. Sindani, Resident Magistrate of 29.3.17 in Tononoka Children's Court Cause No. 158 of 2016 (the suit) in which the Appellant, Ramadhan Ali Athman, sought certain orders against the **Respondent**, Peter Mwingo Chirima in his plaint filed on 5.5.16.
2. The undisputed facts of this case as can be gleaned from the record are that the Appellant was married to the late Mbodze Chirima (the deceased), a sister to the **Respondent** in 2002. The deceased was the Appellant's third wife. She died on 8.7.15. Prior to the marriage, the deceased had a child, Feisal Ramadhan. She then went on to have 3 children with the Appellant, namely Madina Ramadhan, Biadi Ramadhan and Fatuma Ramadhan.
3. The Appellant filed the suit claiming that following the demise of the deceased, while he was busy making burial preparations, the Respondent took the children and all belongings from his house and transported them to the Respondent's rural home in Lungalunga. He left the children with his elderly mother and returned to Mtopanga where he resides. All efforts at settling the matter amicably failed resulting in the filing of the suit. The Appellant sought the following orders:
 - a) *A declaration that the Defendant (sic) has parental responsibility for the issues herein namely Feisal Ramadhan, Madina Ramadhan, Biadi Ramadhan and Fatuma Ramadhan and an order giving that effect.*
 - b) *Legal custody, care and control of the children do vest in the Plaintiff.*
 - c) *The Defendant be permanently restrained from removing the children herein from the Plaintiff's custody.*
 - d) *Costs of this suit and interests (sic) therein at court rates.*
 - e) *Any other relief that this Honourable Court may deem fit.*
4. It was the Respondent's case in the lower Court that the Appellant abdicated his parental responsibility and neglected abandoned the deceased and the children long before she fell ill and died. He has not participated in the upkeep and educational needs of the children. The deceased bestowed parental care and control of the children upon her mother. The matter of the neglect of the children was conclusively dealt with by the Kwale Children's department.
5. Following the hearing of the parties, the trial Court in its judgment of 29.3.17, made the following orders:
 - a) *The plaintiff has parental responsibilities to the issues herein.*
 - b) *Status quo be maintained concerning Actual/physical custody with the maternal grandmother remaining with the children but with unlimited visitation rights to the plaintiff.*

- c) *Legal custody to vest in the plaintiff.*
- d) *Plaintiff to participate in paying school fees for the children buying school necessities and foodstuffs (sic) for the children.*
- e) *Since it's a children's case, each party to bear its costs.*

6. Being aggrieved by the said judgment, the Appellant preferred the Appeal herein. The Appellant contends that the trial Magistrate erred in law and in fact in that she:

1. *ignored the fact that the Appellant is the biological father of the minors.*
2. *failed to give weight to the legal and factual issues raised in the matter.*
3. *failed to consider that the Respondent has no legal basis of maintaining the Appellant's children while the Appellant is alive and of sound mind.*
4. *Failed to consider custody facts that were raised, before making her orders.*

7. The Appellant prayed that the Appeal be allowed and that this Court substitutes its own orders for the orders made by the trial Court. He also prayed for costs.

8. Parties filed their written submissions which I have considered. For the Appellant, it was submitted that the best interest of the child are safeguarded under Article 53(2) of the Constitution and Section 4 of the Children Act (the Act). It was further submitted that under Section 27 of the Act, as the surviving parent of the children, he acquired parental responsibility over the children the moment their mother died. It was further submitted that the children are not residing with the Respondent but were dumped at their elderly grandmother's home. The contended that he was well capable of taking care of his children and ought to be given both legal and actual custody of the children to exercise his parental responsibility as the sole surviving parent.

9. For the Respondent, it was submitted that the trial Magistrate was aware of the wide encompassing nature of parental responsibility as stipulated in Section 23 of the Act. The trial Magistrate also heard the minors on several issues of concern following which she made an informed decision as to how and where the best interests of the children would be served. The children were unanimous that the Appellant was an absentee father who did not even take care of their ailing mother. Their grandmother and aunt took care of their mother and aunt. It was contended that the trial magistrate was concerned about the relationship between the children and their father who opted to keep away from them. She urged him to be more active in their lives so as to build a relationship. It was further submitted that since 2015, the Appellant has not been part of the children's lives and has not visited them, met their financial, educational or food or any other needs as ordered by the trial Court. To the Respondent therefore, the Appellant is the author of his misfortune and should comply with Court orders. It was further submitted that the Appellant did not disclose to the Court that he had 2 other wives and 7 other children with whom he lives in Bombolulu, the house he now wishes to take the children.

10. I have considered the submissions filed by the parties. I have also subjected the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that I neither saw nor heard the witnesses. I have noted that the Appellant only submitted on the issue of actual physical custody of the children.

11. Every child is entitled to parental care and protection. This right is guaranteed by Article 53(1)(e) of the Constitution of Kenya 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;

12. In the present case, the Appellant and the mother of the children herein were married. However, the mother of the children is now deceased and the Appellant, being the sole surviving parent has come to this Court seeking actual physical custody of the children, which was granted to the grandmother of the children in the trial Court. Section 27 of the Act provides for the transmission of parental responsibility upon the demise of one parent as follows:

(1) Where the mother and father of a child were married to each other at the time of the birth of the child or have subsequently married each other—

(a) on the death of the mother the father shall exercise parental responsibility for the child either alone or together with any testamentary guardian appointed by the mother;

(b) on the death of the father, the mother if living shall exercise parental responsibility for the child either alone or together with any testamentary guardian appointed by the father;

(c) ...

13. Upon the demise of the deceased, the Appellant was required by law, to exercise parental responsibility of the children herein. Parental

responsibility is defined in Section 23 of the Act as follows:

(1) In this Act, “parental responsibility” means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child’s property in a manner consistent with the evolving capacities of the child.

14. The duties referred to above include *inter alia* the duty of a parent to maintain the child and in particular to provide him with food, shelter, clothing, medical care, education and guidance. Parental responsibility is intended to secure the best interests of the child. In the present case, it is not disputed that the Appellant and the deceased were married. There is a marriage certificate on record showing that they married under Islamic law on 19.8.07. It is also not disputed that the deceased had 2 other wives and 7 other children. The Appellant was accused of abandoning and neglecting both his ailing wife and the children. He was accused of abdicating his parental responsibility over his children. The Appellant denied this and accused the Respondent of carting off his children and belongings from his home when his wife died. He also denied neglecting his wife during her sickness and even stated that he paid her hospital bill.

15. In his testimony in the trial Court, the Appellant stated that the deceased was sickly from the time they married. He also stated that he did not know that she had been admitted to hospital. It was the children who informed him that the Respondent had taken the deceased to hospital. In cross examination, he stated that his wife died on 08/07/2015 and at the time they were living together with 3 children she had with her and her two other children. The Appellant then stated that he did not know where his children were or who they were with. He stated he could not provide for them as he did not know where they were. In cross examination however, he stated that he sent his son Omari to take the children from their grandmother’s home which neighbours his but he was prevented and a fight ensued. The children were then taken to Lunga Lunga. Since it was Ramadhan, he did not want to fight. 40 days later, he went with his 2 other wives to Lunga Lunga to pick up the children but there was a crowd that had been asked to cause chaos. He then went to the children’s officer in Kwale on 4.6.16.

16. In his testimony, the Respondent stated that during the deceased’s illness, the Appellant neglected the children and they stayed with their grandmother. The Respondent stated that he the Appellant are neighbours and he knew where the children were. After the funeral however, The Respondent stated that the children have a right to see their parents and indeed should be with their surviving parent. He was however could not entrust the children to the Appellant who had abandoned them for 2 years and did not provide for them.

17. Riziki Ramdhan Mkama, a daughter of the deceased and step daughter of the Appellant testified that she dropped out of school in Form 3 due to lack of school fees. The deceased was the one who paid her fees. When she stayed with the Appellant and step mothers, the Appellant mistreated and abused her and she felt isolated. She opted to go and stay with her grandmother. When her mother was hospitalized, she did not see the Appellant. After the funeral, he did not come for the children nor did his other wives attend the funeral or come to show them any love. She prayed that the children continue to stay with their grandmother.

18. In the impugned judgment, the trial Magistrate considered that the Appellant had abandoned the children and the eldest child Riziki had suffered abuse in his hands. She also found that it was the Respondent and his siblings and not the Appellant who were catering for the needs of the children. The trial Magistrate also found that during the illness and hospitalization of the deceased, it was the children’s grandmother who took care of the children. She noted that the Appellant was with his other wives and children. Upon their mother’s demise, the Respondent took the children to live with their grandmother. The trial Court was persuaded that the Appellant had abdicated his parental responsibility. He had not been providing for the children both prior to and following the demise of their mother. The trial magistrate also found that the children were comfortable at their grandmother’s home and that it would be in their best interest to continue being in her physical custody

19. Section 83 of the Act stipulates the Principles to be applied in making custody order. Sub section (1) provides:

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) ...

20. When considering an issue of custody of a child, the Court must look into the conduct and wishes of the parent or guardian of the child. In the present case, the Appellant’s wishes as the surviving parent of the children is that he be granted actual physical custody of the children. However, the evidence on record points to a person who has abdicated his parental responsibility during the life, illness and following the demise of the children’s mother. While trying to explain why he did not cater for his children’s needs, the Appellant contradicted himself in his own testimony. It is evident that he all along knew where his children were and had he any intentions of supporting them, he would have. From the evidence, the Appellant appears to be an unfeeling parent who did not care for his ailing wife nor his children. He appears to have been quite content to have his mother in law step in and take up his role of caring for his dying wife and children, only to come later to claim his children. The Appellant’s conduct is not such as would persuade this Court to grant him custody of the children. He has failed the test of parental responsibility as defined in Section 23 of the Act.

21. It is noted that the Respondent has stepped in to cater for the needs of the children, effectively taking up the role of a guardian to them. The Respondent is also a relative of the children being their maternal uncle. His wishes are that the children remain with their grandmother

given the abandonment and neglect by the Appellant.

22. The ascertainable wishes of the children is a key consideration in making a custody order. The Court must however caution itself on the need to be objective bearing in mind both the short and long term interests of the children. In the case of J.O. v S.A.O. [2016] eKLR The Court of Appeal stated as much stated:

“Section 83 (1) of the Children Act outlines the principles to be applied in making custody orders. They include the ascertainable wishes of the child. But as Njagi, J. held in B. K. versus E.J.H. [2012] eKLR, “the test for the best interest of a child is not subjectively dictated by the selfish whims of a child. There has to be an element of objectivity. ... a child’s wish to stay with a particular parent might not be in his best interest. In such a situation, his own preference may not be automatically allowed. The wishes and feelings of a child must therefore be treated with a lot of caution.”

23. When examined by the trial Court, the children were unanimous that they were happy at their grandmother’s home and wished to continue staying with her. The grandmother has been taking care of the children during the critical period of their mother’s illness and after her demise. The Court is being asked to remove the children from the loving care of their grandmother to live with a father who neglected and abandoned them and their mother in her illness; to remove them from a happy and loving home and place them in a hostile environment in the home of the Appellant with step mothers. This Court has objectively considered the ascertainable wishes of the children and finds that they are not dictated by selfish whims. To make an actual physical custody order in favour of the Appellant at this stage would most certainly militate against the short and long term interests of the children herein as safeguarded by Article 53(2) of the Constitution and Section 4 of the Act.

24. In her judgment, the trial Magistrate recognized that the Appellant is the biological father of the children and stated:

“That does not mean that the plaintiff has been denied the custody forever. He still has a chance as a father to the children. He can start by building his association with the children and establishing a good relationship with the children so as to familiarize himself with the children. He can start by visiting the children in school and providing maintenance for the children from where they are before applying in court basing on the circumstances on the ground.”

25. The above counsel given to the Appellant by the trial Court was obviously disregarded. Rather than building his relationship with his children as advised, he has chosen to come to this Court. Winning the love and trust of his children will not be achieved by court proceedings, but by intentionally taking up parental responsibility over the children and just being the father that he ought to be.

26. In the end, having evaluated the evidence and the law, I find no reason to interfere with the decision of the trial Court. The Appeal herein lacks merit and the same is hereby dismissed. This being a matter concerning children, there shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 13th day of March 2020

M. THANDE

JUDGE

In the presence of: -

.....for the Appellant

.....for the Respondent

.....Court Assistant