



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 10 OF 2017

M N N.....APPELLANT

VERSUS

M O K & C A S MINORS

suing thro' their father H O S.....RESPONDENT

(Being an Appeal from the Judgment and Decree

in Kisumu CMChildren Case No. 40 of 2016

delivered by Hon. P. Shinyanda (SRM)

on 9th January, 2017)

JUDGMENT

1. **M O K & C A S MINORS suing thro' their father H O S (*hereinafter referred to as respondent*)** sued **M N N (*hereinafter referred to as appellant*)** in the lower court claiming:

- a) **Legal custody of the 2 minors of the marriage**
- b) **Defendant be compelled to pay maintenance for the minors**
- c) **Permanent orders restraining the defendant, her servants and servants from interfering with the minors in any manner**
- d) **Costs of the suit**

2. The defendant/appellant filed a statement of defence and counterclaim and prayed for orders that:

- a) **The legal custody of the children of the marriage be granted to her**
- b) **Plaintiff/ respondent be ordered to pay Kshs. 51,000/- monthly for maintenance of the minors**
- c) **Costs of the suit**

3. In a judgment delivered on 9th January, 2016; the learned trial magistrate dismissed the counterclaim and allowed the plaintiff/respondent's claim and made orders granting joint custody of the minors to the defendant mother and the plaintiff father; the actual custody of the children to the plaintiff, father, with reasonable access by the appellant and shared maintenance responsibilities.

The Appeal

4. Aggrieved by the said judgment; the defendant, mother, filed a Memorandum of Appeal dated 24th January, 2017 setting out 5 grounds which I have summarized into 3 grounds to wit:

- i. The learned trial magistrate erred in law and in fact in awarding custody of the minors herein to the respondent yet all the minors are children of tender years whose best interests lie with the appellant
- ii. The learned trial magistrate erred in law and in fact by failing to hold that there were no exceptional circumstance warranting the granting of legal custody of the minors of tender age to the respondent
- iii. The learned trial magistrate erred in law and in fact by failing to appreciate that the appellant had taken all required reasonable steps to prove that she is able to take care of the minors

SUBMISSIONS BY THE PARTIES

5. On 27th February, 2018, the parties' agreed to canvass the appeal by way of written submission which the appellant dutifully filed.

Appellant's submissions

6. Appellant holds the view that the children of the marriage and especially C A S, a girl aged 6, are of tender years and she as the mother should have been awarded actual custody. Appellant placed reliance the following authorities: -

1. **K M M v J I L [2016] e KLR**
2. **GITHUNGURI v GITHUNGURI [1979] e KLR**
3. **J K W v M A A [2015] e KLR**
4. **N M M v J O W [2016] eKLR**

The evidence

7. Respondent testified that he was a primary school teacher at [Particulars withheld] primary school and a part time lecturer at Maseno University. He stated that he and the appellant married in 2009 and were blessed with 2 issues. It was his evidence that they established their matrimonial home in several areas due to their nature of work as teachers the last being at Katito where appellant worked as a teacher. He stated that appellant had deserted the matrimonial home in 2016 and had taken the children to stay with her mother in Bungoma while she worked in [Particulars withheld] Secondary School in Katito in Nyakach Sub-County. That appellant later moved from their rental house in Katito and respondent did not know where she stayed. He stated that he lives in his own house at Gambogi where he also has rental houses where his close relatives stay.

8. Appellant stated that she was a teacher and that the marriage between her and respondent broke in 2016. She conceded that she had taken the children of the marriage to stay with her mother in Bungoma. She also conceded that her mother is sickly.

ANALYSIS AND DETERMINATION

9. A child of tender years is defined under section 2 of the Children Act to mean "a child under the age of ten years". The children herein C A S and M.O were 6 and 3 years at the time the impugned judgment was delivered and are now 7 and 4 years old respectively.

10. Article 53(2) of The Constitution of Kenya, 2010 provides that: "***A child's best interests are of paramount in every matter concerning the child***".

11. In **Githunguri v Githunguri [1979] e KLR**, the Court stated;

"When dealing with the paramount consideration of welfare, especially where young female children are concerned, there is a rule that the mother is normally the person who should have custody. As Roxburgh J said in Re S (an infant) [1958] 1 All ER 783, at 786 and 787:

"I only say this; 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."

12. In **K.M.M v J. I. L [2016] eKLR**, the court stated: -

"It is settled law that a child of tender years' best interests and welfare are where legal custody is awarded to the mother barring extenuating circumstances that would prevent the mother from providing protection and care of the child".

13. In **J K W v M A A [2015] eKLR**, the court reiterated the principle in **Githunguri v Githunguri (Supra)** and state that: -

"In addition, the general principle that has been approved by our courts is that where custody of a child of tender years is in

issue, is that the mother should have the custody unless special circumstances are established to disqualify the mother from having of such in child.”

14. The trial court’s decision may only be interfered with by an appellate court upon the principles set out in **Mbogo v. Shah** (1968) EA 93, 96 (per Sir Charles Newbold, P) that –

“[A] Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

15. In her judgment, the trial court denied appellant actual custody of the children and rendered itself as follows:

The defendant is unsettled.

- a) She has not disclosed her place of residence
- b) She has admitted that the children are in the custody of her ailing mother aged 57 years
- c) She admitted she is not able to take care of the children alone without the help of her mother

d) She failed to demonstrate that she is able to safeguard the security and welfare of the children when she testified that a house help had taken off with the minor M O without her knowledge

16. The court also rendered itself as follows regarding the respondent: -

- a) He has provided a continued and stable home environment at Gambogi
- b) The house is located close to his extended family and not far from Bungoma where the extended family of the appellant stays and Katito where she works
- c) He described social amenities such as schools, police station and market are near the homestead

d) No evidence was adduced of drug or alcohol abuse

17. I have considered the authorities cited by counsel for the appellant *vis a vis* the evidence on record. Appellant has failed to demonstrate that the trial court, in granting actual custody of the minors to the respondent, failed to take into account their best interests and welfare. I am satisfied that the respondent demonstrated special circumstances to disqualify the appellant from having actual custody of the children, their tender age and the fact that C A S is a girl child notwithstanding.

18. I am also satisfied that the order granting joint custody of the minors to the appellant and respondent conforms to the provisions of **Article 53(2)(e)** of the Constitution which provides that every child has the right, ***“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.”***

19. In view of the finding I have made, the appeal fails and is dismissed with costs to the respondent

DATED, DELIVERED AND SIGNED ON THIS 26th DAY OF July 2018

T.W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For Appellant - Mr. Orieyo

For respondent - N/A