



FM v HG (Civil Appeal 15 of 2008) [2012] KEHC 5405 (KLR) (25 July 2012) (Judgment)

FM v HG [2012] eKLR

Neutral citation: [2012] KEHC 5405 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 15 OF 2008**

JA MAKAU, J

JULY 25, 2012

BETWEEN

FM PLAINTIFF

AND

HG DEFENDANT

A mother should have custody of a child of tender years unless there exists special circumstances to disqualify her

The appeal arose from an application at the trial court filed by the respondent seeking custody, care and control of the child pending hearing and determination of the children case. The trial court allowed that application. The court held that where custody of a child of tender years was in issue, the mother should have the custody unless special circumstances were established to disqualify the mother from having of such in child. The court noted that under section 2 of the Children Act a child of tender years meant a child under the age of ten (10) years.

Reported by Kakai Toili

***Family Law** - children - children of tender years - custody of a child of tender years - matters to consider in determining custody of a child - what constitutes a child of tender years - whom should custody of a child of tender years be bestowed in the event of separation/divorce of parents - , 2001, section 2 and 4(3).*

Brief facts

The respondent was married to the appellant and they had one child. The the parties divorced on March 7, 2007. It was claimed that in 2007 without parties agreement, the appellant took away the child from the respondent and failed to return the child as agreed. Subsequently the respondent filed a suit before trial court seeking among other orders that there be stay of the ruling/order in Meru Chief Magistrate Children Cause No 97 of 2007 dated February 22, 2008 pending the hearing and determination of the application and the appeal. Pending hearing of the main suit, the respondent filed an application seeking to be granted custody, care and control of the child pending hearing and determination of the children case. The trial court granted the respondent's application and the appellant was ordered to immediately return the child to his mother, the respondent. The appellant being dissatisfied with the ruling preferred the instant appeal.



Issues

- i. To whom should custody of a child of tender years be bestowed in the event of separation/divorce of parents?
- ii. What constituted a child of tender years?

Held

1. The respondent was seeking interim order of custody of the child pending hearing of the suit and the issue in dispute between the appellant and the respondent was the welfare of the child. Under section 4(3) of the in matters of that nature, the court was required, in exercise of its powers, to treat the interest of the child as the first and paramount consideration. The court in granting custody of the child was required to take into consideration of section 83 of the which included the requirement that custody order should always be made in the best interest of the child.
2. The general rule was that, where custody of a child of tender years was in issue, the mother should have the custody unless special circumstances were established to disqualify the mother from having of such in child. Under section 2 of the the 'child of tender years' meant a child under the age of ten (10) years.
3. The case of *N v K (2008) KLR 518* was distinguishable and not relevant to the instant case as the circumstances were completely distinct from the circumstances therein. The respondent in the instant appeal had not remarried to another man nor did she have other children. In that case the father of the boys had sufficient income to guarantee the children good life, education amongst other things.
4. The trial court took into consideration the applicable law in regard to custody of the child before reaching the determination of granting custody of the child to the mother, the respondent. The appellant did not place before the trial court any special circumstances that would deny the respondent the *prima facie* right to have custody of the child of young and tender age. In cases of custody of the children the paramount consideration was their welfare. The court in exercise of its jurisdiction always acted in the best interest of the child.

Appeal dismissed.

Orders

- i. *Pending hearing and determination of the main suit at the lower court, joint custody of the child was granted to the appellant and the respondent, and the parties shall exercise equal responsibility over the child which shall include providing maintenance, education, medical care and general upkeep of the child.*
- ii. *The respondent, shall have actual custody of the child. In that regard, the appellant was ordered to forthwith surrender the custody of the child to the respondent under supervision of OCS Chuka Police Station and the District Children Officer in default the District Children Officer and OCS Chuka was to be served with the judgment to ensure compliance.*
- iii. *The appellant shall be entitled to structured visitation rights. The schedule shall be agreed between the appellant and the respondent in default whereof, either party shall be at liberty to apply.*
- iv. *Costs to the respondent.*

Citations

East Africa

1. *DK v JKN* Civil Appeal No 54 of 2010 - (Explained)
2. *K v K* [1975] EA 18 - (Distinguished)
3. *N v K* (2008) 1 KLR (G&F) 518 - (Distinguished)
4. *ZMN v GSG* Civil Appeal No 1234 of 1997 - (Explained)

Statutes

East Africa

Children Act, 2001 (Act No 8 of 2001) sections 2, 4(3); 83 - (Interpreted)



JUDGMENT

1. The appellant was the defendant/respondent at the lower court. According to the pleadings the respondent in this appeal, she was married to the appellant under Kimeru Customary Law in 2003 and the two cohabited together as man and wife up to 2005. That their marriage was blessed with one child, IM who at the time of filing the suit, that is to say as of November 1, 2007 was aged 44 years. That the parties obtained divorce as per SRMCC 2 of 2007 on March 7, 2007.
2. That prior to filing of the divorce case the Respondent and the child IM had been chased by the appellant from the matrimonial home in 2005. That in 2007 without parties agreement appellant took away the child from the respondent claiming that he was going out of the country and he wanted to take the child for insurance purposes and would return him back to the respondent but that appellant failed to return the child as agreed.
3. Subsequently the respondent filed suit before trial court seeking the following orders:
 1. That this honourable court be pleased to certify this application as utmost urgent and hear the same ex parte in the first instance.
 2. That there be stay of the ruling/order in Meru Chief Magistrate Children Cause No 97 of 2007 dated February 22, 2008 pending the hearing and determination of this application and the appeal herein.
 3. That cost of this application be provided for.
4. That pending hearing of the main suit, the respondent in this appeal, filed an application dated October 29, 2007 seeking that she be granted custody, care and control of IM a child of the marriage pending hearing and determination of the children case amongst other orders. The appellant filed replying affidavit in opposition. On February 22, 2008 the trial Magistrate granted the respondent's application and the appellant was ordered to immediately return the Child IM to his mother, the respondent, within 48 hours of service of the court's order.
5. The appellant being dissatisfied with this court's ruling preferred this appeal setting down 4 grounds of appeal as follows:
 1. That the learned Magistrate erred in law and in fact by misdirecting herself and granting custody of one IM to the Respondent against the weight of the evidence and law.
 2. That the learned Magistrate erred in law and in fact by disbelieving the evidence of the appellant contained in his replying affidavit and through his submissions that the respondent is not morally fit to be granted custody of IM thus prejudicing the interest and future life of the minor subject matter herein.
 3. That the Learned Magistrate erred in law and fact in putting the interest of the respondent before those of the minor contrary to the Children Act No 8 of 2001.
 4. That the Learned Magistrate's ruling is excessively harsh and cruel in regard to the welfare of IM and is totally against the weight of evidence and law.
6. On November 17, 2011 the appellant and respondent's counsel agreed that the appeal be heard by way of written submissions supported by authorities and the appeal was subsequently set down for



highlighting. When the matter came for highlighting both counsel requested the court to go through their written submissions, and deliver a judgment.

7. The appellant's contention in this appeal is that the trial Magistrate failed to appreciate all factors surrounding the dispute and as such made a ruling that in reality jeopardizes the best interest and welfare of the child by disturbing the status quo in relation to the custody of the minor upon employing a glaring partial and inadequate view of all evidence on record.
8. In this appeal the court is aware that the respondent was seeking interim order of custody of the child pending hearing of the suit and that the issue in dispute between the appellant and the respondent is the welfare of the child. Under section 4(3) of the [Children Act](#) in matters of this nature, this court is required, in exercise of its powers, to treat the interest of the child as the first and paramount consideration. The court in granting custody of the child is required to take into consideration of section 83 of the [Children Act](#) which includes the requirement that custody order should always be made in the best interest of the child.
9. Further to the above, the general rule is that, where custody of a child of tender years is in issue, the mother should have the custody unless special circumstances are established to disqualify the mother from having of such in child.
10. Under section 2 of the [Children Act](#) the 'child of tender years' means a child under the age of ten (10) years. The child that was subject of proceedings before trial Magistrate was by then 44 years and today he is around 9 years. The child subject of these proceedings is a child of tender years. He is a boy aged 9 years. In case of *K v K* (1975) EA 18 Court of Appeal:

' The substantial question in this appeal is whether or not the Judge was right in giving custody of the children to the father. At the time the application was heard, the daughter of the parties was just over seven years of age, and the son was six years old. The Judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children, but he did not specifically refer to the generally accepted rule that, in the absence of exceptional circumstances, the custody of young children should be given to the mother.'

11. Besides the above, in the case of [ZMN v GSG](#) Court of Appeal (Mombasa) CA No 1234 of 1997, The Court of Appeal stated; that there was no arising evidence for review and that the physical custody, care and control of the children should be with the mother unless there was compelling circumstances to disqualify her from being awarded the custody.
12. In addition to the above, in the case of [DK v JKN](#) Civil Appeal No 54 of 2010 Hon Justice L Kimaru in dealing with a similar case involving custody of a child aged 9 years granted custody of the child to the mother and ordered the father to surrender the child into the custody of the mother.
13. On the other hand the Appellant referred me to case of *N v K* (2008) KLR 518 in which Githinji, J as he then was held:

5.

- 1)' The paramount consideration in this type of case is the welfare of the children. To deprive a parent of access is to deprive a child of an important contribution to his emotional and material growing up in the long run.
- 2) The respondent was a suitable parent and he was possessed of sufficient means to guarantee the children of a good life, better education and a sense of belonging.



- 3) The children were boys and were big enough. It was not for their long term wellbeing that they should be alienated from their father. This was one of the exceptional cases where the mother should be denied custody of the children.'
14. The case is distinguishable and not relevant to this case as the circumstances are completely distinct from the circumstances herein. The respondent in this appeal has not remarried to another man nor does she have other children. In that case the father of the boys had sufficient income to guarantee the children good life, education amongst other things.
15. In the present appeal, the trial Magistrate took into consideration the applicable law in regard to custody of the child before reaching the determination of granting custody of the child to the mother, the respondent herein. The appellant did not place before the trial court any special circumstances that would deny the respondent the *prima facie* right to have custody of the child of young and tender age. The trial Magistrate quite correctly directed himself on the principle that in cases of custody of the children the paramount consideration is their welfare. The court was not subjected to record showing, there were exceptional circumstances to justify depriving the mother of her natural right to have her child with her.
16. In the circumstances I do not find any merits in this appeal. This court in exercise of its jurisdiction to always act in the best interest of the child, pending hearing and determination of the main suit at the lower court, shall grant joint custody of the child to the appellant and the respondent, and that the parties shall exercise equal responsibility over the child which shall include providing maintenance, education, medical care and general upkeep of the child. However the respondent, shall forthwith have actual custody of the child. In that regard, the appellant is hereby ordered to forthwith surrender the custody of the child, IM to the respondent under supervision of OCS Chuka Police Station and the District Children Officer in default the District Children Officer and OCS Chuka to be served with this judgment to ensure compliance. The appellant shall however be entitled to structured visitation rights. The schedule shall be agreed between the appellant and the respondent in default whereof, either party shall be at liberty to apply.
17. The upshot is that the appeal is dismissed with costs to the respondent.

A MAKAU J DELIVERED THE FOLLOWING JUDGMENT ON JULY 25, 2012

