REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL NO. 35 OF 2017

V N M ..... APPELLANT

VERSUS

S M M ..... 1ST RESPONDENT

M N ..... 2ND RESPONDENT

JUDGMENT

(An Appeal from the Judgement of Hon. V Yator, Senior Resident Magistrate of 23.10.17 in Tononoka Children's Court Cause No. 109 of 2017)

1. The Appeal herein arose from the Judgment of Hon. V. Yator, Senior Resident Magistrate of 23.10.17 in Tononoka Children's Court Cause No. 109 of 2017. The Appellant had sought orders *inter alia* for return of the minor child known as V W to her by the Respondents. She also sought custody and maintenance of the child. In the impugned Judgment, the learned Magistrate declined to have the child returned to the Appellant. Joint custody was granted to the Appellant and the 1st Respondent with actual physical custody being granted to the 1st Respondent. The Appellant was to have unlimited access during half the school holiday. No order for maintenance was granted.

2. The Appellant being aggrieved by the Ruling filed the Appeal herein, the summarized grounds of which are that the learned Magistrate erred in law and fact by:

a) Granting actual physical custody of the female child of 2 years and 4 months to the 1st Respondent who kept the child away from the Appellant and also relegated custody to the 2nd Respondent denying the child her constitutional right to be with her biological parents.

b) Failing to take into account the recommendations made in the social inquiry report of 25.7.17 that it was in the best interest of the child to be with the Appellant with access to the father.

c) Ignoring evidence that the child was abducted from the Appellant's custody and finding that the Appellant voluntarily relinquished custody of the child and in turn condemned her to a life of suffering in the hands of a bitter 3rd party.

d) Finding that the Appellant had slept on her rights and that the filing of the suit was an afterthought.

e) Showing bias against the Appellant by deferring the order of access to the child by the Appellant in spite of noting that the 1st Respondent lives far away.

3. The background of this matter gleaned from the record is that the child herein is a product of an illicit relationship between the Appellant and the 1st Respondent. The 1st Respondent is married to the 2nd Respondent with whom they have 5 children. The child was born on 8.7.15. The Appellant lived with the child until 13.7.16 when she was taken by the 1st Respondent. According the Appellant, the child was forcibly taken away from her while the 1st Respondent claims that the Appellant voluntarily surrendered the child to him. The 1st Respondent took the child to Wundanyi to stay with the 2nd Respondent and their other children. The Appellant lives in Mombasa while the 1st Respondent lives in Kanamai Kilifi County where he works. The Appellant claimed that she was denied access to the child and was threatened by the Respondents and warned never to set foot at the Respondent's home where the child was staying.

4. The Appellant prayed that the Appeal be allowed and that the judgement of the trial Magistrate be set aside. She also sought the following:

(a) Actual custody of the child with limited and supervised access to the 1st Respondent.

(b) An order barring the 2nd Respondent from intermeddling with the affairs of the child.

(c) Monthly maintenance for the child at Kshs. 10,000/=, medical cover and upon attaining school going age, school fees and school related expenses for the child in the same manner as with his other children with 2nd Respondent.

(d) Costs

5. Parties filed submissions which I have given due consideration to. Although the appellant has raised several grounds of appeal, the only issues sufficient to dispose of this Appeal are:

i) Whether the learned Magistrate erred in finding she had jurisdiction to entertain the suit.

ii) Whether the learned Magistrate erred in granting actual physical custody of the child to the 1st Respondent.

iii) Whether a Maintenance Order should be made against the 1st Respondent

iv) Whether an order barring the 2nd Respondent from intermeddling with the affairs of the child.

Did the learned Magistrate err in finding she had jurisdiction to entertain the suit

6. It was submitted for the Respondents that in their defense and counterclaim they had denied jurisdiction of the trial Court and had put the Appellant on notice that they would at the earliest opportunity object to the jurisdiction of the Court based on Section 15 of the Civil Procedure Act. It is the Respondents' case that at the time of filing the suit in the lower Court to date, the 1st Respondent resided and worked for gain in Kanamai, Kikambala, Kilifi County while the 2nd Respondent resided and worked for gain in Wundanyi, Taita Taveta County and not in Mombasa. Consequently the lower Court in Mombasa had no jurisdiction over the matter. The Children's Court with jurisdiction was either the Kilifi or Wundanyi. In her judgment, the learned Magistrate found that the preliminary objection on jurisdiction ought to have been raised at the earliest time and that it was too late in the day to raise the same.

7. The record does show that the Respondents in their Defense had denied the jurisdiction of the Court and had put the Appellant on notice that they would at the earliest opportunity raise a preliminary objection on the jurisdiction of the Court. I have carefully perused the proceedings and note that on 31.5.17, counsel for the Respondents informed the Court:

"I had indicated I was going to raise a P.O. on jurisdiction of this Court. This matter ought to have been filed in the Kilifi Court."

Counsel for the Appellant indicated that the parties could negotiate with a view to the child being given to the Appellant. The Court then gave parties time to negotiate and the matter would be mentioned later. When the matter was mentioned later, the Court was informed that no consent had been reached whereupon the Court gave parties 2 weeks to continue with talks with a view to settlement failing which the matter would proceed to hearing. In the subsequent times that the matter came up right up to the conclusion of the hearing, the issue of jurisdiction was not raised again by the Respondents. The issue later resurfaced in their written submissions.

8. Section 15 of the Civil Procedure Act provides:

Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—

(a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or

(b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

9. It is acknowledged that the 1st and 2nd Respondents at the time the suit was filed lived and worked in Kilifi and Wundanyi respectively. The suit therefore suit ought to have been filed in Kilifi or Wundanyi as per Section 15 of the Act. Did this fact oust the jurisdiction of the Children's Court in Tononoka Mombasa?

10. Majanja, J. had occasion to consider a similar issue in Betty Nyamusi Machora v Betty Nyanduko Makori [2018] eKLR and had this to say:

In my view, section 15 of the CPA provides for the convenient forum of instituting a suit. It does not divest the magistrates court of jurisdiction, hence a defendant who is dissatisfied with the place where the suit has been filed is entitled to invoke section 18 of the CPA and apply to the High Court to transfer the suit to the appropriate forum. This position still obtains following

repeal of the MCA. The Magistrates Court Act, 2015 provides for the jurisdiction of the Magistrates Court on the basis of subject matter and/or its value; it does not limit the territorial jurisdiction of the Magistrates Court.

11. I agree with Majanja, J. that the place of filing suit set out in Section 15 of the Civil Procedure Act is for convenience of the parties. The provision seeks to ensure that undue hardship is not visited upon a party in defending a suit. The place of filing suit does not go to the jurisdiction of the Court. The filing of the suit in Tononoka, Mombasa as opposed to Kilifi or Wundanyi may have inconvenienced the Respondents but it did not divest that Court of jurisdiction to entertain the matter. In any event the Respondents were at liberty to move to the High Court to seek transfer of the suit under Section 18 of the Act to a more convenient Court. In the circumstances, my finding is that the argument by the Respondents lacks merit.

Did the learned Magistrate err in granting actual physical custody of the child to the 1st Respondent.

12. For the Appellant, it was submitted that the lower Court was informed of her efforts through the FIDA-Kenya, Kijipwa/Kanami Police Station and the Children's Office in Kilifi to get the child back without success. The Court however dismissed the efforts. The Appellant submitted that it was unfair for the Court top find that her inability to get the child back was inaction on her part. The Appellant further faulted the learned Magistrate for denying the actual physical custody of the child and awarding the same to the 2nd Respondent, a party with no lawful guardianship over the child, thereby denying the child the much needed love, care and attention of her biological mother and father who lived miles away and only saw the child once in 2 months.

13. For the Respondents, it was submitted that from the evidence, the Appellant voluntarily relinquished custody of the child to the 1st Respondent and the allegation of abduction was an afterthought. It was further argued that the learned Magistrate correctly analyzed the facts and applied the law in granting actual physical custody of the child to the 1st Respondent. Contrary to the allegation of the Appellant, custody was not granted to the 2nd Respondent.

14. The record shows that the learned Magistrate found that in spite of the child being of tender years, exceptional circumstances existed to deny the Appellant as the mother, custody of the child. She stated in part:

In the instant case the child was voluntarily handed over to the 1st Defendant who is being assisted by the 2nd Deffendant to take care of. The child has been in the custody of the 2nd Defendant since 5.7.16…The child is used to her current home. She is in good health and knows no body other than the 2nd Defendant as the mother. The Plaintiff slept on her rights and it is the Court's finding that the case before the Court is an afterthought as she had relinquished custody to the first Defendant … I find that the actions of the Plaintiff of relinquishing custody to the Defendant and the fact that the child has been staying with the Defendants in the past one year as an exceptional circumstance that she was not ready or able to take care of the child therefore leading her to hand over the child of tender years.

15. The Children Act provides for principles that are to be applied in making a custody order. Section 83 provides:

(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.

16. The circumstances under which the child ended up with the Respondents remain disputed. The Appellant insists that child who was barely 1 year old was abducted while the Respondents maintain that the child was voluntarily handed over to them. Be that as it may, it is common ground that the child was away from the Appellant from 13.7.16 up to 29.1.18 when the Court released her to the Appellant. The child was in actual physical custody not of her father the 1st Respondent, but of the 2nd Respondent. The child was kept away from her biological mother for 1½ years. During this time, the child was led to believe that the 2nd Respondent was her mother yet her own biological mother was alive. The child was neither with the biological mother nor the biological father but left to a third party. This in my view is

nothing short of cruel and militated against the best interest of the child. The learned Magistrate erred in not taking into account the conduct of the 1st Respondent, the express wishes of the Appellant and the best interests of the child as required by Section 83 of the Act. The decision of the learned Magistrate to award actual physical custody of the child to an absentee father militated against the best interests of the child as provided for in Article 53(2) of the Constitution

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

17. Further, the learned Magistrate erred in disregarding the undisputed fact that the child was not in the actual physical custody of the 1st Respondent. He did not personally exercise parental care over the child but delegated this responsibility to his wife in Wundanyi, Taita Taveta County while he was in Kanamai, Kilifi County where he lives. The decision by the learned Magistrate to grant to the 1st Respondent actual physical custody of the child resulted in the child being denied parental care of both parents thereby negating the constitutional right of the child guaranteed by Article 53(1)(e) of the Constitution of Kenya 2010 which provides:

> ***(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;***

18. It is common ground that child is female and of tender years of about 3 years now having been born on 8.7.15. Courts have consistently upheld the general rule that custody of children of tender years should be vested in their mother unless there are sufficient reasons or exceptional circumstances to depart from this *prima facie* rule. In the Court of Appeal case of Githunguri v Githunguri [1979] eKLR Law, JA. opined:

> ***"In the instant case, the learned judge gave the husband the custody of the two little girls because, in his words:***
>
> ***"I do feel that he is in a better position and is generally a more suitable person to look after and to have custody of them."***
>
> ***He did not say that the mother was an unsuitable person, or that she was unfit to have the care and custody of her little daughters. In my view, there are no 'exceptional circumstances' shown in this case to justify depriving the mother of her natural right to have her children with her, so as to exclude the prima facie, or generally accepted rule or principle recognised in the cases to which I have referred in this judgment. "***

19. In her judgment, the learned Magistrate stated :

> ***I find that the actions of the Plaintiff of relinquishing custody to the Defendant and the fact that the child has been staying with the Defendants in the past one year as an exceptional circumstance that she was not ready or able to take care of the child therefore leading her to hand over the child of tender years.***

20. The learned Magistrate stated that the child is used to her current home, is of good health and knows nobody other than the 2nd Defendant as the mother. This is a rather unusual finding of the Court. The question one would ask is why the child should be 'given' another mother yet her own biological mother is alive and able and willing to take care of her. Had she not been willing she would not have filed the matter in Court nor indeed this Appeal. The other question is why would the 1st Respondent deny the child an opportunity to know her biological mother and be very comfortable with the child believing that the 2nd Respondent is her mother?

21. In the case of J.O. v S.A.O. [2016] eKLR, the Court of Appeal 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."***

22. In the present case, other than the Appellant voluntarily handing over the child to the 1st Respondent (which is disputed), it was not shown that the Appellant is an unsuitable person or that she is unfit to have care and custody of her child. The appellant is not unsettled. She has not taken a new husband. Her living quarters as per the social inquiry report are not in a deplorable state. It was also not shown that her conduct is disgraceful and/or immoral. In my view, no exceptional circumstances were shown in this case to justify depriving the Appellant of her natural right to have her child with her, so as to exclude the prima facie, or generally accepted rule. In the premises, my finding is that the learned Magistrate erred in drawing the conclusion that exceptional circumstances existed which warranted denying the Appellant custody of the child.

Whether a Maintenance Order should be made against the 1st Respondent

23. The Appellant sought an order that the Respondent pays the monthly sum of Kshs. 10,000/= as maintenance for the child. Article 53(1)(e) of the Constitution of Kenya 2010 provides that parental care is a shared responsibility of both parents. The article further states that parental care includes equal responsibility of the mother and father to provide for the child. When considering an application for maintenance, the Court shall be guided by the following considerations stipulated in Section 94 (1) of the Act:

(a) 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 an order, have or are likely to have in the foreseeable future;

(b) the financial needs, obligations, or responsibilities which each party has or is likely to have in the foreseeable future;

(c) the financial needs of the child and the child's current circumstances;

(d) …

24. In her testimony in the trial Court, the Appellant stated that she earned Kshs. 15,000/=. The 1st Respondent told the Court that he earns a net salary of Kshs. 20,000/=. He further stated that he used to pay a monthly rent of Kshs. 3,000/= for the Appellant. He has 4 daughters with the 2nd Respondent who in 2017 were aged between 8 years and 24 years. The 2nd Respondent assists him with the upkeep of their children. The 2nd Respondent told the Court that she is a farmer who keeps cows and grows vegetables.

25. Both parties earn an income and both have financial needs and responsibilities. In addition to his income, the 1st Respondent is assisted by the 2nd Respondent through her farming in the upkeep of their children. The current needs of the child include food shelter and clothing but will shortly include school fees as the child is over 3 years old. Both parties should bear the parental care responsibility.

Whether an order barring the 2nd Respondent from intermeddling with the affairs of the child

26. The Court notes that the 2nd Respondent is married to the 1st Respondent and was living with the child in Wundanyi during the period when the child was taken away from the Appellant. I find that her conduct of keeping the child from her biological mother for the period in question was not in the best interest of the child.

27. Before I conclude, I wish to state that the Court has noted the conduct of the Respondents in this matter. They kept the child away from the Appellant for a period of over 1 year. They also defied this Court's order to produce the child in Court. It is only when the 1 st Respondent a police officer of 30 years standing was committed to civil jail for contempt that the 2nd Respondent and child were brought to Court. This conduct raises doubt as to the suitability of the Respondents to have actual physical custody of the child.

28. Having evaluated all the material placed before me, I draw the conclusion that the appeal is merited and the same is allowed. The judgment of the Senior Resident Magistrate of 23.10.17 is hereby set aside. I make the following orders:

i) Joint legal custody of the child is awarded to both the Appellant and the 1st Respondent.

ii) The Appellant shall have actual physical custody of the child.

iii) The 1st Respondent shall have unlimited access to the child supervised by the Children's Officer in the area of the Appellant's residence.

iv) The 2nd Respondent is hereby barred from intermeddling with the affairs of the child.

v) The 1st Respondent shall pay to the Appellant the monthly maintenance for the child in the sum of Kshs. 5,000/= not later than the 5th day of each month.

vi) Upon the child attaining school going age, the 1st Respondent shall pay school fees for the child in the same manner as his other children with 2nd Respondent.

vii) The Respondents shall bear the Appellant's costs in this matter.

DATED, SIGNED and DELIVERED in MOMBASA this 21st day of September 2018

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M. THANDE

JUDGE

In the presence of: -

.....for the Appellant

.....for the Respondents

.....Court Assistant