



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
(CORAM: CHERERE-J)
CIVIL APPEAL NO.33 OF 2019
IN THE MATTER OF GBO AND BJO (CHILDREN)

BETWEEN

BAO.....APPELLANT

AND

BTNO.....RESPONDENT

(Appeal against judgment and decree in Kisumu Chief Magistrate's Children's Case No. 39 of 2017 by Hon. A.Odawo (RM) on 23.01.19)

JUDGMENT

1. BTNO (Respondent) filed suit in the lower court against BAO (Appellant) seeking orders THAT:

- a) Legal and actual custody of the child be awarded to the Respondent
- b) Costs of the suit
- c) Such other or further relief

2. The Appellant denied the claim and for: -

- a) Dismissal of Respondent's case
- b) Actual, physical and legal custody of the minors and visitation rights to the Respondent on weekends and school holidays
- c) Maintenance for the minors
- d) costs
- e) Such other or further relief

3. In a judgment delivered on 23.01.19, the learned trial Magistrate found that the Respondent's case proved and gave orders: -

- a) Granting legal custody of the minors to both parties
- b) Granting physical and actual custody of the minors to the Respondent
- c) Granting the Appellant unlimited access to the minors during weekends and school holidays as may be agreed by the parties from time to time
- d) Each party to bear its own costs **The Appeal**

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 18.07.19 filed the Memorandum of Appeal of even date in which she raised 9 grounds but mainly that the order granting the physical and actual custody of the 5 years and 1 ½ years minors to the Respondent is against the interest of the children.

THE EVIDENCE

5. The parties started cohabiting sometimes in 2017 and they were blessed with two children **GBO AND BJO (Children)** born on 01.12.13 and 13.07.16 respectively. It was the Respondent's evidence that the Appellant stopped breast-feeding the youngest child when it was 6 months old and left the matrimonial home sometimes in May 2017 leaving the minor children under his care. He accused the Appellant of having extra marital affairs and for often going on safari leaving the children under his care and the house girl.

6. The Appellant conceded that she stopped breast feeding the youngest child at 6 months after she started taking PEP when she was pricked by a pin that had pricked her house girl who was HIV +. She also conceded that she left the matrimonial home in May, 2017; that the Respondent had been in actual custody of the children whereas she had access to the them on weekends.

SUBMISSIONS BY THE PARTIES

Appellant's submissions

7. The Appellant holds the view that the children who are of tender age ought to have been placed under her actual and physical custody as their mother. Reliance was placed on **J.O. v S.A.O. [2016] eKLR**; **S.O v L.A.M [2009] eKLR** where the Court of Appeal and **Githunguri v Githunguri [1979] eKLR**.

Respondent's submissions

8. The Respondent holds the view that he had established exceptional circumstances that disentitle the Appellant from actual custody of the minors for the reason that she had not shown that she had their interest at heart.

ANALYSIS AND DETERMINATION

9. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See **Sumaria & Another vs Allied Industrial Ltd (2007)2KLR** and **Selle & Another vs Associated Motor Boat Co. Ltd. & Others 1968) EA, 123**).

Applicable Law

10. The Law governing the interests of children is to be found both in the Constitution and the Children's Act among other laws. Article 53 of the Constitution provides that: -

(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; and

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

11. "A child of tender years" is described under section 2 of the Children's Act as "a child under the age of 10 years. The children in this case are about 7 and 4 years respectively and are therefore children of tender years. Section 4(3) of the same Act requires all judicial and administrative institutions, and all persons acting in the name of these institutions to treat the interests of the child as the first and paramount consideration in every matter concerning the child.

12. Section 83 of the Children's Act provides principles to be applied in making custody order in the following terms: -

(1) 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) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;

(f) the customs of the community to which the child belongs;

(g) the religious persuasion of the child;

(h) whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;

(i) the circumstances of any sibling of the child concerned, and of any other children of the home, if any;

(j) the best interest of the child

13. I have considered case law governing custody of children of tender years. In the case of Midwa vs. Midwa [2002] 2EA 453, the Court of Appeal started as follows:

“It is trite law that, prima facie, other things being equal, children of tender age should be with their mother, and where a court gives the custody of a child of tender age to the father, it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule.

14. In a later decision, the same court in the case J.O. v S.A.O. [2016] stated:

“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.”

15. The prima facie rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule.

16. The Court of Appeal in the case of Mehrunnissa Versus Parvez (1981) KLR 547, held that the trite law that custody of minor children should be granted to the mother is not absolute and stated as follows:

“Custody of a child of tender years should always be a mothers’ right except where she has through her own misconduct divested herself of such right”.

17. Case law on exceptional circumstances were restated in the case of S.O v L.A.M [2009] eKLR to be conduct which is disgraceful such as immoral behavior, drunkenness habit and bad company whereas in the case of Sospeter Ojaamong Versus Linet Amondi Otieno NAIROBI HCCC NO. 31 OF 2004 the learned judge stated that such conduct is one showing that the mother is hopeless and is incapable of looking after the said child.

18. The trial court after considering the evidence by both parties found as a fact that that the Appellant had stopped breastfeeding the youngest child at 6 months and had taken to being absent from the children and engaging in extra-marital affairs. The court also after considering the children officer’s report dated 07.02.18 also found that although the Respondent’s job involved travelling, the children were well taken care of by the Respondent’s second wife.

19. The trial court further considered that the Appellant had abandoned the children under the care of the Respondent when they were 3 ½ years and 9 months old found her unfit to get the actual custody of the minors.

20. From the foregoing, I am satisfied that the trial court rightfully considered that it was in the best interest of the children to grant the actual and physical custody of the minors to the Respondent for the reason that the Appellant had by her conduct disentitled herself from exercising her natural right of nurturing the children.

DISPOSITION

21. From the foregoing analysis, the appeal fails. Since this is a family matter, each party shall bear own costs.

DELIVERED THIS 24th DAY OF April 2020

T. W. CHERERE

JUDGE

Court Assistant - Ms. Amondi

For the Appellant - A.B.L.Musiega & Co. Advocates Absent

For the Respondent - Mr. Omondi of Omondi, Abande & Co.Advocates

Order

This ruling has been delivered to the parties by skype and electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March, 2019.