



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Appeal 123 of 2007

TITUS AUGUSTINE MAINDELEAPPELLANT/ 1ST APPLICANT

SABINA MUTINDI MAINDELE APPELLANT/ 2ND APPLICANT

VERSUS

HARRISON MULINGE MULANDI RESPONDENT

(Being an appeal from the Judgment of Honourable (Mrs) E. Nderitu

dated 8th July 2008 in Machakos Chief Magistrate Civil Case No. 171 of 2006)

JUDGMENT

1. This Appeal raises only one issue; whether the subordinate court erred when an order was made that the custody of one Benjamin Mulinge be granted to the Respondent pending the hearing of the suit in which the same issue is the one to be ultimately determined.
2. From the Complaint filed in the lower court, the Respondent is not the biological father of the minor but his case was that his customary law wife, Stella Ndinda Maindele had “**adopted**” the child before he started co-habiting with her in the year 2000. Although she raised the child, neither the Respondent nor Stella took the necessary legal and procedural steps to legalise their position vis-a vis the child. Tragically, Stella died on 14/6/2005 and it was the Respondent’s case that the Appellants then took the child away soon thereafter and refused to return him to the Respondent in spite of intervention by the Machakos District Children’s office. He claimed that in fact the 1st Appellant took the child to Tharaka and placed him in an orphanage. He wanted custody, he said, as that would be in the best interests of the child.
3. On 27/3/2008, the Respondent filed an interlocutory application seeking orders *inter-alia* that the minor be placed in his custody until the suit was heard and determined. The issue was contested by the Appellants and Mukai Maindele deposed in her Replying Affidavit that Stella, her deceased daughter, was unmarried and may have lived together with the Respondent only as friends. That the Respondent had also claimed Stella’s estate and the issue is apparently pending before this court i.e. **Machakos H.C.**

Succ. 361/2005. Lastly, that the interests of the child would be best protected if he remained with Stella's relatives.

4. I have read the submissions on record and my view is very simple;

I am being asked to overturn the decision of the learned magistrate because it was allegedly haphazard, biased and not in the best interests of the child. The record however does not bear the Appellants out. The issue before the learned magistrate was one where her discretion was being sought. She was yet to determine the substance of the suit but parties were seeking interim orders. In such a case, she only required *prima facie* evidence as to which party was best placed to secure the child. She decided that since the child had recognized the Respondent and the deceased, Stella, as his parents, it was best that he remains in the Respondent's custody. I agree with her completely and I would have reached the same decision on the facts.

5. It was the holding in **Giciem Construction Co. vs Amalgamated Trades & Services (1983) KLR 156** that **"as a matter of general principle, (an appellate) court should not interfere with the exercise of discretion...unless (the judge or magistrate) has misdirected himself, and as a result, arrived at a wrong decision"**.

6. In this case, I have said that there was no misdirection and I say so also because the issue raised about the magistrate holding a one-on-one session with a minor is a non-issue. In matters regarding children and minors, sometimes a court may, if it deems it fit, interview the child alone and record its impressions. At least, I know no law that precludes that practice which I find to be good and useful. In her Ruling, the learned magistrate disclosed her impressions.

7. On the whole, the Appeal before me is misguided and is dismissed. Parties should conclude the succession proceedings that seem to be clouding all their thoughts and conclude the pending suit, subject of this appeal.

8. Each party should bear its own costs.

9. Orders accordingly.

Dated and delivered at Machakos this **18th** day of **September** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Munyasya for Appellant**

Mr Kamanda h/b for Mr Nyakeri

ISAAC LENAOLA

JUDGE