



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO.63 OF 2016

BETWEEN

J A.....APPELLANT

AND

J O.....RESPONDENT

(Appeal against judgment and decree in Kisumu Children's Case No. 52 of 2014 delivered by Hon. T.Obutu (PM) on 5th August, 2016)

JUDGMENT

1. JAPHETH OTONDI(*hereinafter referred to as respondent*)sued J A (*hereinafter referred to as appellant*) in the lower court claiming:

- a) Legal and actual custody of minors M.A and T.A with access and visitation rights to the appellant*
- b) In the alternative, access and visitation rights*
- c) Costs of the suit*
- d) Any other relief*

2. The defendant/appellant did not defend the suit but was allowed to file her written submissions before the delivery of the judgment.

3. In a judgment delivered on 5th August, 2016, the learned trial Magistrate **found that the respondent had proved his claim and** granted the following orders:-

- a) That legal and actual custody of minors M/A and T.A is hereby awarded to the plaintiff till they attain the age of maturity*
- b) The defendant will have access and visitation rights of the minors during school holidays but with prior notification and arrangement with the plaintiff*

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 24.8.16 filed the Memorandum of Appeal dated 19.8.16 in which she raised 6 grounds which I have summarized into 2 grounds that:-

- 1) The Learned Magistrate erred in law and in fact when he held that custody of the female minors of tender years should be awarded to the respondent**
- 2) The Learned Magistrate erred in law and in fact when he failed to consider that the female minors of tender years had stayed with the appellant for three years preceding the filing of the case and that their place of custody was not to be changed without a valid reason**

SUBMISSIONS BY THE PARTIES

5. When the appeal came up for mention on 19.4.18, Mr. Bagada, advocate for the appellant submitted that appellant was wholly relying on the grounds of appeal and submission filed in the lower court. The respondent likewise submitted that he was relying on the evidence in the lower court and submission filed therein.

THE EVIDENCE

6. The respondent told court that he married the appellant under Luo customary law in 2008 and they were blessed with the 2 minors who were 7 and 4 years respectively. The respondent informed the court that appellant left the matrimonial home in 2012 when she fell sick, thereafter got married and left the two minors in custody of her mother as a result of which they were denied parental care.

SUBMISSIONS BY THE PARTIES

Appellant's submissions

7. The appellant holds the view that she is best suited to have custody of the minors since they are female children of tender years. She placed reliance on the following authorities and provisions of the law.

- i. Article 53(2) of the Constitution
- ii. Section 2 of the Children's Act
- iii. Section 4(3) of the Children's Act
- iv. Githunguri v Githunguri [1979] eKLR
- v. A.A versus V.O[2011] Eklr

Respondent's submissions

8. The respondent holds the view that he is best suited to have custody of the female minors since the appellant has remarried and abandoned the children to stay with her mother.

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.**

10. The Law governing the interests of children especially regarding custody is found 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 were 4 and 7 years as at 2016 and were therefore children of tender years. Section 4(3) of the same Act (3) 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 **Githunguri v Githunguri [1979] eKLR** the court held:-

"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".

13. The court further relied on the decision in **Re S (an infant) [1958] 1 All ER 783, at 786 and 787** where Roxburgh J stated:-

"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."

14. This principle was restated in the case of **A.A v V.O [2011] eKLR** where the court finding no exceptional circumstances to deny the

mother custody of a female minor granted joint custody to both parents with care and control of the said minor being granted to the mother.

15. In the case of MEHRUNNISSA VERSUS PARVEZ (1981) KLR 547, the Court of Appeal held that:-

“That 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”.

16. The issue for consideration by this court is whether the trial court in granting custody of the female minors to their father made sure that there really were sufficient reasons to exclude the prima facie rule.

17. Case law on exceptional circumstances were stated in the case of S.O. VERSUS L.A.M. NAI. CA NO. 175 OF 2006 to be conduct which is disgraceful such as immoral behavior, drunkenness habit and bad company while 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 evidence before the trial court that the appellant had remarried and abandoned the minor children to stay with her aged and ailing mother was not controverted. From the foregoing, I am satisfied that the trial court rightfully considered that it was in the best interest of the children to grant custody of the female minor children to the father for the reason that the appellant had by her conduct disintitiled herself from exercising her natural right of nurturing her children.

19. Prior to writing this judgment, I called for a Children Officer’s report to acquaint myself with the status of the children since they were placed in the custody of the respondent. The report dated 28th October, 2018 and filed on 31st October, 2018 confirms that the appellant has indeed remarried and her husband is unwilling to assume parental responsibility of the children. The respondent is still single and singlehandedly takes care of the minors and the appellant frequently visits and supports the children. An interview with the children confirmed that the respondent has not remarried and that appellant frequently visits them.

DISPOSITION

20. In the spirit of Article 53 (1) (e) the appeal succeeds. The order of the trial court is set aside and substituted with the following orders:

- a) ***Both the Appellant and the Respondent herein will have joint custody of the minors M.A and T.A***
- b) ***The respondent will have the care and control of the said minors.***
- c) ***The Appellant will have unlimited access to the minors as much as it is practically possible***
- d) ***The Appellant will also stay with the children for half of the school holidays either at the beginning or at the end of the holiday as shall be agreed between the parties***
- e) ***Upkeep and general maintenance of the children shall be on equal basis as shall be agreed between the parties.***
- f) ***Since this is a family matter, each party will bear own costs.***
- g) ***There will be liberty to apply by either party.***
- h) ***This matter be mentioned within 21 days from today’s date to find out if parties have agreed on modalities of putting this judgment into effect and to record a consent on the same.***

DATED AND DELIVERED IN KISUMU THIS 29TH DAY OF NOVEMBER 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - Mr Kowinoh/Onyango

Respondent - In Person