



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**DIVORCE CAUSE NO.85 OF 2009**

**O.C.A.....PETITIONER**

**VERSUS**

**E. O.....RESPONDENT**

**RULING**

The respondent filed an application pursuant to the provisions of **Sections 4, 7, 13, 76, 81, 82, 83(a)(d)(e) (i)(j), 84, 88, 90, 91 and 114(c)** of the **Children Act** and **Rule 50(1) and 51** of the **Matrimonial Causes Rules** seeking several orders from the court. The respondent sought an order that she be granted sole custody, care and control of the children of the marriage namely, C.O.A and L. A.A. She further prayed for an order restraining the petitioner from interfering with the respondent's custody of the children pending the hearing and determination of the divorce cause. The respondent sought an order that the petitioner be compelled to provide reasonable financial support for the maintenance of the children and the respondent's alimony pending the hearing and determination of the cause. She further prayed that the petitioner be ordered to refund 50% of the costs incurred by the respondent in taking care of the children of the marriage. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the respondent. She swore an affidavit in further support of the application. The application is opposed. The petitioner swore two affidavits in reply and in opposition to the respondent's application.

At the hearing of the application, I heard oral rival submissions made by Mrs. Mbugua for the respondent and by Mrs. Kitaa for the petitioner. I have carefully considered the said submissions. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. There are essentially two issues for determination by the court. The first issue is who is entitled to the custody of the children. As regards this issue, there is no dispute that the children that are the subject of this application are of young and tender age. The children, twins, were born on 26<sup>th</sup> August 2002. They are eight (8) years old. It is now settled law that unless the contrary is established, custody of children of young and tender years shall always be with the mother. In the present application, the petitioner did not put forward any ground that will persuade this court to remove the custody of the children from the respondent. In the premises therefore, this court will award custody of the children to the respondent pending the hearing and determination of this divorce cause. However, the petitioner shall be entitled to access and visitation rights. The petitioner and the respondent shall agree on the best way that the petitioner shall have access and visitation rights without disrupting the education of the children. The ideal situation shall be that the petitioner shall be entitled to visitation rights of the children on weekends following a timetable to be agreed between the petitioner and the respondent. If there shall be any disagreement, either party shall be at liberty to apply.

The second issue for determination is whether the respondent is entitled to be paid maintenance beyond the sum of Kshs.20,000/- that the petitioner is currently paying. From the affidavits on record, it was clear to the court that there is fundamental difference between the petitioner and the respondent in regard to the kind of education that the children should receive. Whereas the petitioner is of the view that the respondent had taken the children to a school that was expensive and therefore beyond his financial means, the respondent is of the opinion that the children should receive the best education that the parents can afford. There is dispute regarding the actual income of the petitioner. Whereas the respondent is of the view that the petitioner had not disclosed his actual income, the petitioner forcefully argued that he had made full disclosure. What is not in doubt is that the petitioner has not been shouldering a fair share of the financial burden of bringing up the children of the marriage. It was apparent to the court that since the petitioner and the respondent separated, the respondent has borne a substantial part of the financial burden of bringing up and educating the children. This court is persuaded that the respondent established a case for the petitioner to be compelled to share the financial responsibility of bringing up the children of the marriage. Taking into consideration all the facts of this case, I direct that henceforth the petitioner shall pay to the respondent the sum of Kshs.75,000/- per month as maintenance and costs of the education of the children. The payment of the above sum shall commence with effect from 30<sup>th</sup> November 2010. This court will not render a decision in regard to whether the respondent shall be entitled to a refund of 50% of the amount that she has so far used to maintain the children. That issue will be

determined upon the hearing and conclusion of the divorce cause.

In the premises therefore, the respondent's application is hereby allowed. The respondent shall have custody of the children pending the hearing and determination of the divorce cause. The petitioner shall have access to the children during the weekends pursuant to a timetable to be agreed between the petitioner and the respondent. The petitioner shall pay monthly maintenance of Kshs.75,000/- per month with effect from 30<sup>th</sup> November 2010 until further orders of the court. The costs of this application shall be in the cause.

**DATED AT NAIROBI THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2010**

**L. KIMARU**  
**JUDGE**