



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MATRIMONIAL CASE NO. 49 OF 2000

J.F.....PETITIONER/RESPONDENT

-VERSUS-

A.H.K.....RESPONDENT/APPLICANT

RULING

The Court was moved by Notice of Motion dated 18th August, 2008 brought under s.30 of the Matrimonial Causes Act, and under the Children Act, 2001 (Act No. 8 of 2001) generally.

The Court was being asked to review orders made by *Mr. Justice Hayanga* on 4th April, 2003 with regard to the custody of a child, *I. N.F.* The applicant asked that this Court should interview or examine *I.N.F* in chambers to ascertain her best interests. The main prayer was that the Court do grant permanent custody of *I. N. F* to the respondent/applicant, and that the petitioner be given limited access to the child.

The general grounds founding the application were, firstly, that the petitioner has filed a suit in Children's Court Case No.[...] at Tononoka, to enforce this Court's orders made on 1st July, 2002; the respondent wishes to have the said orders of 1st July, 2002 reviewed; the child "is traumatized and the respondent denied access to the child"; the child is not attending school since April, 2009; the circumstances in which the orders of 1st July, 2002 were made have changed, and the child is now 14 years of age, and able to make her own decisions, and so her wishes are paramount; the Children's Court had not taken *viva voce* evidence from the parties, and hence that Court would be unable to grant explicit orders on custody and would be unable to ascertain the wishes of the child; the filing of Children's Case No.[.....]while the instant one is subsisting, poses risks of contradictory orders being made.

In her supporting affidavit sworn on 18th August, 2009 the applicant makes a large number of depositions: she is the biological mother of *I.N.F*; at the age of 28, and being mentally and physically exhausted, she had been unable to contest the respondent's case for custody in 2002; when *Hayanga, J* delivered the divorce and custody judgment on 4th April, 2003 the child was at the impressionable age of 7 years and was not in a position to make her own decisions; the respondent had denied her access to the child, even though she had access to the child through the child's cellphone; the child is now fourteen years old, and capable of deciding who she wants to live with; the child has represented to the deponent that she is undergoing psychological trauma at the hands of the respondent; the deponent has informed the petitioner she is ready to take custody of the child without seeking maintenance from the respondent; the child had for sometime been attending G[particulars withheld] School in Nairobi, but has lately been removed from there due to poor performance; the deponent hears from (unnamed) others that the child no

longer attends school; on 12th August, 2009 the Tononoka Court ordered that the child had to stay in the custody of the respondent, in compliance with the Court order of 4th April, 2003; the child has a German passport and as the respondent is a citizen of Germany, the deponent apprehends that he will relocate, with the child, to Germany; the child has not been staying with the respondent, but with the respondent's girl-friend.

The respondent, in a replying affidavit sworn on 26th August, 2009 depones, in substance, as follows:

the matrimonial cause was instituted in 2000, and on 4th December, 2000 he was granted temporary custody of the child which was confirmed after full hearing (*Hayanga, J*) on 4th April, 2003; prior to the custody orders the respondent had separated from the applicant in 1998, and all along he has single-handedly taken care of the child, while minding the child's best interests; throughout the custody hearing, the applicant was ably represented by counsel; it had emerged in the evidence during the custody hearings that the applicant was affected by alcoholism; the applicant had not well used the limited access-to-child rights which the Court had granted her, mainly due to an alcohol problem; the child had been taken to G School in Nairobi, but due to poor performance, the deponent committed her to private tuition; the child has close relations with the respondent's wife, S.W; the deponent has no intention to remove the child from Kenya, and she currently attends C[particulars withheld]Academy in Mombasa; the applicant has in the past escaped with the child, but the child was restored to the deponent who has a lawful custody order; the deponent loves and cares deeply for the child; the applicant has no known means of income or a personal home – and this shows her not to be independent and responsible; the deponent has faithfully taken care of the child for several years, and has done nothing to warrant the custody order being reversed.

Learned counsel *Mr. Onyango* presented the applicant's case before me on 20th August, 2009, and submitted that the circumstances in which the custody orders had been made in 2003 have changed. Counsel relied on facts which, however, are contested by the respondent: he said the child was no longer staying with the respondent, and that she had sought refuge with the applicant. Counsel said the respondent had had to rush to the Children's Court at Tononoka, and in this way secured the return of the child who was reluctant to return to him. Counsel also maintained, in spite of the respondent's explanations contained in the replying affidavit, that the child was not at present attending any known school. Counsel asked for the Tononoka Children's Court decision in Children's Case No.[.....] to be stayed, in so far as that decision restated the High Court's custody orders of 2003; and this was urged on the basis that it would enable the child to attend school courtesy of the applicant.

Learned counsel urged that the alcoholism factor which had cost the applicant custody in 2003, was no longer applicable, as there was a new doctor's report "confirming that the respondent is now a responsible and independent person". Counsel urged that the custody of the child be now transferred to the applicant.

Learned counsel *Mrs. Makone*, presenting the respondent's case, submitted that the baseline for custody with the respondent, goes back to interim custody orders of 2000, and, for nine years thereafter the respondent has been the lawful custodian of the child. Counsel noted that there had been an attempt by the applicant, in July 2009, to remove the child from her nine-year-old custody; she urged it to be not right that one who didn't have the custody for so long, should now be seeking custody.

Counsel on both sides took the common position, also found in particular in the applicant's affidavit, that the Court should give a hearing to the child herself, before coming to a decision.

Mr. Onyango urged the many points featuring in the applicant's affidavit, in particular, that this was a case of the biological mother seeking to retrieve the custody of her daughter; and counsel urged that the child, at this stage in her life, particularly needed her mother for social and personal guidance.

On the basis of this Court's orders of 20th August, 2009 the child was brought to Court for examination *in camera* on 17th September, 2009. In an informal setting, I put certain questions to *I.N.F*; I will summarise here the main points featuring in the examination, which was attended by counsel on both

sides.

The child said she was aged 14, and currently attends C Academy, located next to [particulars withheld] Hospital in Mombasa. She had done her Standards I, II, III and IV Primary School stages at W School, D; for Standards V and VI, she had attended [particulars withheld] Academy; for Standards VII and VIII, she had attended G School, in Nairobi; and for Standard IX, she was now attending C Academy. At all these stages of education, the child said, the person who had been paying her fees was the father – respondent herein.

The child said she lives with her father, in a two-bedroomed house situated at Diani, in the South Coast; one bedroom is reserved to her, while the other is used by her father and her step-mother.

How does the child relate to her parents? How do they care for her? She said her father buys the food; her step-mother buys her clothes. She gets on well with her step-mother, and she has had no cause to complain about her step-mother; in the child's words: "She is proud of me; and I am proud of her". The child is not quite so close to the father; in her words: "I don't have so much of a conversation with him".

About her real mother, the applicant herein, the child said: "she does not stay with us. She lives in town, and sometimes she is at Nyali. I see her once in a while. She once used to come home. I don't see her much. I sometimes call her; and she calls too".

It was clear to me that the child was in a sensitive and delicate position, in relation to the divide between her natural parents. When I asked her how she feels about her custody, she said: "I just want to go to school". When I informed her that the Court cares for the best interests of children, and she will certainly go to school, whatever decision is taken, she said: "I don't know. I cannot take a choice between the two parents" – and I noted that at this point, the child shed several tears.

Against that background, learned counsel *Mr. Onyango* and *Mrs. Makone* came before the Court to make their submissions on 4th October, 2009.

Mr. Onyango asked for a review of the custody orders, and a grant of custody to the applicant in place of the respondent. He urged that the examination of the child had shown her to be under an emotional trauma. Counsel contended:

"She is not having proper communication with the biological father, she has to rely on a third party, the step-mother; this has affected the child".

Counsel urged that the child had been transferred from school to school, due to poor grades – and he submitted that this is cause for reviewing the custody orders.

Counsel contended that the hearing of the child *in camera* had shown her to be under emotional trauma – and so her best interests dictated a review of the custody orders – and that custody should be granted to the applicant.

Learned counsel *Mrs. Makone* expressed the respondent's objection to the application: for the child had been only three years old in 1998 when her parents separated; and since then, the child has been under the custody and care of the respondent.

Mrs. Makone submitted that the respondent's position in relation to the child, remains today as it was in 2002 when in his ruling of 1st July, 2002 *Mr. Justice Ouna* held that "the child should not be left [under] the control of the mother for [the] foreseeable future". Determining the applicant's application at that time, for access to the child, the learned Judge had remarked:

"The mother has been totally irresponsible and unable to take care of her child. To allow her access to the child without the necessary precaution would disrupt the child's development and mental stability. Therefore any orders given for access should be restrictive to ensure full protection of the child's

rights.....”

Mr. Justice Ouna in his said ruling thus said, in relation to the respondent’s attitude regarding education for the child:

“Her father is keen to provide her with the best education money can [buy]. He is financially able to do this. I have noted that he has in place a full-time trained lady to look after her at home and assist her with homework, something which the wife is unable to provide.”

Counsel submitted that *Hayanga, J* who made a divorce decree on 4th April, 2003 had also reinforced the original custody order in favour of the respondent herein. Counsel urged that the findings of the two learned Judges had come in the wake of full hearings, during which the demeanour of the parties and of the child herself had been observed.

Mrs. Makone urged that the respondent having had the custody of the child for the last nine years, should not now be denied custody – save where there is some very grave cause, but such has not been demonstrated by the applicant. Counsel brought to the attention of the Court a decision of the High Court – *John Ngugi Kabogo v. Jane Waithera*, Nairobi High Court Civil Appeal No. 35 of 2009 – in which an application to reverse a custody order was refused, even though the father of the child had had custody for only three months. In making the Court’s order, *Lady Justice Gacheche*, in that case, remarked:

“...it is best that my earlier order is confirmed and that [the child] remains with the applicant until the appeal is heard and determined, for to order otherwise would be tantamount to causing the minor unnecessary anguish and trauma”.

Counsel urged that, from the hearing of the child *in camera*, it could not very well be said that she was traumatized while being in her father’s custody; the child said she could not elect between her two parents: and *Mrs. Makone*, in those circumstances, urged that the Court should leave the child in the custody in which she had been for the past nine years.

Mrs. Makone contested the contention made for the applicant, that there was no proper communication between the child and her biological father; it was not in evidence; and moreover, she was quite close to her step-mother, and the nature of communication among the family members was in all respects, normal.

Counsel urged that the respondent had taken all necessary courses of action to ensure the child’s schooling. She urged that no proof had been provided that the reason the applicant had in the first place been denied custody, had now ceased to be. Counsel also urged that it had not been shown that the applicant had any home of her own, nor a responsible livelihood which could serve as the basis of sustenance for the child if the child were in her custody. The child herself had said her mother sometimes lives in town, and sometimes stays at Nyali.

Before this Court is the detailed evidence of the parties, in the form of depositions; the personal statement of the child-subject; the whole record in this case going back to 2002 and 2003; and the detailed submissions of counsel.

The historical fact that, for some nine years the child has been in the custody of the respondent, is not insignificant. Such custody, in the first place, has been in compliance with valid Court orders made after the conduct of hearings on the merits. Secondly, such a long period of custody creates a continuum of family relations which cannot be overlooked, unless special reasons are shown. Thirdly, it emerges from the evidence that the prolonged period of custody has gone hand-in-hand with the continuous discharge of essential upkeep duties, in relation to the child: food, accommodation, health-care, schooling, family belonging. On the child’s own evidence, she is not complaining about any short-falls in that regard. Therefore, the history of custody creates a *status quo* to be preserved, save for good cause which must be proved by evidence.

The evidence raised by the applicant is not, in my opinion well-focused, or reflective of the true position;

it is claimed that the respondent has neglected the child's schooling – but even the child herself didn't say so. It is alleged that there is bad relations between the child and her father: but this does not emerge from the evidence.

The applicant, without clear cause, impugns the reasoning which led the High Court to deny her custody in 2002 and 2003; but the findings of the High Court in the earlier cases are now governed by the *res judicata* principle, and they constitute the valid record which this Court must take as it stands. Therefore, the point being raised in relation to the earlier decisions, that circumstances have changed, and so the applicant merits custody for the child, is by no means a valid point.

After carefully considering the case made by the applicant, I have come to the conclusion that the application must fail; and I will make specific orders as follows:

- (1) *The prayer that the Court be pleased to review the orders made by Mr. Justice Hayanga on 4th April, 2003 as concerns the custody of the child, I.N.F, is refused.*
- (2) *The prayer that permanent custody be granted to the applicant, and the respondent be given limited access to the child, is refused.*
- (3) *The applicant shall have limited access to the child; and the parties themselves shall make agreement on the specific detail thereof, for the approval of the Court which in this regard shall be moved by application.*
- (4) *The parties shall bear their respective individual costs.*

Orders accordingly.

DATED and DELIVERED at MOMBASA this 6th day of November, 2009.

J. B. OJWANG

JUDGE

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Respondent/Applicant: *Mr. Onyango*

For the Petitioner/Respondent: *Mrs. Makone*