

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.16 OF 2013

BETWEEN

G A A.....APPELLANT

AND

N J O.....RESPONDENT

(Being an appeal from the judgment and decree of P.K. Rugut (SRM) in Rongo Children Cause No.20 of 2012)

JUDGMENT

1. The appellant (**G A A**) was married to the respondent (**N J O**), but the relationship got sour and she filed a suit seeking to be granted custody of the children namely **M A** aged 15 years, **A O** aged 12 years, **E O** aged 9 years, **P A** aged 8 years and **N A** aged 2½ years, and the respondent be at liberty to visit the children at his pleasure.
2. The basis for her prayer was that the respondent had abandoned her and the children since the year 2005, and offered no financial assistance to them. However in May 2012, the respondent colluded with one of her relatives and took away all the children. It was her contention that the children were exposed to hardship and starvation leading to the elder child fleeing back to the appellant.
3. When the appellant tried to get back the children through the assistance of the Children’s Department, the respondent became cruel and disregarded the orders from the department. The appellant’s greatest concern was that the children were staying in pathetic and unbearable conditions, and their ages necessitated the care of a mother, especially because they had not lived with the respondent for close to 7 years.
4. The respondent opposed the prayer saying he was the sole provider for the family as the appellant was not in gainful employment and was a housewife. He further claimed that it was the appellant who wilfully deserted the matrimonial home and abandoned the children in Nairobi.
5. The trial court upon hearing the evidence was persuaded that the appellant was of disreputable conduct was not in employment, of dubious abode. She had neglected the children and there was no evidence that she had enrolled them in school that it was in their best interest that she be denied custody. She had also disobeyed court orders when granted temporary custody of the children during the August School holidays, by retaining one child despite knowing that the child would miss out on her studies.
6. The respondent on the other hand was found to be working as a mechanic and had a 5 acre parcel of land where he was growing sugar-cane and he had enrolled the children in school. On account of this the court held that the best interest of the children would be fulfilled by leaving them in the respondent’s custody.
7. The appellant was aggrieved by these findings and appealed on grounds that it was wrong to award custody of the children to the respondent yet he had not even filed a counter-claim for custody. Further that the trial magistrate failed to recognize that some of the children were of tender years who deserved to be with their mother, and in any case when the children were interviewed, they were categorical that they preferred to be with their mother, yet the court ignored this. The trial court was also accused of ignoring

documentary evidence which was presented at the hearing.

8. When the appeal was set for hearing on 20th June 2017 the appellant sought a two weeks adjournment to enable her get some documents. This request was granted and the matter was listed for 27th July 2017 when it was set for hearing at 11.00 a.m. because the appellant was not present and it was hoped she would be in court later. The court had a heavy hearing list and the matter was not reached until 2.30 p.m. but the appellant had still not appeared. The respondent then prayed for the dismissal of the appeal for want of prosecution. Indeed when the matter was set for hearing, the appellant was present.

9. The court tried to indulge her by giving time later in the hope that she would either attend or send word as to her inability to attend-none of this was forthcoming. The only conclusion I can draw is that the appellant has lost interest in the appeal and it is dismissed for want of prosecution.

Delivered and dated this 17th day of August, 2017 at Homa Bay

H.A. OMONDI

JUDGE