



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 48 OF 2018

IN THE MATTER OF R.A.S AND R.D.S

EOO.....APPELLANT

VERSUS

MSB.....RESPONDENT

(Being an appeal from the judgment and decree of the Honorable Senior Resident Magistrate

G. M. Gitonga (Mr.) delivered on the 11th December, 2017 in Children's Case No. 779 of 2016)

JUDGMENT

1. In a judgment dated 11th December, 2017 the Children's Court at Nairobi in Children's case number 779 of 2016 made orders for maintenance being that the defendant/father do provide for the school fees and related expenses of the two children at the older child's current school or any other school to be agreed upon by the parties. Both parties were to take care of the minors' medical care needs through the existing medical covers taken out by the parties, or by way of cash whenever circumstances so demand. The plaintiff/mother was to take care of the minors' food and clothing needs. The party having actual custody of the children during school holidays would take care of the children's needs as they would arise.
2. The orders of the children court provoked the filing of an appeal, prompting the Appellant to approach this court by way of a Memorandum of Appeal dated 5th April, 2018 and filed on 27th April, 2018.
3. The Appellant is asking the court to set aside the decree and judgment of the Children's Court in the interest of justice and order that: the school fees and related expenses of the children be shared equally between the parties, or that the Respondent meets the difference of fees at the children's current school and in the alternative, the Appellant pays school fees and related expenses in an alternative affordable school; the Respondent do produce evidence of her monthly salary/income for effective and efficient determination of maintenance orders; the Appellant do have actual custody, care and control of the minors and in the alternative that the parties have shared actual custody, care and control of the minors.
4. In his grounds of appeal, the Appellant argues that the trial magistrate misdirected himself by finding that if the younger child was to join his elder sibling's school it would be expensive for the Appellant to pay fees for both children yet he concluded that the Appellant should pay school fees and related expenses at the school for both children. Further that in determining the terms of maintenance the trial court failed to consider the earning capacity of the parties, and the Respondent filed only an affidavit of means and not evidence of her monthly salary or income.
5. The appeal came up for hearing on 24th January, 2019 where upon application by Counsel for the Respondent the court directed that the appeal be disposed of by way of written submissions.
6. The Appellant in person filed written submissions dated 21st February, 2019 in support of his case in which he submitted that it will be in the best interest of justice if the appeal is allowed. In opposition, learned Counsel Mr. Chege filed written submissions dated 9th April, 2019 on behalf of the Respondent in which he submitted that the appeal as filed is an abuse of court process and ought to be dismissed with costs for lack of merit.
7. I have carefully considered the appeal herein, the grounds proffered, the orders appealed against and the written submissions filed by both the Appellant and the Respondent to determine whether the maintenance orders, in the terms granted by the trial court are justified and whether the grant of custody to the Respondent is in the best interest of the children.

8. It is the Appellant's case that the learned trial magistrate granted maintenance orders without having a full picture of the financial position of the parents of the subject children. That whereas the Respondent filed an Affidavit of means, she did not indicate her monthly income instead enumerating her expenditure. He urged that without comprehensive affidavits of means from both parties, the Court could not have come to an informed decision on how to apportion maintenance between the parties. That to his knowledge, the Respondent has a higher earning capacity, earning almost three times his monthly income.
9. The Appellant contended that **section 94(1)(a)** of the **Children Act No. 8 of 2001** provides that an order made by the court should consider the income or earning capacity, property and other financial resources which the parties or any other person in whose favour the court proposes to make the order, have or are likely to have in the foreseeable future. To buttress his argument, the Appellant cited the case of **Najma Ali Ahmed vs. Swaleh Rubea, Malindi H.C. Civil Appeal No. 22 of 2007 [2010] eKLR** in which the court set out the principles of determining maintenance.
10. In pertinence to payment of school fees and related expenses, the Appellant submitted that in ordering him to solely cater for the school fees and related expenses of both minors, the trial court failed to exercise its discretion judiciously. This he says is owing to the fact that the Respondent is a highly paid professional with a higher earning capacity. He cited the case of **AMK vs. SDM [2018] eKLR** in which the court held that **Article 53(1)(e)** of the **Constitution** does not mean 50-50 financial contribution by each parent.
11. Mr. Chege opposed the Appellant's arguments. He argued that the Children's court did not order the Appellant to pay school fees and related expenses for both minors in the older child's current school, but rather placed the discretion to decide which school the minors should attend on both parties, subject to mutual consent and the best interest of the children. Counsel referred to the relevant part of the judgment which reads "*The Defendants/father shall take care of the two children's school fees and related expenses at the elder child current school or any other school to be agreed upon by the parties*".
12. A reading of the relevant paragraph of the judgment of the Children's Court reveals that while the Court ordered the Appellant as father of the children to cater for their school fees, the Court also directed that the decision about which school the children would attend should be upon both parties. The Court did take note of the fact that it will be expensive for the Appellant to pay school fees for both minors at [particulars withheld] which school the older child attends.
13. In addition to paying school fees and related expenses, the Respondent also has the obligation of taking care of other needs of the minors whenever they arise when he has custody of the children. Both parties are charged with catering for medical care needs of the minors through existing medical covers or cash whenever circumstances so demand.
14. As rightfully pointed out by the Appellant, it is evident from the record that while the Respondent filed an affidavit of means, she only listed her monthly expenditure which amounts to about Kshs. 79,000/- but failed to state her income. The Appellant on the other hand indicated that he earns a monthly net of Kshs. 100,000/-. It is therefore evident that the Children's Court did not peg the apportionment of maintenance on any concrete evidence of the earnings of the parents of the subject children.
15. On the issue of custody, the Appellant submitted that since the grant of custody of the children to the Respondent, he has faced frustration trying to obtain access to the children. That despite being their father, he has been relegated to having to pass glances at the Children while they are in school. He urged that the best interest of the children are best served when both parents are present in their lives during their formative years, and asked the court to grant him custody of the children.
16. In reply, Mr. Chege submitted that the Appellant has been an absentee father who did not pay any attention to the minors until after the suit was instituted in the Children's Court. That since then, the Appellant has only paid school fees for the older child. Counsel urged that it is curious that the Appellant is asking the court to grant him custody of the children and on the other hand stating that he is not amenable to catering for the two minors.
17. It is Mr. Chege's submission that in granting actual custody, care and control of the minors to the Respondent the Children's Court considered a number of factors being that: it was the Respondent who solely maintained the minors from the onset; the Appellant was fixated on financing his lifestyle as opposed to catering for his children; the Respondent currently resides in what was the parties' matrimonial home and which the minors have always considered as home.
18. To buttress his arguments, Mr. Chege referred to the case of **M.A. vs. R.O.O High Court Civil Appeal No. 21 of 2009 [2013] eKLR** in which Kimaru J held that the best interest of the child shall constitute in the child not being destabilized from the environment he is currently living in, which environment includes where the child is sheltered and is educated.
19. Mr. Chege contended that the Respondent is a woman of means who will offer the children a better upbringing in light of the financial constraints the Appellant alleges he has. That uprooting the children from a stable and conducive environment with the Applicant's family and school community will adversely affect the children. Counsel urged that any reasonable father would want his children to live in an environment best suited for their upbringing, especially in a case such as this one where the Appellant has been granted unlimited access to the children.
20. It is Mr. Chege's submission that in granting custody to the Appellant, the Children's Court took into account the age of the subject children who were born in the year 2011 and 2015 respectively and are therefore children of tender years within the meaning of **section 2** of the **Children Act**. Counsel urged that the prima facie rule is that children of tender years should be with their mother as held by the Court of Appeal in **Githunguri vs. Githunguri Civil Appeal No. 30 of 1978 [1979] eKLR**.
21. Counsel urged that whereas custody of children of tender years may be granted to the father, this is only where it is demonstrated that there are special and peculiar circumstances to disqualify the mother from being awarded custody. That in the present case, the Appellant failed to demonstrate any such circumstances.

22. This court is alive to the fact that ordinarily, custody of children of tender years will often be granted to the mother of the children unless it is demonstrated that there are exceptional circumstances not to grant the orders in favor of the mother. In arriving at such a conclusion, the court must be guided by the principle of the best interest of the child which is paramount as provided under **Article 53** of the **Constitution** and **section 4(3)** of the **Children Act**.

23. In any event, the Children Court ordered that the Appellant shall have access to the children on every alternate weekend from Saturday at 9.00 a.m. to Sunday 5.30 p.m. during school days and will also have access for half of the school holidays. This will ensure that both parents are present in the lives of the Children during their formative years. The custody orders were therefore issued for the benefit of the children.

24. I note that in his submissions before the Children's Court, the Appellant confirmed that their arrangement at the time was working well and only asked the court to grant him access on alternate weekends which the court did. The Appellant also asked that access be structured in a manner that would enable the children to spend time with their grandparents in Siaya during the school holidays. To meet this end, the Children's Court granted the Appellant access during half of the school holidays. I therefore find that whereas the Appellant was not granted custody of the minors by reason of their tender years, he was granted reasonable access to the children.

25. It is also noteworthy that in seeking to have custody of the children, all the Respondent did was state that there are unique circumstances which should have been taken into account by the court in granting the custody orders. He however did not specify the circumstances. In the premise therefore, I find that the Children's court exercised its discretion judiciously in granting custody to the Respondent. It is worth repeating that the best interest of children and their welfare are paramount and superior to the rights and wishes of their parents.

26. In view of the foregoing, this court declines to grant custody to the Appellant as sought. It is evident from the judgment that the presiding magistrate was cognizant of the provisions of **Article 53** of the **Constitution** and was properly guided thereby, when he made his determination to grant custody to the Respondent in line with the best interest of the children.

27. With regard to the terms of maintenance, I note that the Children's Court failed to conduct a proper inquiry and assessment into the level of the incomes of both parents and their respective financial responsibilities in apportioning maintenance. While the Appellant indicated his monthly income in his affidavit of means, all the Respondent indicated in her affidavit of means was her monthly expenditure. The court took note of the fact that it ought to consider the earning capacity of the parties in apportioning parental responsibility but went ahead to make orders without knowledge of the Respondent's income stating that the evidence was not produced before it.

28. Bearing in mind that orders of maintenance, like all other orders of court, must pass the test of practical enforcement, and guided by the principle of the best interest of the child, I remit this case back to the Children's Court only to the extent that the court shall conduct a proper inquiry and assessment into the financial ability of each parent to apportion responsibility equitably. This is because the quantum of maintenance and school fees payable is dependent on the available means of a party on whom such responsibility is placed.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **25th** day of **June, 2019**.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Appellant in Person.

In the presence ofAdvocate for the Respondent.