



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 98 OF 2010

E.B.O.....
.....**APPELLANT**
-VERSUS-

P. S.M.....
.....**RESPONDENT**

JUDGMENT

(Being an appeal from the ruling and order of Mr. J. Macharia of the Senior Resident Magistrate in Children Case No. 1 of 2010 at Nyamira delivered on 12th May, 2010)

The respondent filed a suit in the principal magistrates court at Nyamira, being Nyamira children's court case number 1 of 2010 in which he sought permanent custody of **E.W.S** alias **N**, the only issue of cohabitation between the respondent and the appellant. He also sought leave of the court to have the said issue of the cohabitation returned into his custody, an injunction to restrain the appellant from interfering with his lawful custody of the issue aforesaid and finally costs of the suit.

The suit was informed by the fact that at some point in the past respondent and appellant had cohabited and out of that cohabitation they were blessed with one issue, **E.W.s** alias **N**. On or about the month of March, 2010, the appellant deserted the matrimonial home and left behind the issue and thereafter commenced separation proceedings in Nyamira SRMCC No. 3 of 2010 against the respondent. However on or about 6th April, 2010 the appellant abducted the issue from the respondent's home in Kahawa West, Nairobi and spirited her to Nyamira. The actions of the appellant aforesaid according to the respondent were most inhuman and inconsiderate as they had the effect of disrupting the issues education, besides jeopardizing her health and safety. The appellant's actions showed scant concern for the interest and welfare of the issue. The respondent further averred that the appellant was currently unemployed and hence without the necessary means to support the issue. The extent of her carelessness and negligence was evident from the fact that she had abandoned and or deserted the issue opting instead to live with her parents, away from the issue. For all these reasons, the respondent prayed for the orders in the plaint.

In her defence, the appellant denied ever cohabiting with the respondent or establishing a matrimonial home. She denied deserting the respondent. In so far as she was concerned, the issue was handed over to her by the respondent's mother in the presence of the respondent's sisters on the grounds that the respondent was incapable of taking care of her. The appellant was the biological mother of the issue and was thus more than suited to take care of her at her infant stage. She also averred that she was employed and earned a salary that would sustain her and the issue. Otherwise, the respondent was ill-suited to take care of the issue who apparently was a girl and not even 5 years old. She therefore prayed

for the dismissal of the suit.

Contemporaneously with the filing of the suit, the respondent took out a chamber summons application under sections 25(1) & 2, 82(1), 83, 84, 85 and 88 of the **Children's Act**, section 3A of the **Civil Procedure Act** and **all other enabling provisions of the law**. In the main he sought for an interim order of custody of the issue pending the hearing and determination of the suit. Consequent upon granting the said prayer, the court do grant leave for the issue to be repatriated and or returned into his custody at Kahawa est, Nairobi along with her personal effects. He further prayed that the court do vest in him parental responsibility, Notice do issue to the appellant to show cause why she should not be punished under section 84 of the **Children's Act** for jeopardizing the health of the issue and finally, that the OCS, Nyamira police station in conjunction with the children's officer, Nyamira do ensure compliance with those orders in the event that they are granted.

The grounds in support of the application were that on 6th April, 2010, the appellant forcefully and without the consent of the respondent abducted the issue from his custody and hid her at an unknown place in Nyamira. The abduction and sudden removal of the issue from her family home was contrary to the wishes of the respondent together with issue, interfered with her welfare and was not in her best interest. That the sudden and unplanned removal of the issue from school and social setting was detrimental to her security, mental health, education and all round growth. That the appellant was not gainfully employed and was dependant on her parents having deserted her matrimonial home leaving the issue stranded and helpless. Her parents were not in a position to provide and maintain the issue. It was not customary for maternal grandparents to raise the issue when his father, the respondent was able and willing to do so. He was in gainful employment and had endeavoured to provide the issue with an environment for her all round growth and development which the appellant had failed and or was unable to do.

In support of the application, the respondent swore an affidavit. It is not necessary to reproduce the contents thereof since what he deponed to merely helped to elucidate the grounds in support of the application aforesaid.

As expected, the application was vehemently opposed. In a replying affidavit dated 26th April, 2010, the appellant deponed where appropriate that she never cohabited with the respondent, nor did she establish a matrimonial home with him as they were not married. The respondent was a mere boyfriend. That the respondent had never had custody of the issue though he was his biological father save for short periods between July to December, 2007 and January to March, 2010 respectively. This was when the appellant was staying with the respondent on trial basis. However when she found the respondent unbearable to live with due to his cruelty and immorality she moved out with the issue. Apparently, the respondent had more than 4 previous broken relationships with a total of 5 children whom he maintained but had custody of one boy whom he stayed with but whose mother does not care much. She moved out with the issue because of her tender age and because of the respondent's cruelty towards her. On 16th March, 2010, the respondent abducted the issue from Nyamira. However in April, 2010, the respondent's relatives and confidants called her to Nairobi and handed the issue to her as she was suffering neglect from the respondent. She brought the issue back to her parents and was in the process of arranging to register her in a school in Nairobi where she was currently working. Otherwise the respondent was a drunkard, temperamental and cruel who came home in the wee hours of the morning frequently. Currently, she was employed by Pan Africa Life Assurance Limited and was thus capable of taking care of the issue and the respondent being her biological father was obligated to educate and maintain her until she attained the age of majority. Given the status of the respondent being a bachelor, previous broken marital relationships and the number of children ensuing therefrom which he does not keep custody of but are kept by their various mothers, it was only fair and just that the issue be left in her custody.

The lower court heard both parties on 29th April, 2010. At the end of it all, the trial court granted interim custody of the issue to the respondent pending the hearing and final determination of the main suit. This is the order against which the appellant has preferred this appeal. She has faulted the learned magistrate on 6 grounds to wit:-

“1. That the learned trial magistrate erred in law and in fact in awarding the custody of the child to the Respondent despite serious issues of the child’s welfare being raised.

2. That the learned trial magistrate erred in law and in fact in making what would be final Orders at the interlocutory stage without according parties a full and proper hearing.

3. That the learned trial magistrate deliberately ignored glaring facts that the child has been (sic) the custody of the appellant all its (sic) time.

4. That the learned trial magistrate erred in law and in fact in making reference to the Respondent’s supplementary Affidavit dated 28th April, 2010 which was filed without leave of court.

5. That the learned trial magistrate should have disqualified himself having dealt with the parties in Nyamira S.R.M No. 3 of 2010.

6. That the learned trial magistrate erred in law and in fact in not finding that the court had no jurisdiction.....”.

When the appeal came up for directions before me on 9th July, 2010, **Mr. Masese** and **Mr. Ochoki**, learned counsel for the respective parties agreed amongst other directions to have the appeal canvassed by way of written submissions. Subsequently they filed and exchanged written submissions which I have carefully read and considered.

As correctly observed by the learned magistrate, the way the parties approached the application was as though they were urging the court to make a final determination on the question of custody of the issue. This was not proper. The issue before court was who between the two should enjoy the custody of the issue in the interim and pending the hearing and final determination of the suit. It is only after the hearing of the main suit that the question of permanent custody would be finally addressed, resolved and determined. Of course the learned magistrate was not oblivious to the fact that even on the question of interim custody, the interest and welfare of the child is paramount. It is not in dispute that the issue is a girl child of tender years. At the time she was aged about 5 years. It therefore follows that in determining interim custody the paramount consideration must be what is in her best interest. Ordinarily a girl child of such tender years is best taken care of by the mother. However it is not a legal requirement. There may be occasions when a girl child is better off with her father. The issue such as the conduct of the parents with regard to the issue must come into focus. As correctly observed by the learned magistrate, ***“.....the issues such (sic) conduct of the parties whether child is likely to suffer any harm, Environment of upbringing, the parties capabilities of providing for the issue, issues of morality and wishes of the child among other issues should be considered by the court before granting custody.....”.*** It matters not that the custody is in the interim

Having considered all the foregoing, the learned magistrate granted interim custody of the issue to the respondent on the grounds that the appellant had not convinced him as to the danger or mistreatment the issue had been subjected to by the respondent to warrant her to take away the issue when she had already filed a case in court touching on the issue and which case was still pending hearing. By her actions aforesaid, the learned magistrate felt that the appellant was contemptuous of court proceedings. Further the learned magistrate considered the fact that the appellant had been summoned severally by the children’s officer on account of her disrupting the issue’s schooling in Nairobi to no avail, and that the respondent was a man of means capable of providing for the issue. He also considered the fact that the issue was already enrolled in a private school in Nairobi whilst staying with the respondent and that the 2nd term had already commenced.

I have no quarrel at all with what the learned magistrate took into account as aforesaid in arriving at the decision that the respondent ought to have interim custody of the issue. Those were legitimate concerns and considerations. It is also instructive that in granting the custody of the issue to the respondent, the learned magistrate granted the appellant access to her whilst at school and as per the

school regulations. It is not as though the appellant was completely locked out from accessing the issue as it was made to appear in this appeal. I further note that the appellant handed over the issue to the respondent on or about 26th May, 2010 going by the record of the trial court. In this appeal, the respondent had made it appear as though she was still had the custody of the issue. Clearly the appellant was not being candid with the court. I also do not feel that it will be in the interest and welfare of the issue to be tossed from one parent to another in the interim. If the learned magistrate had not acceded to the respondent's request, then the consequences would have been as aforesaid.

A child requires a stable environment, albeit temporary as in this case for her to achieve her full potential. In this case, the appellant first abandoned the issue for well over one month when she deserted from what I would rather call cohabitation home in view of the averments of the appellant. She came back on 6th April, 2010 and spirited away the issue to Nyamira. She was aware that the issue was enrolled in school. She does not appear to have been concerned with the school issue. I note though that she took the issue in April. Perhaps the schools were closed for the usual April holidays. However, she did not have the courtesy to inform the respondent. Whilst doing this though, she had already filed a suit in Nyamira court being separation Cause number 3 of 2010 in which she had sought custody of the issue among other prayers. For her to have proceeded to forcefully take custody of the issue whilst her case was pending was clearly contemptuous of court proceedings. The learned magistrate had a right to take such conduct of the appellant into account. A person who has no respect for court process is undeserving of court's assistance. It matters not that there was no application for contempt before court. Indeed she snatched the issue while a ruling was pending in her case where the respondent had raised preliminary objection. Was it within her knowledge that perhaps, the preliminary objection was unassailable and was likely to succeed which fact spurred her to take the law into her hands? Perhaps! As it turned out the preliminary objection succeeded and her suit was struck out.

Between the date when the appellant took the issue as aforesaid until when the trial court granted the respondent temporary custody, there is no evidence that the appellant was keen to have the issue attend school. If anything, the appellant was content with leaving her with her parents. I do not think that, such an arrangement even if it is in the interim is in the best interest and welfare of the child. If indeed the appellant was staying in Nairobi, had a job as she wanted everyone to believe, nothing stopped her from staying with the issue. After all she is the only child.

The respondent is the biological father of the issue. He is thus qualified to seek for and be awarded interim custody. This is in terms section 82 of the **Children's Act**. It was therefore not necessary as submitted by the appellant that the trial court should have first dealt with the issue of parental responsibility before proceeding to deal with the custody of the child.

With regard to ground 3 of the appeal, it may well be that the issue had been in the custody of the appellant all the time. However there is no doubt at all that at the time the appellant forcefully took custody of the issue in April, 2010, she did not then have her custody. Indeed the issue had been in school from 27th January, 2009 and she must then have been living with the parties until the appellant moved out in March, 2010. Further the appellant did not move out with the issue immediately. From the foregoing it is not correct as the appellant had stated that she had been in sole and continuous custody of the issue.

Dealing with the 4th ground of appeal, I do not think that the appellant is right in faulting the learned magistrate in making reference to the respondent's supplementary affidavit dated 28th April, 2010, apparently on account that it was filed without leave of court. The appellant never raised and canvassed the issue before the trial court. He is only raising it now in this appeal and from the bar. It is not proper. I am certain that had the appellant objected to the supplementary affidavit on the above ground, no doubt the learned magistrate would have considered the objection and made a ruling thereon. Since at no point the appellant objected to the presence of the supplementary affidavit on record, he cannot do so now in this appeal. Since the supplementary affidavit was on record, the learned magistrate was duty bound to consider it whether filed with or without his leave.

With regard to ground 5 of the appeal, it is quite apparent that the appellant has not carefully

considered the trial records of the 2 suits viz Nyamira Children's court case no. 1 of 2010 and Nyamira SRMCCC No. 3 of 2010. If she had done so, she will no doubt have come to the conclusion that the two cases were handled by different and or separate magistrates. The instant case was handled by **J. Macharia R.M** whereas Nyamira **SRMCCC No. 3 of 2010** was handled by **L. Komingoi, P.M.** There was no reason or basis therefore for **J. Macharia** to disqualify himself from hearing the instant suit. In any event, the appellant did not expect the magistrate to reclude himself from the case in a vacuum or on his own motion. The record does not show that the appellant sought the disqualification of the magistrate and he refused. In other words there was no application either orally or formally, brought by the appellant asking the learned magistrate to disqualify himself from hearing and determining Nyamira SRMCCC. No. 1 of 2010. Once again this is an issue the appellant is raising for the first time in her submissions. It does not fall for consideration in my view.

On the question of jurisdiction, I note that the issue was raised and canvassed before the learned magistrate on 29th April, 2010 and in ruling delivered on the same date, the preliminary objection was not sustained. In other words the objection to the suit by the appellant on the grounds of want of jurisdiction was dismissed. The appellant did not file an appeal against that ruling. This appeal is in respect of the ruling of the learned magistrate delivered on 12th may, 2010. Thus the ruling of 29th April, 2010 is not the subject of this appeal. It cannot therefore be canvassed in this appeal.

In the upshot, I find no merit in this appeal. Accordingly it is dismissed. Having regard to the relationship of the appellant and respondent, past and present, I will make no order as to costs.

Judgment dated, signed and delivered at Kisii this 16th September, 2010.

ASIKE-MAKHANDIA
JUDGE