

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 36 OF 2013

I.A.A APPELLANT

V E R S U S

A.M.N DEFENDANT

R U L I N G

In her chamber summons dated 10.5.2013 the applicant is seeking custody of her three children aged 7, 6 and 1 year and 7 months old pending the hearing and determination of the appeal. The application is supported by her affidavit sworn on the same dated. Mrs. Odoyo, counsel for the applicant submitted that the children are still young and they should be in the custody of their mother who lives with his brother. Counsel would like the respondent to be ordered to pay monthly maintenance of KShs.45,000/= should the court grant custody to the appellant. Counsel further contends that the applicant has been denied access to the children and the children will be better taken care of by their mother.

Mr. Abok, counsel for the respondent relied on the respondent's replying affidavit sworn on the 3.6.2013. Counsel submitted that the respondent is not employed and relies on his mother for his up-keep. The children attend [particulars withheld] Primary School and are normally picked and dropped by school bus. It is the respondent's mother who is the breadwinner and the respondent is ailing as he suffers from diabetes. Counsel further contends that the applicant has no fixed abode as she lives her brother. The respondent is willing to allow the applicant unlimited access to the children.

The dispute between the parties herein started before the Kakamega Kadhi as Divorce Cause No. [.....]. The Kadhi delivered his judgment on the 3.4.2013. That led to the filing of the current appeal. The main issue for determination in the application before the court is whether pending the hearing and determination of the appeal the three children who are the results of the marriage should be put in the custody of the applicant. There is no dispute that the first born is 7 years old, the second born is 6 years old while the third born is below 2 years old. It is clear from the pleadings that the two parties have engaged in physical confrontation and I am satisfied that the marriage has indeed broken down. The applicant annexed a P3 form alleging that she was assaulted by the respondent while on his part the respondent in his affidavit states that the applicant filed Criminal Case number 596 of 2013 claiming to have been assaulted. Given the circumstances of the case I do find that although the respondent or his mother is the one taking care of the children, it is morally and legally wrong for a child aged below 2 years to be separated from the mother. I believe a child below 2 years should be still suckling and even if the mother has no employment that does not matter. The mother should in one way or another be able to take care of her young baby. As for the other two children, although they are young I do find that it will be unfair at this time to pluck them away from the school and place them under the mother's care. I have seen the fee statements from [particulars withheld] Child Enrichment Centre for both children and I do hold that for their own interest they are better off staying with the respondent.

It is the responsibility of both parents to provide for their children. However, the mere fact that the respondent will be staying with the other two children does not mean that he should not provide for the last born. I do order that the last born child be placed under the care of the applicant and the respondent provide monthly maintenance expense of KShs.7,000/=. In the end the application dated 10.5.2013 partly succeeds in the above terms. Each party to meet his/her own costs. I do further order that the Kakamega District Children officer do ensure that the last born of the marriage is placed in the hands of the applicant within 7 days hereof.

Delivered, dated and signed at Kakamega this 26th day of June 2013

SAID J. CHITEMBWE

J U D G E