



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 47 OF 2013

J A O APPELLANT

VERSUS

D O O RESPONDENT

JUDGMENT

1. The Appellant and the Respondent married under Luo customary law in 2006. In 2008, they were blessed with a son now the subject of this appeal. The marriage could not however hold and sometimes in the year 2011 they separated. Subsequently on 2nd November, 2012 the Appellant filed a plaint in which she sought dissolution of the marriage, custody of the child with visitation rights for the father and also maintenance for the child. She cited cruelty as a ground.
2. The divorce was contested and the Respondent on his part counterclaimed for divorce on the ground of adultery. He alleged that since their separation the Appellant had at different times cohabited with 2 different men as a wife. He also cited desertion as a ground. In addition to dissolution of the marriage he too sought custody of their child.
3. While the case was still pending the Appellant filed a Notice of Motion in which she sought temporary custody of the minor. Upon considering the material placed before him by both sides the Trial Magistrate dismissed the appellant's application and gave custody of the child to the father (Respondent). Being aggrieved the Appellant filed this appeal. She cited the following grounds:-

i) That the learned Magistrate erred in law and in fact and wholly misdirected himself in granting temporary custody of one SBO to the Respondent against the weight of the evidence and law.

ii) That the learned magistrate erred in law and in fact by believing the evidence of the Respondent contained in his replying affidavit and through his submissions that the Appellant is not morally fit to be granted custody of SBO thus prejudicing the interest and future life of the minor subject matter herein.

iii) That the learned magistrate erred in law and in fact in putting the interest of the Respondent before those of the minor contrary to the Children's Act No. 8 of 2001.

iv) That the learned magistrate's ruling is excessively harsh and cruel in regard to the welfare of SBO and is totally against the weight of evidence and law.

v) That learned magistrate erred in law and in fact in relying on the consent entered into by the parties when the said consent left the interest of the child in limbo and thereby going against the

interest of the child which are paramount as enshrined in the Constitution.

vi) That the learned magistrate misdirected himself in the application of principle of res judicata and sub judice.

Vii) That the ruling ought to be set aside ex debiti justitiae on the basis that the magistrate considered and gave undue weight to irrelevant issues and totally failed to consider the relevant issues.

This appeal was canvassed through written submissions. I agree fully with Counsel for the appellant that as the matter before Rongo Court was not fully heard and determined the issues now raised are not res judicata. Before the Rongo court parties merely agreed to terminate the proceedings as they had settled their differences. It had also been agreed that neither of them would raise any other claim in respect of the same subject matter. It would appear however, that the appellant approached the same court with a view to setting aside the order then giving custody of the child to the Respondent and she succeeded. The court then went ahead to state that custody had been given to the Respondent by virtue of the consent. In my view a reading of that consent does not show that to be the position. I do however, agree with the submission by Counsel for the Respondent that the Appellant should avoid filing multiple suits. The record shows that she filed a suit in Kisii as well before finally coming to the Chief Magistrate`s court in Kisumu. The subject matter is the same -divorce and custody of the child. This is to be deprecated. The appellant ought to if she was aggrieved appealed against the decision of the Rongo Court rather than file another suit in Kisumu. That notwithstanding this court should and must make a determination on the issue of custody now before it. It will be noted that what is sought is an interim order of custody pending the hearing and determination of the divorce proceedings in the lower court.

3. As was stated in **Githunguri V. Githunguri(1981) KLR** an appellate court will not interfere with a trial court`s exercise of discretion unless it was based on a wrong principle or was clearly a wrong decision.
4. In matters of custody the paramount consideration is the welfare and best interest of the child-see **Githunguri V Githunguri, (1981)KLR 598**. The courts have also held that the best interest of young children more so girls is to be with their mother. In **Githunguri V. Githunguri (1981) KLR 598** for the court of appeal expressed itself thus:-

“ The rule is that the mother should normally have custody of children of tender years and where the court gives it the father, it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule.”

In **KA V. KB (2008)/KLR G&F** the same court held that faulted a judge for not referring to the presumption that young children should be with the mother. So are there exceptional circumstances in this case that would warrant this court to depart from this presumption. Both the courts in Rongo and in Kisumu found that the appellant was not suitable because of her character in that she had after separating from the Respondent cohabited with two other men. The allegations against her were however not proven by cogent evidence as the authors of the letters did not testify. In any event even were she to remarry that in itself would not be sufficient reason to deny her the custody of the child. Accordingly, I allow this appeal and order that pending hearing and determination of the divorce, custody of the child revert to the appellant. The respondent shall however have rights of access to be agreed by the parties and/or determined by the Deputy Registrar of this court.

5. Each party to bear their own costs.

Dated, signed and delivered at Kisumu this 19th day of February, 2015.

E.N. MAINA

JUDGE

In the presence of:

Mr. Ojuro for the Appellant

No appearance for the Respondent

Moses Okumu – court clerk

ENM/aar