



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 84 OF 2016

FCK (SUING AS GUARDIAN AD LITEM FOR KKI

AND DAAM).....APPELLANT/APPLICANT

VERSUS

DMN.....RESPONDENT

RULING

1. The applicant moved the court under certificate of urgency dated 30.10.2019 seeking that the matter be certified as urgent, the court be pleased to review the orders of custody and give the minors to their mother pending the hearing and determination of this suit; the custody of the minors during school holidays be shared equally between the applicant and respondent and that the applicant to have the children on the 1st part of the holiday while the respondent takes them on the 2nd part up to the date of opening schools.

2. The application was supported by an affidavit sworn by the applicant on the grounds that the court ordered the minor girls to live with their father during school holidays; one of the minors KK was sexually assaulted and defiled; the matter was reported to the police and investigations were underway; the circumstances under which the said minor was defiled are very suspect; the father had failed in his responsibility as the parent of the minors and he is therefore not fit to have custody of the children during the school terms. The best interest of minors who are girls of tender years is not being considered, it is in the interest of justice and the best interest of the minors of the application is allowed.

3. The applicant in the supporting affidavit deponed that the children were given to the respondent and he transferred them to a school not known to her, and he even moved residence from Kapsoya to unknown place. That one of the minors K was defiled and a medical report confirmed the same; she reported the matter to the police station. The respondent has continually denied her any visitation rights of the minors. The minors should not be left to suffer because of the difference between the respondent and herself. She prayed that the application be allowed.

4. In response to the application, the respondent deponed that the molestation took place while the children were at SOS children center at the applicant's request to have the minors placed there. The applicant has custody of the children over the school holidays and she does not need another court order for the same, as this was the 3rd similar application. He had not denied the applicant custody of the children during school holidays as per the court order which he strictly adheres to. He is a responsible parent and he had informed the applicant about the defilement as a good parent. He was not residing with any male person in his house.

5. The applicant filed a further replying affidavit dated 11.11.2019 stating that the respondent's replying affidavit was full of falsehood and is a total misrepresentation of material facts. The respondent's allegation on where and when the molestation and defilement occurred remains an allegation and shows the respondent is an irresponsible parent. The P3 form shows the incident was recent as she was still healing. It was the court which ordered the minors be placed at SOS children's center after her arrest in December 2018. On 16.1.2019 she filed an application to have the minors released from the children's home to her and the respondent be granted visitation rights. By consent parties agreed the respondent to have custody of the minors and her to have custody of the minors over the August 2019 school holiday. The respondent however disobeyed the consent order and he released the minors to her for only one week during the August holidays.

6. In addition to the above, she could not in any way influence the minors to say the incident happened after they had been removed from the SOS children's home. The respondent was unfit to have custody of the minors as he could not protect them. He had failed to report the incident to the police when the minor was sexually molested. The minor had been sexually molested severally. She denied trying to register the minors using birth certificates bearing different names. The letter dated 3.4.2019 was malicious and was meant to taint her name.

7. The respondent also filed a further replying affidavit where he annexed the court proceedings for 7.1.2019 to show the applicant had resisted release of the minors to him but preferred the children to be placed in a children's home.

8. The parties filed submissions.

Applicant's submission

9. The applicant urged that it was not in the best interest of the minors to be placed under custody of the respondent, the minors are of tender years. The 1st minor had been sexually molested and though investigations were under way, it would be prudent to have the applicant be given custody. Article 53(1)(d) of the Constitution provides that every child has a right to be protected from abuse, neglect, all forms of violence, inhuman treatment and punishment. Further Article 53(2) provides that the best interest is paramount in every matter concerning a child. The court was also urged to refer to *Section 83* of the *Children's Act*.

10. Further that if the court is inclined to decide otherwise, she urged that she be given custody of the children partly during school holidays as parental responsibility had to be shared equally. See *M.A.A. v. A.B.S*, Mbs civil appeal no. 32 of 2017 and in *N.M.M v. J.O.W*, Kakamega high court Civil Appeal No. 30 of 2016 where the court held that the custody of every young female child should be granted to their father.

Respondent's submission

11. It was urged that the entire appeal was solely on the issue of custody of the minors which the court ordered that it be shared. The application to have the orders set aside and or reviewed was incompetent and untenable. The applicant sought review on the allegation that one of the children had been assaulted at SOS children home. Granting custody to the applicant equals to allowing the entire appeal. The applicant had made a similar application dated 6.1.2019 and the same had been dismissed.

12. The applicant had applied the children be taken to SOS children home and they had been assaulted while there, and not while in his custody. Further the applicant was abusing the court process, she could have appealed against the court's decision dated 6.1.2019. The court was aware of the variation in the school holidays when it issued the court orders. He urged the application be dismissed.

13. The issue that arises for determination is whether the application is merited. The applicant seeks to review the orders of custody of the minors to her and also for the court to vary the custody orders for the minors during the school holidays, to be shared equally, that is the 1st part of the holiday to be given to the applicant and the respondent to have the 2nd part of the school holiday.

14. The parties herein have had a long battle in regard to the custody of these two minors. The matter was heard at the trial court where the applicant instituted this suit. There is a decree dated 13.6.2016 which the applicant seeks for variation orders. The decree states that the custody of the minors is given to both the applicant and respondent. The respondent was to have the custody of the minors during school holidays while the applicant was to have visitation rights over the holidays, the applicant (mother) was to live with the minors for two weeks during the school holidays. It is at this point that the applicant disappeared with the children only to be arrested two and half years after. The court granted custody of the minors to the respondent as per the order dated 24.2.2019. Prior to this, the minors had been taken to SOS children's home. By an order dated 6.3.2019, the minors were released to the respondent. The applicant did not prefer an appeal on this ruling.

15. The applicant then decided to appeal against the decree issued in 2016 and applied for review of such orders on the ground that the minors had been sexually assaulted. The application was brought under *Section 3* and *3A* of the *Civil Procedure Act*. It provides as follows:

Saving of special jurisdiction and powers

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court

16. The court has the power to hear and determine this application. *Section 3* comes in place where there is no specific provision governing the same. However, in review order, the same is governed by *Order 45* of the *Civil Procedure Rules*. It provides as follows: *Order 45, rule 1.J Application for review of decree or order. 1. (1) Any person considering himself aggrieved—*

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

17. In regard to the provision above, the applicant had already appealed and there is a record of appeal in place. The respondent contends that the applicant was seeking for orders which if granted would dispose off the entire appeal. The Constitution in Article 53 provides for the best interest of the child is paramount. It is for that reason that the court in the two cases referred by the applicant, the minors were given to their mother. In this instant case, the applicant (mother) had initially been given custody of the minors but did not obey court orders as to give the respondent the minors during school holidays.

18. The issue that arose is of one of the minors being sexually molested and the applicant alleges that the incident took place when the respondent was with the minors. The respondent disputes the same. The welfare of the minors is paramount and the allegation brought forth

by the applicant is very grave.

19. The application seeks for orders of which if granted shall dispose off the entire appeal. Such should not be allowed. There is no tangible evidence that either by commission or omission the respondent caused one of the minors to be sexually assaulted. There is also no reliable evidence showing that the best interest of the minors will be better served if the applicant is granted their custody. There are orders in place in relation to the sharing of the custody during the school holidays, of which I find sensible and logical.

20. No good case has been presented by the applicant in favour of granting the orders sought. As such the application lacks merit and is dismissed with costs to the respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 10th day of March, 2020

In the presence of:

Ms Nafula for the appellant/Applicant

Mr. Momanyi for the respondent absent

Mr. Gregory – Court assistant