



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO. 136 OF 2011**

**H K M..... APPELLANT/APPLICANT**

**VERSUS**

**D M A..... RESPONDENT**

**JUDGMENT**

1. This appeal arises from the ruling of the Principal Magistrate at Ogembo in **Civil Case No. 40 of 2011**, in which the appellant **H K O**, sued the respondent, **D M A**, for a declaration that the two were married and for the custody of a male child, **J B A** alias **J O M O**. The appellant also sought for a permanent injunction order to restrain the respondent either by himself, agents and/or servants from taking custody of and/or in any other way interfering with the appellant's rights over and in respect of the child aforementioned.

2. The statement of claim was filed on the 17<sup>th</sup> May 2011, together with a Notice of Motion also dated 17<sup>th</sup> May 2011. The orders sought by the appellant in the motion included the grant of interim custody of the subject child to the appellant pending firstly, hearing and determination of the application and secondly, hearing and determination of the suit.

The motion was heard by the learned Principle Magistrate who thereafter rendered a ruling dismissing the same with costs to the respondents and with an order that the custody of the child reverts to the respondent.

3. Being dissatisfied with the ruling, the appellant preferred the present appeal on the basis of the grounds contained in the memorandum of appeal dated 18<sup>th</sup> July 2011.

It is the appellant's prayer that the disputed ruling of the Principle Magistrate be set aside and/or quashed and that there be an order allowing the notice of motion dated 17<sup>th</sup> May 2011.

As directed by the court, the appeal was argued by way of written submission. In that regard, the appellant through **Messrs Oguttu, Mboya & Co. Advocates**, filed her submissions on the 2<sup>nd</sup> May 2014, while the respondent through **Messrs Bosire Gichana & Co. Advocates**, filed his submission on the 7<sup>th</sup> May 2015.

4. Having considered the appeal on the basis of the supporting grounds and the rival submissions in

support and in opposition thereto, the duty of this court was to reconsider the disputed notice of motion and arrive at its own conclusion. In that regard, it was averred by the appellant in her supporting affidavit that she and the respondent eloped in May 2004 and commenced cohabitation as husband and wife up to and including the Month of September 2009, when she was chased away by the respondent. They were blessed with two (2) issues during their cohabitation. These included the subject child, **J B A** alias **J O M O**, and a child who later passed away.

5. The appellant averred further that the elopement and/or cohabitation between herself and the respondent was never formalized and/or solemnized into a marriage and as such, they were never husband and wife. The cohabitation ceased in September 2009, when she and the subject child were forcibly and violently chased away by the respondent. She later, on the 12<sup>th</sup> December 2010, contracted a civil marriage with one **J O M**, with whom she had been living together with the subject child. However, on or about 10<sup>th</sup> February 2011, the respondent through a letter to the Seventh Day Adventist Church Nyamira Conference, demanded custody of the subject child.

6. The appellant went on to aver that the child was at the material time studying and/or schooling at [particulars withheld] Academy but was “**abducted**” and/or kidnapped by the respondent on the 4<sup>th</sup> May 2011, whereupon she reported the matter to Nyamira Police station and to the children department at Gucha. The District Children’s Officer, Gucha District, summoned her and the respondent for a discussion on the welfare of the subject child but the respondent failed and/or neglected to return the child to her and continues to hold on to the child much to her disadvantage. Being apprehensive of the child’s welfare while in the custody of the respondent, the appellant moved the lower court for an interim custody of the child pending the hearing and determination of the main suit.

7. In opposing the application, the respondent deposed a replying affidavit dated 14<sup>th</sup> June 2011, in which he averred that he never violently chased the appellant as alleged but that she left their matrimonial home on her own volition, took away their subject child against his wish and got married to another man. The child was thereby isolated from his real father resulting in psychological torment, ill treatment and poor health on his (child’s) part. He (respondent) took back the child after calling and informing the appellant that their son will be happy and safe with him. Thereafter, he secured the child’s educational right by enrolling him in the best school.

8. The respondent further averred that he was a single man and would not allow anybody such as foster mother to mistreat the child. He was therefore the person most suitable to keep the child and being on salaried employment was financially stable to provide for the child’s health, upkeep and other needs incidental or related thereto, as opposed to the appellant who was a student and had to compromise a person in the name of a step father and having disclosed she did not have sufficient means to take care of the child, she had no right to have custody as she entirely depended on her current husband.

9. As may be deciphered from all the foregoing averments by both sides, the issue that clearly presented itself for determination before the trial court was that of the custody of the child pending the hearing and determination of the suit. As there was no substantial dispute that the appellant and the respondent cohabited and brought the child into this world, the bone of contention was who between them should have interim custody of the child who was at the time aged four (4) or five (5) years thereby fitting the description child of tender years.

10. The lower court was at that juncture not required to make a final determination of the custody of the child. It was only required to determine interim custody even as the parties awaited the hearing and determination of the main suit which encompassed a prayer for custody of the child. Indeed, the disputed interlocutory application for custody was essentially made under **Sections 82, 83, 88 and 97 of the Children Act 2001**.

**Section 88** of the Act was the most vital in the circumstances as it provided for the court’s power to make intent custody orders which may be varied or reviewed or suspended from time to time. This was followed by **Section 83(1)** which provided for matters which the court shall have regard to in determining whether or not a custody order should be made in favour of the applicant. These include the best interest

of a child.

**11.** The guidelines provided under **Section 83 (1)** may also apply in considering an application for an interim custody order whose operation is limited to only twelve (12) months in terms of **Section 88 (2)** of the **Act (Children Act)**. In her submissions, the applicant herein stated that to the extent that the subject child is of tender years, it was appropriate for him to be placed under the care and custody of the mother.

The appellant contends that after the end of her cohabitation with the respondent, the child was in her custody until the time he was irregularly taken away from her by the respondent.

**12.** The respondent did not deny that he took the child. He submitted and contended that in a desperate attempt to rescue the child who was then leaving with the appellants mother-in-law, he took him away without notice in order to secure his safety. The appellant alleged that the child was actually abducted or kidnapped by the respondent and that a report was made to that effect to the police. Notwithstanding the manner in which the child was removed from the custody of the mother by the father, in situations where the parents are separated for one reason or another or are not even formally married, the age of the child is mostly the deciding factor as to which of the parents is to get custody. Nonetheless, the welfare of the child would also be a significant deciding factor.

**13.** In the cited case of **Githunguri .vs. Githunguri (1981) KLR 598**, the rule that the mother should normally have custody of children of tender years was affirmed with acknowledgement that it is incumbent upon the court to ensure that there are sufficient reasons to exclude the **“prima facie”** rule when giving custody to the father.

In **Nurani vs. Nurani (1981) KLR 87**, the court held that in all matters of custody of children, the welfare of the children is given paramount consideration and normally the custody of children of tenders years should be with the mother.

**14.** In the English case of **Re S (an infant) (1958) 1 All ER 783**, which was cited in the **Githunguri case**, it was stated that:-

***“The prima facie rule (which is now quite clearly settled) is that other things being equal children of this tender age should be with their mother and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the “prima facie rule.”***

It is therefore clear that as long as the welfare of a child is guaranteed custody would be granted to the mother rather than the father. Herein, the father (respondent) was entitled to interim custody of the child only if there were sufficient reasons to exclude the set **“prima facie”** rule.

**15.** In the reply to the disputed application by the appellant, the respondent indicated that due to absolute isolation of the child from himself as the father, there was psychological torment on the part of the child which was coupled with ill-treatment, poor state of health and wanting educational standards. These reasons compelled him to take away the child from the mother believing that he (child) would be happy and safe with him.

However, there was no material placed before the trial court to establish the aforementioned complaints and/or allegations directed at the appellant. The allegations remained mere allegations which could not be acted upon to deny the appellant favorable exercise of discretion by the trial court.

**16.** In its ruling on the disputed application, the trial court was very much alive to the principle that the interest and welfare of the child was of paramount importance in determining custody. The court was also very alive to the rule that a child of tender years should ordinarily be taken care of by the mother but went ahead to disregard the rule and give away to the father without ensuring that there were sufficient and exceptional reasons to exclude the application of the rule in the prevailing circumstances. This was both an error of fact and law if not a misapplication of the law.

17. Seems to this court that the trial court placed a lot of emphasize on the fact that the respondent was in gainful employment and therefore capable of looking after the child as compared to the mother.

The burden of establishing the exceptional circumstances for exclusion of the applicable “*prima facie*” rule was placed on the mother (appellant) rather than the father (respondent) when the trial court stated that the appellant did not demonstrate that the child was likely to be exposed to any danger or mistreatment if he remained with his unmarried working father.

This court’s view is that the respondent did not fall within the exception to the “*prima facie*” rule and in any event, was unable to establish as much.

18. Ultimately, it is the finding of this court that the appeal is well merited and is hereby allowed to the extent that the disputed ruling of the trial court dated 14<sup>th</sup> July 2011, be and is hereby set aside and submitted with an order that interim custody of the subject child be granted to the appellant (mother) pending the hearing and determination of the main suit but on condition that the suit be prosecuted and finalized within the next seven (7) months from this date hereof and in default the order be vacated forthwith.

Ordered accordingly.

**J.R. KARANJA**

**Judge**

[Delivered and signed this 17<sup>th</sup> day of November 2015].