



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MALINDI**  
**CIVIL APPEAL NO. 10 OF 2014**

**Z A.....APPELLANT**

**VERSUS**

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

**RULING**

1. The parties herein were married under Islamic Law in 2003 but following differences divorced in 2010. The minor children of the marriage T.A. and T.A. both girls, now aged about 9 and 4 years respectively were left in the care and custody of the respondent and so remained until 2013 when the appellant allegedly “snatched” them.
2. She has since the divorce remained and is living in Mombasa with her new spouse, a retired professor and his children from his previous marriage. The respondent did not take matters lying down. He approached the court sitting at Lamu for custody of the minors. The Ag. Senior Principal Magistrate having heard representations from both sides ordered on 11<sup>th</sup> March, 2014 that the custody of the minors be vested in the respondent “pending the hearing and final determination of the main suit.” He also allowed the appellant limited custody “*restricted to school holidays two weeks and two weekends each month in consultation with the plaintiff (respondent) and supervision by the Children’s Officer.*”
3. These orders triggered the present appeal filed simultaneously with the Notice of Motion dated 25<sup>th</sup> March, 2014, the latter which seeks inter alia:
  - b. THAT, there be stay of execution of the custody orders pending hearing and determination of the application interpartes/further orders of the court/disposal of the appeal.**
  - c. THAT, the respondent to exercise parental responsibility in terms of school fees, medical and other amenities pending hearing and disposal of the appeal herein.”**
4. The main ground stated on the face of the application, the appellant’s affidavit and robustly canvassed at the hearing is the rule that absent exceptional circumstances being proven, a female child should remain in the custody of the mother. Several authorities were quoted by the appellant to buttress this position, including **Wambua v Okumu [1970] EA 5778, Karanu v Karanu [1975] EA 18, Githunguri v Githunguri [1982 – 88]1 KAR 9**. These authorities spell out the applicable principles but the facts of this case can only be finally determined after a full trial.

5. The respondent filed a replying affidavit asserting his capacity and responsibility to care for the minors and emphasizing the appellant's lack of means and previous "abandonment" of the minors in 2010. He claims that the appellant, in "snatching" the minors from his custody in 2013 was motivated by the desire to draw maintenance from the respondent. He claims that the environment in the appellant's new matrimonial home is not conducive to the best interest and welfare of the minor issues. He states that there are exceptional circumstances in this case justifying departure from the general rule on custody of female children.

6. I have considered all the material presently before me. It is undisputed that the minors remained in the respondent's custody upon the divorce between their parents. That for three years the children were cared for by the father with the assistance of a sister. The minors were admittedly removed by the appellant in 2013 without a court order or consultation with the respondent. It must be borne in mind that the orders given by the Lamu Ag. Senior Principal Magistrate were for interim custody pending determination of the suit. It seems that at some point before that, the respondent with the consent of the appellant took in one of the minors but did not return her into the custody of the mother until 21<sup>st</sup> January, 2014 by order of the court. The said minor had enrolled at a school called Swafaa but the court ordered she be removed to Matondoni Lamu where she apparently stays with a grandmother. Meanwhile her mother apparently lives in Mombasa with the other sibling.

7. From the foregoing, the two minors have experienced sudden separation and disruption that is not in their best interest. They have been moved to different schools and unfamiliar social environments. As characteristic of such cases, the parents are unable to find a middle ground for the sake of the minors' welfare. At present the appellant though having custody seemingly lacks the means to support the children. Hence the prayer for child support by the respondent in her application.

8. No doubt the minors will be disrupted by another order altering custody. However, in my view that must be balanced against the existing scenario which seems more prejudicial in my opinion. Having lived with their father for three years, they have been removed and separated to live in unfamiliar surroundings. One child apparently lives with a grandparent, at Matondoni and the other with the appellant in her new home where members of another family also reside. The respondent's home in my view seems to offer more stability and security at the moment for the minors pending the final determination of the suit. The minor at Matondoni had already been enrolled in a better school by the respondent and in my view the Lower Court should have allowed her to remain there in January, 2014.

9. The impugned order by the Lower Court clearly granted limited custody to the appellant hence she has not been shut out of her children's lives. On the available facts, it is my considered view, that staying the order of the Lower Court may cause greater social instability in the lives of the minors occasioning them prejudice not just in the short term but also the long term.

10. For the foregoing reasons I decline to allow to the Notice of Motion dated 25<sup>th</sup> March, 2014. I direct that the main suit in the Lower Court be expedited. The appellant will do well to honor the Lower Court's order of 11<sup>th</sup> March, 2014 now that initial stay orders have lapsed. Costs will abide the outcome of the appeal.

Delivered and signed at Malindi this **23rd** day of **May, 2014** in the presence of:

**C. W. Meoli**

**JUDGE**