



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CIVIL APPEAL NO 87 OF 2014

J.W.N.....APPELLANT

VERSUS

C.I.W.....RESPONDENT

(Appeal from Decree passed on 25/09/2014 in Kigumo SPM Children Case No 9 OF 2013 – D. Orimba, SPM)

J U D G M E N T

1. The Appellant was the plaintiff in the lower court while the Respondent was the defendant. The plaintiff sued the defendant by plaint dated 18/07/2013 for monthly maintenance for herself and the two children of the marriage between herself and the defendant, costs of the suit and interest on both. In his statement of defence the defendant admitted the customary marriage between him and the plaintiff and the two issues of that marriage. However, he averred that he was in custody of the children since the plaintiff abandoned them some years back, contrary to the pleadings of the plaintiff that she was in custody of the children. He further pleaded that he was solely maintaining and bringing them up (including schooling) without any contribution by the plaintiff who had deserted the matrimonial home and abandoned the children.
2. The defendant counter-claimed for full custody, care and control of the children. He sought dismissal of the plaintiff's claim, and also costs of the suit.
3. On 05/06/2014 the lower court awarded temporary custody of the children to the plaintiff pending hearing and final determination of the suit. But later on the same day after talking to the children and the parents, the court noted that it was apparent that the children did not know the mother. The plaintiff's learned counsel then conceded temporary custody of the children to the father (the defendant) pending disposal of the suit upon condition that he brings them back to court when required. The court then set aside its earlier order awarding temporary custody to the plaintiff and granted the same to the defendant and directed that he bring them to court on 20/06/2014 for mention. On that date the court fixed the case for hearing on 03/07/2014.
4. On that date the learned counsel for the plaintiff informed the court that he was ready to proceed. The defendant, who was then appearing in person, stated that he had filed his submissions. Learned counsel for the plaintiff then requested time "to do submissions on the main suit". The court then ordered "mention on 18/07/2014 for submissions". On that date learned counsel for the plaintiff informed the court that he had filed his submissions and sought a date for judgment.
5. Judgment was delivered on 25/09/2014. The court held that the plaintiff had not proved her case as required. It then entered judgment in the following terms –

- (i) The defendant to have legal custody of the two minor children.
- (ii) The plaintiff to have visitation rights one a month.
- (iii) “Each party to meet the rest of the costs” (whatever that means!).

It is against that judgment that the Appellant (plaintiff) has appealed.

6. The first and last thing to be noted is that there was no evidence placed before the trial court upon which it could prepare and deliver judgment. Submissions are not evidence. There was no agreed statement of facts filed, and there was not even adoption by the parties of their witness statement) as their testimonies-in-chief. There were no admissions in the pleadings in respect to the two main issues in the suit – **custody** and **maintenance** of the children. So, where was the evidence upon which the trial court prepared and delivered judgment in a suit commenced by plaintiff in which the defendant filed defence and joined issues with the plaintiff and also counterclaimed?

7. The judgment prepared and delivered by the trial court was a nullity in law as it was not based upon any evidence placed before the court, there being no such evidence. It bears to repeat, submissions are not evidence!

8. The proper thing to do is to set aside that judgment and remit the case back to the lower court for proper trial by way of *viva voce* evidence, or by way of an agreed statement of facts. It is so ordered. In the meantime the Respondent (defendant) shall continue to have custody of the children. Parties shall bear their own costs of this appeal. It is so ordered.

DATED, SIGNED AT MURANG'A THIS 21ST DAY OF APRIL 2016

H P G WAWERU

JUDGE

DELIVERED AT MURNG'A THIS 22ND DAY OF APRIL 2016