



**FRANK OMWANGE OMARE )**

**SHALOME JOY OMARE ) .....APPELLANTS/APPLICANTS**

**Suing through the Next Friend)**

**DUBINE NYABOKE SIRO )**

**VERSUS**

**KENNEDY JAMES OMARE OKORE ..... RESPONDENT**

**RULING:**

The appellant herein filed an application seeking to restrain the respondent from taking custody of the applicants herein or interfering with their education at Green Hill Academy, Kisii, pending hearing and determination of an appeal.

In an affidavit sworn in support of the said application, Dubine Nyaboke Siro, the next friend of the appellants who is also their mother, narrated how she was chased out of their matrimonial house in Nairobi together with her minor children by the respondent. Thereafter she moved to her mother's house at Kisii and enrolled the minor appellants at Green Hill Academy. Thereafter the appellants filed a suit seeking, inter alia, that their custody be granted to her (the mother).

The trial court dismissed the said suit and granted custody of the minor children, 5<sup>1</sup>/<sub>2</sub> and 2<sup>1</sup>/<sub>2</sub> years to the respondent. The appellants were aggrieved by the said decision and filed an appeal against the same.

The deponent further stated that the said children, being of tender age, would suffer if custody is given to respondent who is a sales person by profession and travels extensively.

The respondent filed a replying affidavit and stated that on 22<sup>nd</sup> November, 2007 the applicant's mother left their matrimonial home at Ongata Rongai, having removed the children from the schools where they used to attend. She went to live with them at her parent's home at Kisii. He said that his wife was a student at Nyanchwa Adventist College where she was training as a P1 teacher since September, 2006.

While she was in college, he was staying with the children and their mother would join them during the college vacation.

He added that the first appellant, Frank Omwange Omare, wanted to go back to his former school, thorn Tree Academy, Rongai. In his view, the appeal had no merits and the trial magistrate had considered the welfare of the children in arriving at her decision.

He admitted that he is a salesman but he had always discharged his responsibilities as a father to his children. He urged the court not to grant the orders sought.

The respondent's advocate did not attend court for the hearing of the appellants' application although the date was fixed by consent.

I have considered the said affidavits and the submissions that were made by Mr. Oguttu for the appellants. It is trite law that in cases of custody of children the paramount consideration is the welfare of the children.

Where the children are of tender age, custody is ordinarily given to the mother except where there are exceptional circumstances that militate against issuance of such an order.

See **JOYCE MUTHONI GITHUNGURI –VS- STANLEY MUNGA GITHUNGURI** [1982-88] 1 KAR 9.

The children here are of tender age. They are currently staying with their mother at Kisii. The respondent is a salesman working at Nairobi. Although he used to live with the children until 22<sup>nd</sup> November, 2007, since then the next friend is the one who is living with them. The children's education will be disrupted if they are removed from Green Hill Academy, Kisii, and returned to Rongai.

If that were to happen before the appeal is heard and determined, in the event that the appeal succeeds, the children will have to be returned back to Kisii. That will not auger well for the welfare of the children.

In the circumstances, I allow the application. The costs thereof shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED AT KISII THIS 30<sup>TH</sup> DAY OF MARCH, 2009.**

**D. MUSINGA**

**JUDGE.**

**30/3/2009**

Before D. Musinga, J.

**Court:** Judgment delivered in open court in the presence of:

Mobisa – cc

Mr. Oguttu for the Appellants

N/A for the Respondent

**D. MUSINGA**

**JUDGE.**