



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL NO. 24 OF 2017

D N N.....APPELLANT

VERSUS

M A M.....RESPONDENT

RULING

(An Appeal from the Ruling/Decree of Hon. L. K. Sindani, Resident Magistrate of 5.7.17 in Tononoka Children's Court Cause No. 369 of 2016)

1. The Appeal herein arose from the Ruling and Orders of Resident Magistrate Hon. L. K. Sindani of 5.7.17 in Tononoka Children's Case No. 369 of 2016. In the said Ruling, the learned Magistrate made orders that the 2 children the subject of the suit (the children) remain with their father M A M, the Respondent herein. The Hon. Magistrate further ordered that the mother D N N, the Appellant herein may have visitation rights which can be agreed upon by both parties. The Appellant, being dissatisfied with the above Orders filed the Appeal herein.

2. The record shows that the parties were married in 2010 and were blessed with 2 children who in 2016 when the suit was filed were aged 5 and 2 years old respectively. Trouble however started in the marriage around the year 2015 and the parties separated. The children were in the custody of the Appellant until 15.10.16. The Respondent claims that on that day, the Appellant abandoned the children with his manager at his business premises at [Particulars Withheld] Pub in Jomvu with a bag that had only 2 sets of clothes. On 24.10.16, the Respondent filed the suit at the Children's Court together with an interlocutory application seeking *inter alia* interim custody of the children and an order allowing him to continue residing with the children. It is this application that led to the impugned ruling of 5.7.17.

3. 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:

- i. Failing to appreciate and correctly apply the principle of the "best interest of the children" in respect to the subject children while conferring legal custody of the children to the Respondent.
- ii. Finding that the controverted issue of abandonment by the Appellant had been credibly proved through affidavit evidence that was not tested by way of cross- examination.
- iii. Granting exclusive legal custody of the children to the Respondent which amounts to divesting the Appellant of parental rights and responsibilities contrary to Article 53 1(e) of the Constitution.
- iv. Issuing an ambivalent and equivocal order for access yet the parties are estranged and therefore the Learned Magistrate would have set clear terms of the Orders of access rather than leaving the issue to the parties.
- v. Failing to consider that the Respondent had abandoned the children with a stranger in Kisumu while the Respondent works and lives in Mombasa.
- vi. Finding that the Appellant had abandoned her parental responsibilities when the evidence on record overwhelmingly proved that the Appellant had taken care of the children for a period of five years and two years respectively since when they were born.

4. The Appellant prayed that the Appeal be allowed and that the ruling of the trial Magistrate be set aside. She also sought actual and legal custody of the children with reasonable access and visitation rights to the Respondent as well as costs.

5. Parties filed submissions which I have given due consideration to. The issues for determination in my view are:

- i. Whether the learned Magistrate erred in finding that the Appellant abandoned the children.
- ii. Whether the order that the children remain with the Respondent is in the best interests of the children.

Whether the learned Magistrate erred in finding that the Appellant abandoned the children.

6. In her Ruling, the learned Magistrate noted that issue of abandonment of the children is disputed. The record shows that the Respondent accused the Appellant of abandoning the children at the Pub while the Appellant states that the Respondent asked her to take the children there. The learned Magistrate stated that the issue of the abandonment cannot be overlooked and can only be determined at the full hearing of the suit. This notwithstanding, the learned Magistrate makes the following curious finding:

As at the moment, the court cannot overlook abandonment of the children by the mother yet and until the same is determined then it is my considered view that the children remain with their father.

7. By stating that “*the court cannot overlook abandonment of the children by the mother*”, it would appear that the learned Magistrate prejudged the case and formed the “*considered view that the children remain with their father*”. It is a rule of natural justice that a decision-maker must approach a matter with an open mind that is free of prejudgment and prejudice. My view is that the learned Magistrate failed the test by finding that the Appellant abandoned the children which decision could only be arrived at after hearing the evidence in the main suit.

Whether the order that the children remain with the Respondent is in their best interests.

8. The principle of the best interests of the child which is enshrined in Article 53 of the Constitution of Kenya 2010, will guide this Court in determining the matter herein. Article 53(2) provides:

A child’s best interests are of paramount importance in every matter concerning the child.

The Children Act requires that the best interest of the children herein must be the primary, the first and paramount consideration in this matter. Section 4(2) and (3) of the Act provides:

(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration... to the extent that this is consistent with adopting a course of action calculated to—

- (a) safeguard and promote the rights and welfare of the child;**
- (b) conserve and promote the welfare of the child;**
- (c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.**

9. The children herein were aged 5 years and 2 years old in 2016 when the suit was filed. Section 2 of the Children Act states that a child under the age of 10 years is a child of tender years. The children now being 7 and 4 years of age respectively are children of tender years. Our Courts have been consistent in upholding the general rule that custody of children of tender years should be vested in their mother because mothers are best suited to exercise care and control of the children. As with all general rules, this rule has an exception. A court will however only depart from this *prima facie* rule if there are sufficient reasons or exceptional circumstances to do so. 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.

The Court went on to define exceptional circumstances thus:

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.

10. In the instant case, the learned Magistrate did not in her finding state that there existed any exceptional circumstances to warrant the departure from the general rule when she awarded actual physical custody of the children to the Respondent. She did not even give reasons for doing so. She simply stated:

With the above I find that it will serve the best interest of the children if the status quo is maintained until the suit is heard and determined.

11. The children herein are of tender years. The record shows that they have lived without their mother since they were 5 and 2 years old respectively. The record further shows that the children live in Kisumu while the Respondent works in Mombasa. The Respondent did aver in his affidavit sworn on 13.2.17 that his second wife Dr. Faith Loice Agoiu Amahwa has ably taken up the role of care-giver of the children while he is away due to work. This is confirmed by Dr. Faith Amahwa in her own affidavit sworn on 11.2.17. She averred that she had assumed the role of care-giver and taken on parental responsibilities over the children as their step mother. The Court notes that this affidavit was sworn to demonstrate that it would be difficult to produce the children in Court in Tononoka Mombasa on the date directed by the Court as the children were in Kisumu.

12. When the orders of 5.7.17 were made, the foregoing information was available to the Court. By the stroke of her pen, the learned Magistrate denied the children parental care of both parents thereby negating their constitutional right that is 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;

13. Though the Court granted visitation rights to the Appellant, the distance between Kisumu and Mombasa is rather long and it would be difficult for the Appellant to have frequent access to the children. It is not clear why the Respondent chose to send the children all the way to Kisumu to live there rather than live with them in Mombasa where the Appellant would exercise visitation rights without undue hardship. The young children have therefore since 2016 been deprived of the love, nurture, warmth, affection and general parental care of their mother. They have been primarily under the care of the step mother yet their own biological mother is alive. The children were, during the times the Respondent was at work in Mombasa neither with their biological mother nor their biological father but left to a third party. This in my view militates against the best interest of the children. Further and very important, the children are out of the jurisdiction of the Court which is seized of the matter thereby limiting that Court's supervision.

14. It is common knowledge that Court processes take a great deal of time to be concluded. Already 2 years have passed since the suit was filed in the lower Court. It is not known how long it will take for the suit to be heard and determined. I do therefore find that maintaining status quo as far as actual physical custody of the children pending the hearing and determination of the suit, will not be in the best interests of the children.

15. In the premises, I draw the conclusion that the appeal is merited and the same is allowed. The Orders of the Resident Magistrate of 5.7.17 are hereby set aside and in substitution thereof I make the following orders:

- i. Interim joint legal custody of the children is awarded to both the Appellant and the Respondent.
- ii. The Appellant shall have actual physical custody of the children pending the hearing and determination of Tononoka Children's Court Cause No. 369 of 2016.
- iii. The Respondent shall have reasonable access to the children.
- iv. Each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 23rd day of November 2018

M. THANDE

JUDGE

In the presence of: -

..... **for the Appellant**

..... **for the Respondent**

..... **Court Assistant**