REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 178 OF 2009

S.B…….……..……APPELLANT

VERSUS

A. A.L…….. …….……RESPONDENT

J U D G M E N T

The Appellant and the Respondent met in the United Kingdom in 1992 and started cohabiting with each other as husband and wife and as a result of the said cohabitation the relationship was blessed with four (4) children namely:-

(1) O.A.B - A girl born on 12th December 1993

(2) N.A.B - A girl born on 19th July 1995

(3) D.P.O.B – A boy born on 7th September 1998

(4) A.R.L.B – A girl born on 18th December 2000

On 15th December, 2008, the Respondent filed in the Children's Court at Tononoka Children's Case No. 382 of 2008 seeking inter alia the following orders:-

(a) A Declaration that both the plaintiff and the Defendant have parental responsibility of their children namely the four children whose names have been set out hereinabove.

(b) Custody of the children be granted to the plaintiff and the Defendant to have unlimited access with visitation rights as follows:-

i. During the school term from Friday 6.00 p.m. to Sunday 5.00 p.m.

ii. During School holidays the Defendant to have the children every alternative two weeks. The defendant to have the children for the 1st two weeks of the holidays and the plaintiff to have the children during the next two(2) weeks and so on alternatively until school resumes

(c) The Defendant do provide maintenance for the upkeep of the children by paying and catering for all education expenses.

(d) The Defendant do provide medical covers for the children with AXA and/or any reputable and authorized medical provider.

(e) The Defendant do pay a monthly maintenance of British Pounds 2000 on or before the 5th day of each month with effect from 5th December 2008, until further orders of this Honourable court.

(f) The Defendant do pay to the plaintiff arrears of maintenance of British Pounds 2,375 due and owing from the Defendant to the plaintiff and as per agreement.

(g) The Defendant do provide a serviceable and roadworthy Family motor vehicle (4 wheel drive) for the use of the children.

(h) Any other order or relief that this Honourable Court may deem fit and just to grant in the best interest of the four(4) minor children.

(i) Costs of the suit.

(j) Interest thereon at the current court rates from the date of filing suit.

The Appellant filed a Defence. Upon hearing the case the Honourable Trial Magistrate delivered judgment on 5th October 2009 substantially in favour of the Respondent. The Orders granted were as follows:-

1. The plaintiff (Respondent herein would take care of the physical custody of the Children whilst the legal custody is vested equally with unlimited access to the Defendant/Appellant.

2. Monthly maintenance of Shs.100,000/- payable by the Defendant to the plaintiff, the said monies to be paid through the plaintiff's account on or before the 5th day of every month.

3. Defendant (Appellant) to pay school fees for the children at their present school together with all other school requirement.

4. If there is need to change schools or arrange for transport, both parties need to consult.

5. The Defendant (Appellant) to continue providing medical cover at A&A for all the children.

6. The clothing to be shared on 50:50 basis.

7. The plaintiff to cater for rent and payment of water and generator expense (utility) in part of the contribution. To this end the children to continue to stay in the present residence.

8. Either party be at liberty to apply.

The Appellant, the father and Defendant in the said children's case being aggrieved with the said judgment lodged this appeal on 13th October 2009. The Appellant set out 24 grounds of appeal in the Memorandum of Appeal dated 13th October 2009. The said ground can be categorized or condensed into four major grounds:

(a) Custody (Grounds 14, 19 and 22)

(b) Maintenance (Grounds 1,5,8,11,13,15,16,17,18,20,21, 23 and 24).

(c) Possession of Property registered in the name of A Limited Liability Company, Creek Marketing Development Limited.

(d) Parental Responsibility.

At the hearing the parties agreed and the court directed that the Appeal be disposed by way of Written Submissions. The Appellant filed his written submissions on 11th June 2010 while the Respondent filed her written submissions on 16th July 2010. With leave of the Court the Appellant filed a Reply to the Respondent's submissions on 29th July 2010. Both parties filed their lists of authorities and supplied copies thereof to the court.

I have considered the Memorandum of Appeal, the Record of Appeal, the written submissions together with the authorities.

I will deal with the issues based on the grounds which are to be determined by the court. Happily, both parties through their counsels identified similar issues as set out above. The Appellant was represented by Miss P.A. Osino, Advocate while the Respondent was represented by Mr. Benjamin Njoroge, Advocate.

CUSTODY:

The children of the parties here are now aged as follows:-

(a) O, girl, now aged 17 years.

(b) N, girl, now aged 15 years

(c) D , boy, now aged 12 years

(d) A, girl, now aged 10 years

The principles to be applied in making a custody order are set out in Section 83 (1) of the Children's Act. This provides that:-

"83 (1). In determining whether or not a custody order should be made in favour of the applicant, the court shall have regard to –

(a) The conduct and wishes of the parent or guardian of the child.

(b) The ascertainable wishes of the relatives of the child.

(c) The ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under who the child has made his home in the last three years preceding the application.

(d) The ascertainable wishes of the child.

(e) Whether the child has suffered any harm or likely to suffer any harm if the order is not made.

(f) The customs of the community to which the child belongs,

(g) the religious persuasion of the child.

(h) Whether a care order, or supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force.

(i) The circumstances of any sibling of the child concerned, and of any other children of the home if any

(j) The best interest of the child

The Court also must be guided by the provisions and principles set out in Section 76 of the Children's Act.

The Trial Court found as a matter of fact that since 2003, the Respondent has had Physical custody of the children. The Honourable Magistrate stated as follows:-

"……Ever since the parties separated in 2003, the Plaintiff has been having actual physical custody of the four children. It came out in evidence that the two had a working arrangement whereby the Plaintiff would stay with the Children during the school term but with the Defendant having liberty to stay with the Children during weekends and school holiday.

It appears this arrangement worked well for all parties concerned. The children are not of tender years and are capable of deciding where they wish to stay.

However being that the plaintiff has been in continuous care and custody of the children for over three years since 2004, I find that she would be the one best placed to take care of the children's interest ……"

From the record, it is clear that there was such an arrangement between the parents even if it was operated with some variations or flexibility. During the hearing he testified and the Appellant at p. 24 of the Record of Appeal stated: -

"With this arrangement the children seem very happy with the arrangement – it has not affected the children negatively. For the holiday, I am happy with the arrangement."

In this case, the court did not invite the children to testify or to be examined by the court. It appears none of the parents applied for such testimonies and choose to leave the children out. The Honorable Magistrate held that:

"the children are not of tender years and are capable of deciding where they would wish to stay."

Both parties submitted on the same lines although the law is that the children's ascertainable wishes may not override other important considerations which are in his /her best interest.

This is an appellate court and the children's court had the benefit of looking at the evidence of the parties, looking at their demeanour while facing cross-examination before arriving at its decision. This court therefore cautions itself that it did not have the benefit of such direct evidence and has considered the record while bearing this in mind.

The Appellant in his submissions has referred to the evidence and stated that in fact the physical custody was divided almost equally for specific periods of time. He went ahead to give figures. These calculations are not reflected in the record and I will go by the trial court's finding. It would appear from his submissions that the appellant would have settled for joint physical custody just like that of legal custody since the parties residence are close to each other and the children's **"access to both parents is of fluid nature and they access both parents as they wish."**

It is my view, despite the aforesaid, flexibility and fluidity with regard to access to both parents and which I find truly commendable and a positive aspect in this case; the fact remains that the physical custody was substantially with the Respondent in accordance with a mutual arrangement by both parents and which continued to operate from 2004 or thereabouts.

The Appellant in his Reply to the Respondent's submissions (at p. 2) had this to say with regard to physical custody:

“ ……..

3. the entire proceedings reveal that the appellant and the respondent had shared the physical custody for specific periods of time that is to say, the Appellant from Friday to Sunday evening and all school holidays, during the month of December, April, June, and July, while the Respondent had physical possession during school week-days Monday to Thursday.

4. It is actually the appellant who spent more time with the children since during the periods when he was with the children, they were not going to school and did not have any engagement when the respondent had physical possession of the children, they were in school the whole day.”

The foregoing confirms that the findings of the trial magistrate were not far from this truth. In fact she was correct on this fact. The argument by the Appellant to consider the school time not to be part of the physical custody of the Respondent is a novel and interesting one but it is not backed by law. The arrangement the parents had is that during week-days, from Monday to Friday evening the children stay with the mother. They slept at their mother’s house and left for school from there and returned in the evening. In law the physical custody during school hours remained with her, although they were not actually and physically at their mother’s house.

There are no allegations that the children’s health, welfare or well being were adversely affected being with their mother. The court found that there was no evidence presented to it to show that the mother was unfit or incapable of taking care of the children.

In the premises, on the basis of the evidence I do not see any reasons and justification to interfere with the findings and decision on custody. In the absence of any adversity or prejudice to the children and applying the principles in sections 76 and 83 of the Children’s Act, I hereby uphold the decision on custody.

I am not persuaded that the issue of gender of the parents or the children are to be considered in the circumstances of this case. However, depending on the facts or circumstances, if the age or the gender of the child is a factor that can expose him/her to suffer harm then the court would be under a duty to provide special protection in this regard.

I am of the view that the legal position regarding children of tender years is distinguishable from cases where the child is above tender years. I think that the law enunciated in **GITHUNGURI – V – GITHUNGURI C.A.C.A. NO. 30 OF 1978 AND ZULEKHA MOHAMED NAMAN – V – GHARIB SULEIMAN GHARIB (1997) e KLR** apply to children of tender years. The trial court in this case found the children herein not to be of tender years, a finding supported by both parties in their submissions in this Appeal. In fact the children have now grown even more when this appeal was heard and judgment delivered.

The contention by the appellant that the child O is residing exclusively with the Appellant since January, 2010 is not a fact or issue in the Appeal, strictly. It could have arisen in some interlocutory proceedings during the pendency of the Appeal but it is not a matter arising in the appeal. I therefore, agree that to allow the present action of the allegation in the appeal will amount to adducing additional evidence in this appeal. There has been no application to adduce such evidence and I disallow it. I will also disallow the **“new”** factors outside the appeal.

The issue of custody of a child is a continuous matter and ever changing. In case new situations arise, one can still go to the children’s court and present the new factors through fresh applications, review or variation proceedings. For the purposes of this appeal, this court is not entitled to admit the new factors or evidence unless they are of such nature that they touch on the child’s safety, health or life and there is an imminent danger and the child is likely to suffer harm, if the court does not intervene. This must be in very exceptional circumstances.

(b) MAINTENANCE

Most of the orders granted in the judgment were in respect of maintenance. Due to this the Memorandum of appeal shows that the Appeal substantially challenges and goes to attack the decision and findings in respect of Maintenance. The trial Court made the following orders with regard to maintenance:

i. Monthly maintenance of Shs.100,000/= payable to the Respondent through her account on or before the 5th day of every month.

ii. To pay school fees for the children at their present school together with all other school requirements.

iii. To continue to provide medical cover for all the children through AXA Insurance.

iv. The clothing expenses to be shared on 50:50 basis.

The evidence on record shows that while the parties were in the United Kingdom, the Appellant was the sole bread winner while the Respondent was Home-maker. She did not engage in any formal employment. She is what is commonly referred to in Kenya as a **"House wife"**. When the parties relocated to Kenya the same arrangement subsisted. The appellant obtained a class **'H'** visa which is an Investor's Visa with the Respondent and the children as his dependants. This arrangement existed even when the relationship became bad. The Appellant testified that he continued to maintain the children. At p. 28 of the Record of Appeal the Appellant stated in cross-examination that: -

"I no longer stay with A.L, we separated in August 2004. I have been giving her 2,500 pounds since 2003 for a portion of time. While giving her this amount we were staying together. It was altered to 2,375 pounds in 2006 because it was agreed that health insurance and food should be divided."

He added at p. 24: -

"The Agreement we had with Miss L was that, Miss L was to pay 50% of the fees for the children from money I give her. We entered this Agreement in 2002".

The trial court found that the respondent did not earn or have any income of her own. She claimed that she came to court when he stopped honouring the agreement. I do find that under this agreement or arrangement existed and continued since 2002. In an e-mail sent to the Respondent the Appellant stated as follows:-

"The school fees work out currently at Kenya shilling, Fifty thousand (Kshs.50,000/=) per month which is about 385 pounds sterling. So the living cost for the kids is 1990 pounds."

The foregoing evidence shows that it is the Appellant who has always maintained the Respondent and the children. I have carefully considered the submissions by counsel and find that the appellant is a man of substantial means with properties in the United Kingdom and holding shares in various companies. The Respondent has always been a House wife and looking after the family especially the children. It appears that there was an understanding between the appellant and Respondent that he would be the bread- winner while the Respondent would be the home-maker. Everything went well until their differences arose.

I find that the respondent does not have a source of income and has always relied upon the appellant to maintain her as well as the children. In this case, the maintenance sought is for the children and strictly not the mother, the Respondent.

Both the Appellant and the respondent are shareholders and directors in the company called Creek Marketing and Development Limited. There was no evidence that she works at the company or that the company does any business. It appears that the company only owns the property at Mtwapa on which the matrimonial home is situated.

This court takes judicial notice that the said company is in the process of selling the said property

and the parties as shareholders will receive the proceeds of the sale. By the time this judgment was concluded the court had not received any information as to the final position.

Even if the court knew of any receipt of the proceeds of sale, I am not sure whether the court had any jurisdiction for the purposes of the Appeal in directing how it should be applied in so far as maintenance is concerned.

The court cannot deviate from the appellate process to investigate the assets of the parents or parties herein which are possible matrimonial properties or assets or to make provisions of maintenance taking these into account. The children need to live now, eat, have shelter and go to school right now.

The result is that I also find that the Respondent has no source of income or is not able to provide maintenance for the children to such a degree as to equal the ability of the Appellant to provide maintenance.

I agree that parental responsibility should be shared and is now equal in the eyes of the law where the parents were married or where the parental responsibility has been conferred by the law or courts. Parental responsibility is not only about who pays the bill or who has more income. The respondent submits as follows: -

"…….

When she attends the school meeting , sports day, take the children to hospital, cook and clean for them, stay awake while a child is sick, she is executing her parental responsibilities. A mother is a mother twenty four (24) hours, seven(7) days a week three hundred and sixty five (365) days a year. The duties of a mother do not cease and cannot be compared to a monthly maintenance Cheque. To do so is to discriminate against the role of a mother and a woman. The children's court considered that the mother had no source of income and did not assign upon her any formal parental responsibility."

I wholly accept and agree with the said submissions. They are logical and sound principles on the position of the parental responsibilities of a mother.

The court has compared the findings of the trial court with regard to the sources of income of the Appellant and the Respondent. The Appellant has dutifully and quite committedly paid school fees for his children. The amounts are substantial – the school the children go to is one of the best high cost private schools in Kenya. Despite some difficulties, the Appellant has gallantly continued to pay for their school fees or other maintenance well beyond what the trial court ordered. The trial court lauded him and so did this court. Despite all difficulties he has not even once suggested pulling out the children from the said schools.

The foregoing goes to demonstrate that the Appellant is able to provide for the children's education and maintain them to the standard they are used to and which the mother cannot sustain.

In the case of **S.O. –V- L. A.M. (2009) e KLR**, the Children court had ordered a member of Parliament with a monthly income of Kshs.485,000/- to pay Kshs.10,000/- per month and housing at Kshs.20,000/- per month. In addition to pay school fees and medical expense for the child. The father appealed against the award to the High Court and he lost. At P.6 the Court of Appeal found that it would be proper to award custody to an unemployed mother and also make provision for accommodation as its in the best interest of the child.

That is because the court of Appeal came to a conclusion that the best interest of the child demands that after awarding actual custody to an unemployed mother of a child who has no means that the father is ordered to provide maintenance.

Applying the principles in **S.O. –V- L.A.M,** I do hold that the Appellant is better placed and able to

provide maintenance for the children living with their mother. It is in the best interest to do so as the appellant is able to provide for his children. The order of maintenance and payment of school fees, food medical etc. flows from the order awarding the Respondent the physical custody.

(c) POSSESSION OF PROPERTY REGISTERED IN THE NAME OF A LIMITED LIABILITY COMPANY

The Appellant in his own submissions has stated that this issue has been overtaken by events in view of the consent orders issued in the High court in H.C. O.S. No. 178 of 2009 STEPHEN BLANCHET –V- AKACH LANGI & ANOTHER on 26.5.and 28.5.10.
However, he proceeds to prosecute this ground. It is my view that it may have operated in the mind of the trial court that the property at Mtwapa owned by the company was indeed the matrimonial home of the parties and home to the children. The trial court directed that the Respondent caters for rent and should continue to reside in the same residence. This may appear to be contradictory and inconsistent. However it should be remembered that the Respondent was said to be a 50% shareholder of the company while the other 50% was held by the Appellant. The house was the matrimonial property from which the Respondent and the children had never moved. The company knew of the proceedings in court but it did not intervene to object. This is not surprising since the owners were the ones litigating in the Children's court. I think that in the best interest of the children the Appellant could possibly consider how the company could demand rent from the Respondent in which he would then have a share or stake. However, in the light of the intended sale and the house likely to go to a third party, one wonders, what purpose any change will serve except for the parties to take accounts.

I am not inclined to interfere with the decisions in regarding the rent and the residence.

With regard to the direction on the medical cover, I think that it would have sufficed for the trial court to have ordered that the Appellant provide for the medical expenses or needs of the children without necessary stating where medical insurance should be obtained from. This should be at the discretion of the Appellant, I would therefore allow the appeal against the direction that the medical insurance should be with AXA or other specific company.

(D) PARENTAL RESPONSIBILITY:

Section 25 of the Children's Act provides as follows:-
"25 (1) –

(2) Where a child's father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for a period which amount to not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that parental responsibility agreement has not been made by the mother and father of the child."

I do hold that the Appellant has in the circumstances acquired parental responsibility as a father as he has cohabited with the Respondent for a period of about 15 years by the time they broke up and he has maintained the children throughout to-date.

In such a case neither the father nor the mother shall have a superior right or claim against the other in exercise of such parental responsibility.

I therefore hold that the decision of the trial magistrate was proper. I do not see how the obiter comments of the trial magistrate which are alleged to amount to discrimination and violation of the Appellant's Constitutional rights altered the decision on maintenance herein.

I do hold that the ultimate decision of the court was in line with the facts and law.

The upshot is that I do hold that the judgment of the trial court was sound and proper except for the

direction on the medical insurance provider. I do hereby uphold the judgment except that the Appellant is at liberty to source the medical insurance from any company or institution of his choice. The Appeal is otherwise dismissed with costs to the Respondent.

It follows therefore that the entire judgment is fully reinstated and the interim orders of stay are hereby discharged with immediate effect.

Dated and delivered at Mombasa this 2nd day of December 2010.

M. K. IBRAHIM
J U D G E

CORAM
Ibrahim, J
Court Clerk – Kazungu
Ms. Osino for the Appellant
Mr. Njoroge for the Respondent
Judgment delivered in their presence.

Ibrahim, J