



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO.10 OF 2019

IN THE MATTER OF GBO AND BJO (CHILDREN)

BETWEEN

NMO.....APPELLANT

AND

TAO.....RESPONDENT

(Appeal against judgment and decree in Kisumu Chief Magistrate's Children's

Case No. 39 of 2016 by Hon. P. Mbulikah (RM) on 18.12.18)

JUDGMENT

1. **T.A. O (Respondent)** who is grandmother to **SD, IAM** and **NEM** filed suit in the lower court against his son in law, **N.M.O (Appellant)** seeking the following orders:

- a) **An order vesting actual and legal custody of SD, IAM and NEM to the Respondent**
- b) **An order granting the Appellant access to the children**
- c) **Costs of the suit**
- d) **Such other or further relief**

2. The Appellant denied the Respondent's claim and urged that it be dismissed with costs.

THE EVIDENCE

Respondent's case

3. The Respondent who is maternal grandmother to the minors told court that the Appellant and his wife (her daughter) who is since deceased had a troubled marriage where the children had been exposed to violence. She told court that she was in a position to take care of the children until they attain the age of majority. **SD** one of the minors was 17 as at 2017 when the case was heard. She recalled that the Appellant rarely visited home and when he did, he was violent to her mother. She also recalled that Respondent beat her step-brother one **MD** who then left home and never returned. He described his father as one who had a bad temper and was afraid that he could be violent to her too. It was her evidence that she has been living with the Respondent since their mother passed on, did not know where in Migori Appellant lived and that Appellant has never visited them. It was further her evidence the school fees and upkeep for herself and her siblings was paid by the Respondent and her sons. **PW3 MOO**, the minor's uncle testified that his sister had complained about the Appellant's cruelty and failure to provide for the children. He stated that his mother (**Respondent**) was in a better position to take care of the minors.

Appellant's case

4. Appellant told court that the minors **SD, IAM** and **NEM** were born in 1999, 2011 and 2015. In 2018, **SD** was over 18 years waiting to join

university, **IAM** was in class 8 and **NEM** was in pre-unit. He denied neglecting his wife and children or being violent to his wife. He confirmed that the minors were handed over to the Respondent in 2016 when their mother was lying sick in hospital and that they had been in their custody since then. He explained that he beat up his son MD to discipline him because he was naughty but that they had made up and he was a 4th year university student in 2018.

5. Before writing the judgment, the trial court heard the evidence of **IAM** and **NEM**. **IAM** who was in class 8 in 2018 stated that his father had remarried 3 times in a period of 2 years since her mother died. She did not have kind words for her father, the Appellant. She praised her grandmother and expressed her wish to stay with her. **NEM** who was in pre-unit and lived with the Appellant stated that his father beat him a lot. He expressed his wish to stay with his grandmother.

6. In a judgment delivered on 18.12.18, 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 custody of the children during half of the school holidays**
- d) **Granting Appellant unlimited visitation rights**
- e) **The Appellant was ordered to provide for the maintenance of the children with the Respondent providing if need arose**

The Appeal

7. The Appellant being dissatisfied with the lower court's decision preferred this appeal mainly on the ground that the orders by the learned trial magistrate were not in the best interest of the children.

8. I have considered the appeal in the light of the evidence on record and submissions for both parties.

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 9 and 5 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. 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.

13. 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.”

14. 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.

15. This case presents a challenge for the reason that the mother of the minors is deceased and the dispute is now between the children's father and maternal grandmother with each urging the court to give them custody.

16. I have sought guidance from Section 83 of the Children's Act which provides for 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; (emphasis added)**
- (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 (emphasis added)**

17. After considering the evidence on record, the court ruled that the children had expressed their wish to stay with the Respondent. The court also found that the Appellant had in a period of 2 years since the death of the children's mother married 3 wives and on that basis ruled that the Respondent did not have provide a stable environment for the upbringing of the children.

18. From the foregoing finding of the learned trial magistrate correctly took into account the ascertainable wishes of the children and their best interest and rightly found that the Appellant had by his conduct divested of the right of actual custody of the children.

19. Consequently, I am not persuaded to interfere with the verdict by the learned trial magistrate. Hence, the appeal fails. Since this is a family matter, each party shall bear own costs.

DATED THIS 22nd DAY OF October 2020

T. W. CHERERE

JUDGE

Court For the Appellant For the Respondent - Mr. Kirenga for Kirenga & Company Advocates **Assistant - Ms. Onsongo for** **- Owiti,** **Ms. Otieno &** **Ragot** **Amondi Advocate**