



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL NO. 15 OF 2016

BETWEEN

M A A APPELLANT

AND

M O1ST RESPONDENT

B O2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.T. Obutu, PM dated 19th November 2015 in Kisumu Chief Magistrates Children's Case No. 8 of 2014)

JUDGMENT

1. The matter arises from an appeal where the subordinate court gave custody of the child, **F O**, to the biological father, **M O**, the 1st respondent. The appellant, **M A O**, who is the child's grandmother, had sued for legal custody of the child. She is dissatisfied with the court's decision dismissing her claim and ordering her to return the child to the 1st respondent.

2. Before hearing the appeal, I directed the parties to appear before me and see whether an amicable solution could be reached in the best interests of the child. What emerged from the discussions was that the child was born out of a union between the 1st respondent and the appellant's daughter now deceased. The child was left with the appellant upon the death of his mother thereafter the appellant applied for legal custody of the child. The appellant did not deny that 1st respondent was the father and was entitled to custody, she asserted that according to Luo customary law she had to be paid bride price before she could release the child to him. She also stated that the child did not know the father and was a stranger to him and thus it was not in his best interest to be with his father.

3. The learned magistrate held that the father was entitled to custody as he was the biological father and that he was the person with parental responsibility under **section 24** of the **Children Act**. He also found as a fact that the appellant had not demonstrated that the 1st respondent could not take care of the child. He noted that, "*Being a boda boda operator does not mean that he is irresponsible or in any way not able to take care of his own child.*" I do not find any fault with these findings and I affirm the same.

4. Since the child had been in the custody of the appellant, I commissioned the Children's officer to examine the circumstances of the parties and file a report. The report filed on 1st August 2016 confirmed the following:

- a) The child had been living with his grandmother and was enrolled in school.
- b) The child had never lived with the father and when informed this decision he kept crying and was not willing to talk to anyone.
- c) That according to her observation, the child may have been influenced by the grandmother to be hostile to the father.
- d) During the discussion, the father told the officer that he was ready to take care of the child and nurture him.

5. After considering the report, I directed that the child should be handed over to the father in presence of the court for one weekend, from 5th August to 7th August 2016. The handing over had to be enforced by the Children Officer and police officers. Nevertheless, the child stayed for the weekend with the father and when the matter was mentioned on 15th August 2016, the child appeared to have no problem with his father.

6. At the heart of this case is what is the best interests of the child. In my view the best interests of the child require that he be given an opportunity to know his father and to establish a relationship with him. One must not lose sight of the fact that the child has been living with his grandmother for his whole of his life and he is now enrolled in school. He needs some time to get used to his father. I think this process needs to be gradual in order to ensure that the child's life is not disrupted in a negative way. I add here that in making its decision the subordinate court noted that the appellant can only get visitation rights. In a situation where the parties are hostile to each other it is proper the court to define access in a structured manner that accommodates each parties demands while paying attention to the best interests of the child.

7. I therefore dismiss the appeal but for the reasons I have set out above, I order as follows:

- (a) The child, F O, shall remain in physical custody of the grandmother, M A O.**
- (b) The father, M O shall have legal custody of the child and shall be consulted on the child's welfare, maintenance and upkeep.**
- (c) The 1st respondent M O shall take the child every alternate weekend from the date hereof on Saturday at 8.00 am. and return the child to the appellant at 5.00 p.m. in the evening on Sunday.**
- (d) This arrangement shall remain in force until the end of December 2016 whereupon the M O shall have full legal and physical custody of M O**
- (e) The Children's Court shall issue further orders upon examination of the parties including granting access to the appellant herein.**
- (f) This matter is referred back to the Chief Magistrate's court, Kisumu to monitor the orders and shall be mentioned on 12th September 2016 in that court.**
- (g) There shall be no order as to costs.**

DATED and DELIVERED at KISUMU this 15th day of August 2016.

D.S. MAJANJA

JUDGE