



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**CIVIL APPEAL NO. 22 OF 2008**

V M M.....1ST APPELLANT

J N M.....2ND APPELLANT

R G N.....3RD APPELLANT

**VERSUS**

J M M.....RESPONDENT

*(An Appeal from the Judgment and decree of the Honourable L.O.Onyina:Senior Resident Magistrate dated 25/4/2008)*

**JUDGMENT**

**V M M**, **J N M** and **R G N**, being the 1st, 2nd and 3rd Appellants respectively, filed a suit before the Chief Magistrate's Court vide Nyeri, Children's Case No.12 of 2007 against **J M M**, the Respondent herein. The Respondent filed a defence to resist the Appellants' suit. The case was heard by Hon. Onyina, learned Senior Resident Magistrate who on 25th April, 2008 delivered his judgment which was in the following terms:

- 1. That the defendant has not abdicated his parental responsibility.**
- 2. That the defendant to take care of the medical needs of the 1st and 2nd Plaintiffs.**
- 3. That the 3rd Plaintiff and the Defendant to share the responsibility of paying for the cost of the children's education and educational accessories on equal basis.**
- 4. That the defendant to shoulder the responsibility of buying clothes for the children.**
- 5. That the defendant to contribute Kshs.2,000/= per month while the 3rd Plaintiff to contribute Kshs.1,000 per month for the children's food.**
- 6. That the defendant to be paying his contribution for the food directly to the 3rd Plaintiff or in the alternative, he be depositing the money in a bank account whose details will be furnished to him by the 3rd Plaintiff or, in the alternative, he be depositing the money in a joint account to be opened in the joint names of the 3rd Plaintiff and the defendant.**

**7. That the 3rd Plaintiff to meet the cost of a house-help, if and when necessary.**

**8. That both the 3rd Plaintiff and the defendant to have joint custody of the children and to organize how they will be putting up with the children alternatively as long as they continue living separately, and, if they fail to agree, each of them to be living with the children alternately for one school term.**

**9. That each party to bear their own costs.**

The Appellants were unhappy with the aforesaid decision hence they preferred this appeal.

Before delving deeper into the merits or otherwise of this appeal let me first set out in brief the case that was before the trial court. The 1st and 2nd Appellants through their mother, the 3rd Appellant sued their father, the Respondent before the Children's Court at Nyeri. The trial court was informed that the Respondent had abdicated his parental responsibility over the 1st and 2nd Appellants who are children of tender age. The 3rd appellant is a nurse at [particulars withheld] while the Respondent is a nurse at [particulars withheld]. The 3rd Appellant is a wife of the Respondent. The couple lived in their matrimonial home at Mathari in Nyeri until September 2006 when the 3rd Appellant moved out with the children due to serious domestic differences she had with the Respondent to live in a hospital house. After a short-while, the Respondent moved into the 3rd Appellant's residence to join the family. It would appear the couple again had serious differences forcing the Respondent to move out of the 3rd Appellant's residence. The Appellants were then prompted to file the case before the Children's Court. The Respondent on his part contended that he has been performing his parental responsibilities but the 3rd Appellant has denied him access to the children making it difficult to assess the needs of the children. The learned Senior Resident Magistrate considered the evidence from both sides and finally arrived at the decision the appellants now seek to impugn via this appeal.

Learned counsels appearing in this appeal recorded a consent order to have the appeal disposed of by written submissions. Though the appellants put forward eleven grounds of appeal in their Memorandum of Appeal, those grounds can be condensed to two main grounds. I propose to deal with grounds 1,4,5,6,7,8,9,10 and 11 together as the first ground of appeal and determine grounds 2 and 3 together as the second ground of appeal.

In the first ground of appeal, the Appellants have basically complained against the trial court's decision to make an order directing the 3rd Appellant and the Respondent to have joint custody of the children. The appellants have given various reasons for attacking that decision. First, the 3rd Appellant argues that it will not serve the best interest of the children (1st and 2nd appellants). Secondly, it is also argued that the order was given without being asked for by the Respondent. Thirdly, it is further argued that there were no compelling reasons to deny the 3rd appellant the sole responsibility to have custody of the children since they are currently separated.

The Respondent on his part opposed the 3rd Appellant's arguments. He was of the view that the order directing the couple to have joint custody of the children was to the best interest of the children because the children will have a feel of the two parents. The Respondent further argued that the 3rd Appellant has hidden the children from him hence she does not deserve to have the sole custody. It is further argued that the decision was objective since it is possible for the Respondent and the 3rd Appellant to set aside their differences and sit down and agree on the issues touching on the welfare of the children. In my view, the arguments of the protagonist in this saga revolves around the question of the joint custodial order. I have re-evaluated the evidence and it is clear that the learned trial Magistrate analysed the evidence before making the decision. He appreciated the applicable law. There is no doubt that the 3rd Appellant and the Respondent are nurses each earning a salary. The duo are husband and wife who for personal domestic differences have decided to live separately. The 1st and 2nd appellants are children aged 7 and 5 respectively hence they are children of tender age. The parents are each willing to take up parental responsibility by providing for the children. The 3rd Appellant had specifically sought for the custody of the minors. The Respondent on his part did not make a request for such an order in his defence neither did he apply for custody by way of a counter-claim. The Respondent's main contention

was that he was denied access to the children by the 3rd Appellant hence the issue regarding custody of the children came as a by the way. Under **Section 83 (1)** of the **Children Act**, it is expressly stated that children of tender age should be in the custody of the mother unless there exist exceptional circumstances that justify departure from that principle. There is no dispute that the children in this dispute are of tender age. The parents are both suitable to take custody of the children. There is no judicial separation but defacto, the couple live separately. The learned Senior Resident Magistrate was influenced by the following factors to reach at his decision to award an order of joint custody. **First**, he concluded that the couple live within the same neighbourhood. **Secondly**, that transport to school is easily and readily available. **Thirdly**, that both parents have shown love for the children hence they should each be given an equal opportunity to exercise love for the children. The question which must be settled on appeal is whether those grounds should be regarded as exceptional circumstances to enable the court depart from the principle that custody of children of tender age should be given to the mother where the parents live separately? The grounds which influenced the trial Magistrate to depart from the general principle in my view are not exceptional in the strict interpretation of the word. The circumstances must be extraordinary that is to say that the circumstances must be of highly unusual set of facts that are not commonly associated with the family set up. The law does not in any case provide a middle ground the way the trial Magistrate purported to do. With respect, if the court takes the route suggested by the learned Senior Resident Magistrate it will work against the best interest of the children as recognized under **Section 4(3)** of the **Children Act**. The schooling and routine life of the children will be interrupted after every three months as they are shifted from their mother's house to that of their father to and fro. It would appear the learned Senior Resident Magistrate had imposed custody on the Respondent since he did not ask for such an order. The Respondent admits in cross-examination he did not seek for custody of the children. For the above reason that order must be set aside on appeal.

The second main ground argued on appeal is in respect of grounds 2 and 3. It is the 3rd Appellant's submission that the trial Magistrate erred when he ruled that the Respondent had not abdicated from his parental responsibility yet there was ample evidence she presented to prove that. She further argued that the Respondent did not adduce any evidence to show that he provided the children but was prevented from doing so. The Respondent on his part lamented that he was prevented from playing his role to provide for the children as a father after they separated. He argued that when they lived together he provided the family with ease. He claimed he presented evidence to prove that during their separation he paid school fees for the children despite the 3rd Appellant's attempt to frustrate. The Respondent stated that he has an N.H.I.F joint medical cover for the children. In short, the Respondent, argued that he was impeded by the 3rd appellant from playing his role of parental responsibility. I think it is important to discover the meaning of parental responsibility to enable the court discover whether or not the Respondent abdicated from playing that role. **Section 23(1)** of the **Children Act** defines parental responsibility to mean ***"All the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacity of the child"***. The Act further gives the details of those rights duties, powers and responsibilities in the following subsections. The 3rd Appellant testified before the trial court claiming she was forced to leave the matrimonial home together with the children in the year 2006 because life was unbearable. She alleged that the Respondent since then refused to provide for the children. She stated that the Respondent paid Kshs.8,000 school fees for first term leaving a balance but only managed to pay that of 3rd term when served with a court order. She denied ever preventing the Respondent from providing and paying school fees for the children. The 3rd Appellant said that the Respondent has not even complied with a court order directing him to pay Kshs.4,000 as maintenance but only paid school fees. She produced various documents indicating her contribution in providing for the young children. She produced a payslip showing she earned a monthly net pay of Kshs. 9,043 and that of the Respondent showing he earned Kshs.17,000 per month. The 3rd Appellant denied barring the Respondent from accessing the children. When the Respondent was called to testify he denied failing to pay for maintenance of the children. He produced payment receipts showing he paid school fees. He admitted in cross-examination that he has never paid for maintenance except for school fees. He also admitted that he was forced to pay the school fees in compliance with a court order which was served upon him. He also admitted he was ready to pay the money for maintenance but was restricted by the 3rd Appellant. The learned Senior Resident Magistrate when presented with these conflicting evidence, he came to the conclusion that the Respondent was unable to comply with the court order to pay Kshs.4,000 as

maintenance because the 3rd Appellant kept shifting from one house to another. He further concluded that the 3rd Appellant frustrated the Respondent from performing his parental responsibilities hence he cannot be condemned for abdicating from those responsibilities. After a careful re-evaluation of the pleadings, evidence and rival submissions. I have come to the conclusion that the learned Senior Resident Magistrate came to an erroneous determination. It is clear from the evidence on record that though the Respondent claimed he was paying for maintenance for the family he did not submit any evidence to the trial court as to how much he used to pay. In fact, the Respondent confirmed the 3rd Appellant's allegation that the Respondent only paid school fees up to the first term of 2006 and only paid the balance and the subsequent terms after he was slapped with a court order. The Respondent was intensely cross-examined and he managed to let the cat out of the bag when he said that he was not ready to support the children when they are away from him unless he was ordered by a court. He further stated that he was not ready to pay contribution as asked because the 3rd Appellant denied him access to the children, the matrimonial home hence he could not get her. It is interesting to note that the Respondent all along knew that the 3rd Appellant had hired the services of an advocate at the time when he claimed he was unable to access the 3rd Appellant. It is clear that he could as well have paid the money through the 3rd appellant's advocate. He confirmed he did not do so in cross-examination. The overall picture on the conduct of the Respondent is that he was not willing to pay fees and money for maintenance unless ordered by court. In the circumstances, there was therefore sufficient evidence that the Respondent had abdicated his parental responsibilities hence he should have been declared as such. In sum, the order stating otherwise must be set aside.

In the final analysis, the appeal succeeds. Consequently, the judgment and decree of the trial court delivered on 25/08/2008 is set aside and is substituted with following orders:

**1. The J M M, the Respondent is found to have abdicated his parental responsibility. Consequently, he is hereby directed to provide as follows:**

- a. Pay Kshs.3,000 per month to cater for food and clothing through the 3rd appellant or her advocate with effect from 1st March, 2014.**
- b. To pay half the children's school fees and other educational necessities.**
- c. To pay costs of the house help.**
- d. To meet the medical expenses of the children.**

**2. The custody of the children is given to the 3rd appellant but with a rider that the respondent shall have un-inhindered access to the children.**

**3. The 3rd Appellant and the Respondent to each meet his or her own costs.**

**Dated, Signed and delivered in open court this 21st day of February, 2014.**

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**J.K.SERGON**

**JUDGE**

**In the presence of :**

Mr. Gori h/b for Mr. Gachiri Kariuki for the Respondent

N/A for Waweru Macharia for Appellant but with Notice