



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.70 OF 2011

(An Appeal arising from the judgment of the Children's Court at Nairobi – Milimani

Hon. Mrs. Ocharo, dated 31st October, 2011 in Children's case No. 411 of 2010

In the matter of T. N. M and V. W. M

P. W. M.....PLAINTIFF

VERSUS

C. M. M.....DEFENDANT

RULING

PLEADINGS

The matter was presented before Court following the order of 30th June, 2014 that the appeal on the issue of more access to the appellant of the children of the marriage be heard and determined.

On 26th September, 2014 learned Counsel for the Applicant and Respondent; Ms. Kimani and Mr. Gichuru respectively informed the Court that they were engaging their clients to come up with an amicable settlement and agreement on the issue of access of the children of the marriage by the parties.

On 22nd October, 2014, the matter proceeded for hearing both Counsel informed the Court on their clients concerns and it was agreed by consent the same be tendered in form of affidavits filed to enable the matter be adequately addressed.

SUBMISSIONS

The Applicant filed a supplementary Affidavit on 20th November, 2014 and in a nutshell sought equal access and time for the children with both parents. The Magistrate's Court Judgment of 31st October, 2010 in Children Case Number 411 of 2010 gave the Respondent two (2) uninterrupted weeks and one (1) weekend which total to 12 days every two (2) weeks in comparison to him visiting the children in school during school term and alternative weekends and ½ the holidays. He has been forced to visit the children in school which is difficult and disrupts the children's learning. The Appellant raised the issue of the children having mobile phone. The appellant pursuant to a Court order obtained phones for the children which the Respondent confiscated. The appellant stated that he and the Respondent by mutual consent agreed to vary the Court's order on visitation as he had very little time with the children of the marriage.

The child counsellor from *[particulars withheld]* School encouraged both parties that the children spend time with the father. In light of the averments made by the Respondent the Appellant asked the Court to interview the children to establish the truth of the matter.

The appellant informed the Court, that the issue of disrupting the children's environment and school life is not true if he has more time with the children as it is clear that their school and both parties' homes are within reasonable distance. Therefore having the children with the appellant for 10 days and the Respondent 14 days is a plan that he had tested and is appropriate for the children. The appellant previously was engaged in work assignment out of town but is now available to recoup the lost time and have ample time with the children.

The appellant stated that he has talents in languages, arts, technology and sports which he would want the children to acquire and benefit from. He maintains a suitable home for the children and maintains high standards of hygiene and safety. The appellant explained the inability to meet financial obligations was due to lack of employment which subsisted until November 2014 when he got employment.

The appellant stated that he needed more time with the children to visit and know paternal relatives; assist them in academic work, social and religious values.

The Respondent filed the Replying Affidavit of 5th November, 2014 and stated as follows;

That the Children Court's judgment of 31st of October, 2010 was to the effect;

“The Appellant to access the children on alternative weekends and half school holidays. Both parties to alternate on special holiday; Christmas and Easter holiday. The appellant shall be a liberty to access the children as per the school regulations and may also have reasonable phone access...”

The Respondent informed the Court she never varied access of the children as given by the Children's Court. The appellant sought more access as he was unemployed but now he is employed as from November 2014. The Respondent seeks that the same arrangement prevails so as to establish routine during the school term and stability as opposed to anxiety and confusion by moving from two (2) homes during the school term.

The Respondent stated that the appellant had caused the girls to have skin infections whenever they came back from the father's home. The girls do not complete their home work on time, the appellant does not contribute maintenance of the children and the children drop off times are not complied with as illustrated in paragraphs 19 and 20 of the Replying affidavit.

The Respondent informed Court that the children especially the young one Tiana are scared of the father's temper. She has been taken to a Child counselor and the report is annexed as **“PWM4”**.

The Respondent requests that since the children of the marriage are entering adolescence and require special care of the mother to help them grow from girls to women; the access order should not be varied.

The Replying affidavit of 9th December, 2014 controverted the assertion made by the appellant. The Respondent did not object to attendance of the children in view of the Court to find out the truth and what is best interest for the children of the marriage.

The Respondent said the appellant was not informed of the psychologist as the younger child feared to tell him. The Respondent has never invaded the Appellant's privacy, it is the children who talk with her and explain what happened while at the father's home.

The Court was presented with the children of the marriage on 15th December, 2014. The child officer did not attend Court. In light of the fact that the children were brought during school holidays; the matter

proceeded in chambers with the two (2) children V and T in the presence of their respective Counsel Ms. Kimani and Mr. Gichuru.

The Court observed the two (2) children of the marriage. V who is older was not very open in her communication T on the other hand was free spirited and quite candid and forthright. The Court observed from answers and questions about their school life; they are well adjusted and settled. They interact quite well with teachers and classmates and they are actively involved in school activities.

On the home front; they have taken well their parents' separation; they both seem close and happy with both parents. For the mother; they are exposed to auntie and grandmother in addition to the house help. For the father, they are exposed to the house help and aunties and cousins who they frequently visit. Both homes are suitable and nurturing and each parent makes effort to attend to the children. The sum total of the interview is that they were fine with the present arrangement. The parents have done a commendable job in helping the children accept and adjust to the circumstances following the divorce also they have settled well both in school and in both homes.

ISSUES

- a. Should the Court uphold and maintain the access of the children in terms of the Children Court Order of 31st October, 2010 or
- b. Should the order be varied and/or amended to allow equal access between the two (2) parents of the children of the marriage?

LAW

The issue of custody of the children of the marriage has arisen from the divorce of the parents of the children of the marriage.

1. Section 98 of Children Act 2001 allows the Court to direct as to custody and maintenance for the child(ren)

A Court shall have power to make an order and to give directions regarding any aspect of the maintenance of a child, including but not limited to, matters relating to the provision of education, medical care, housing and clothing for the child; and in this behalf may make an order for financial provisions for the child.

2. The Paramount and overriding consideration is the best interest of the child(ren) as outlined in;

Section 4 Children Act 2001

Article 53 Constitution 2010

Article 16(1) African Charter on the Right and Welfare of the Child.

3. Parental responsibility is joint whether the parties are married or not; to provide for the children the necessities envisaged in **Article 53(3) Children Act 2001 and Section 23(a) (b) (c) and 24(3) of the Children's Act 2001**

4) **In Sospeter Ojaamong Vs Lynnette Amondi Otieno Court of Appeal Civil Appeal No. 175 of 2006** the Court held;

a. **In Abdalla Bin Wendo & Another Vs R(1953) 20 EACA 166 at page 168** that issues of custody do not as a matter of law require testimony of more than one(1) witness to establish a fact.

b. The principles that guide the Court in custody of children are that except where exceptional circumstances exist, the custody of such children should be awarded to the mother, because

mothers are generally best suited to exercise care and control of the children.

c. The exceptional circumstances would include if the mother is unsettled, has taken a new husband or her living quarters are in deplorable state.

4. Martha Olela & another Vs Jackson Obiera C.A 16 of 1979 explained the general principle that custody of young children should be awarded to the mother unless special circumstances and peculiar circumstances exist to disqualify her for being awarded custody. These would include disgraceful conduct, immoral behavior, drunken habit, or bad company.

5. In determining the best interests of the children in awarding custody and/or access to the children the considerations are as per **Section 83(1) of the Children Act 2001**.

The Court is called upon to vary the judgment custody order of the Children Court of 31st October, 2010.

The Court has considered the pleadings filed, oral submissions by learned Counsel for the respective parties and the interview with the children. More particularly the Court addressed its mind to the following considerations; largely envisaged by **Section 83(1) of the Children Act 2001**.

- a. Ascertainable wishes and feelings of the children considering their age and understanding;
- b. The children's emotions, physical and educational needs;
- c. The likely effect of the children in light of change in circumstances;
- d. The children's age, sex, background and any characteristics of which the Court considers relevant;
- e. Any harm which the children suffer or are at risk to suffer.
- f. The capability of each parent, conduct and wish of parents.
- g. The customs of the community to which the children belong and/or religion persuasion.
- h. The orders made and effect of the order on the children and,
- i. The best interests of the children.

EVALUATION

The affidavits and oral submissions are mainly accusations and counter accusations ventilated by each party to the other which stem from acrimony evidenced in the divorce proceedings.

Other than that each party has remained focused and put in effort in maintaining the children of the marriage in decent and suitable environment and they have adjusted well both at homes and in school.

During the interview of the children of the marriage the Court did not detect any detrimental circumstances either from the mother's home or the father's home to adversely impact the growth and development of the children of the marriage.

From the pleadings and oral submissions no exceptional circumstances of unbecoming behavior of the parents to necessitate this Courts intervention in varying or amending the custody and access order with regard to the children of the marriage was disclosed.

The children were happy in each of the homes and did not disclose any adverse issue to any of the parents. The deponed accounts are from the parents against each other.

The Constitution and Children Act provide shared parental responsibility to the children of the marriage. However, it is not possible that it can be exactly equal due to prevailing circumstances.

The Court has considered the children's emotions, physical and educational needs. Also the children's age, sex, background and characteristics. The children V and T are children of the female gender who are 12 years and 9 years respectively and are about to enter adolescence and puberty age and require the mother's special attention at this stage. These are special and unique circumstances which can only be addressed and attended to by the mother of the children of the marriage.

Secondly, the children are schooling children; to award custody in form of alternate days and weeks during the school term will disrupt their routine attendance to school, completion of homework on time and daily preparation for school. They will fatigue and be disoriented as they will be engaged in to and fro journeys from one parent to another. They need consistent environment during the school going period so as to sustain a routine. The best situation for the children is with the mother who will oversee the school uniform, school books, daily readiness to school and on alternative weekends will stay with their father to bond and access the paternal family.

No exceptional circumstances have been pleaded of the mother's unbecoming conduct to prevent her to carry out these duties or been proved in Court. Therefore there is no reason to vary the order of 31st October, 2010.

The Court has considered the parents' wishes and capability. The father has a right to access the children. They share equally the weekends and holidays. It is only the school days. On school days the children are in school except when they come home to rest and leave early morning. The Respondent has minimal time with them too.

With regard to the father, no evidence has been shown to prove that he is the cause of the children's infections. There is evidence of the children skin infections but it cannot be attributed to the father's commission or omission or unsuitable hygiene standards. During interview the children did not complain of neglect from the father's residence.

Of the younger child's attendance of psychologist session, although aspersions have been cast against the father, again there is no tangible evidence on record to show the cause or if it is the father. Infact the father should be involved in the welfare of the children and the medical attention given to the children.

With regard to maintenance of the children it is confirmed from the appellant's pleadings and those of the Respondent that the Appellant is in arrears of payments. However it is not controverted that the appellant was unemployed and obtained employment in November, 2014. Therefore it is not a case of willful neglect but financial inability which shall be regularized with the onset of employment.

The appeal lodged in this Court is to the effect that the Court Order of 31st October, 2010 was oppressive as to visitation rights to the appellant and not in the best interests of the children. Secondly, that parental responsibility should be just and equal between parents.

This Court appreciates that both parents should share parental responsibility to the children. The Court finds there are reasonable grounds to maintain the custody and access orders due to the prevailing circumstances.

FINDINGS

In the absence of any adverse conduct of any of the parents of the children of the marriage or any exceptional circumstances that adversely impact the welfare of the children of the marriage, this Court orders as follows;

1. Both parents have joint legal custody of the children of the marriage.
2. The access order of 31st October, 2010 is upheld and remains in force due to lack of any evidence on any of the parties of conduct that would adversely affect the children. The children are well adjusted in both homes and school and the Court finds no reason to vary the order. The children are happy with the prevailing arrangements and the Court find no reason to amend, vary or change the said order. The children at this stage require special attention by the mother.
3. The Appellant, the father of the children is equally competent to raise the children. However as explained he will visit and access the children as per the Court order of 31st October, 2010. The allegations made with regard to health of the children and care of the children were not borne out by evidence or proof in Court.
4. The Appellant to have access to the children in school if regulations allow.
5. The Appellant to have telephone access to both children.
6. Any party is at liberty to apply.
7. No orders as to costs.

READ AND SIGNED IN OPEN COURT ON THIS 16TH DAY OF FEBRUARY 2015

M. MUIGAI

JUDGE

In the presence of;

Mr. Gicheru for the Appellant and,

In the absence of the Respondent.