REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL 99 OF 2007

SYPROSE ADHIAMBO …….. APPELLANT

- Versus -

RICHARD ODHIAMBO ……...……RESPONDENT

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J U D G M E N T

The Appellant, Syprose Adhiambo, has appealed to this court against the decision of the Children's Magistrate's Court at Tononoka, Mombasa, in which she lost the custody of a child to the child's father, one Richard Odhiambo, the respondent herein.

The facts of the case were that the parties cohabited from January, 2000, and their relationship was blessed with the child, who is the subject matter of this litigation, and who was born on 3rd August, 2001. A second child born in 2004 passed away at birth. On 3rd February, 2006, the appellant left the respondent's home and went away with the surviving child. The respondent thereupon filed a case in the Children's Court aforesaid, praying for judgment against the appellant for a declaration that the defendant had parental responsibility for the child of their union, pursuant to Sections 3, 24(2), 25(b) and (2) (b), and 81 of the Children's Act (sic) and an order giving that effect; maintenance and custody orders; and any other relief that the court may deem fit.

After hearing the respondent and his one witness, on the one hand, and the defendant, on the other hand, and after considering the welfare of the child, the court found that the best interest of the child dictated that the custody be given to the father. For that reason, the court granted the respondent's prayer for custody, with the appellant being allowed access to the child. The appellant then moved to this court on appeal against that judgment.

At the hearing of the appeal, Mr. Obara appeared for the appellant and the respondent appeared in person. Mr. Obara submitted that the Children's Magistrate erred by failing to refer to the appellant's submissions, and that if she had looked at Section 88 in those submissions, she would have come to a different conclusion. Secondly, he further submitted, the magistrate erred in granting custody to the respondent whereas such custody had not been specifically prayed for, and that what the respondent had sought were a maintenance and custody orders. Thirdly, he also submitted that the magistrate had failed to consider the best interests of the child, and that if she had done so, she would have come to the conclusion that the appellant was better placed to cater for those interests. Finally, he submitted that the appellant's counterclaim was not considered, and that judgment should be set aside as it was entered in

error.

On his part, the respondent submitted that a child cannot have two fathers and that he was the only father of the child. He also submitted that the child's name was changed to Wasonga while his name had been Odhiambo, and that the appellant denied the respondent access to the child contrary to a court order. He finally submitted that he should be awarded the custody of the child as he was the true father, with liberty to the appellant to access the child.

Mr. Obara said in reply that the access was suspended by the court because of too much acrimony between the parties.

Having considered the arguments of both sides, I find that there are four issues to be determined. These are whether the magistrate failed to refer to the appellant's submissions; whether the respondent had prayed for the custody of the child; whether the magistrate considered the best interests of the child; and whether the appellant's counter claim was considered.

The appellant's first ground is that the learned trial magistrate erred by failing to refer to the appellant's submissions, and that if she had looked at Section 88 of the Children Act in those submissions, she would have come to a different conclusion. I agree with the appellant's counsel that Section 88 of the Children Act empowers the court to make interim custody orders and from time to time to review, suspend or vary such orders. In his written submissions, learned counsel proceeded to say that this was a just case for the court "*to make such orders by vesting custody on the mother, which order can then be reviewed, varied or suspended depending on any future events and circumstances.*" By making this statement, counsel has engaged in self contradiction. His second ground of appeal, to which I shall revert shortly, is that the magistrate erred in granting custody to the respondent whereas such custody had not been specifically prayed for. It is notable that nowhere in her counterclaim did the appellant specifically pray for interim custody of the child. If it was erroneous for the court to grant custody to the respondent when he had not specifically prayed for it, would it not have been equally erroneous for the court to award interim custody to the appellant since she had not specifically prayed for it?

This brings me to the second ground of appeal, which was that the trial magistrate erred in granting custody to the respondent whereas such custody had not been specifically prayed for, and that what the respondent had sought were a maintenance and custody orders. Whereas it is true that in his prayer two the respondent asked for what he called "*a maintenance and custody orders*", we should bear in mind that he was and still is a layman at law, and that he drafted and signed his own plaint and other pleadings. But I think that his prayer was specific. He sought maintenance and custody orders. The whole of this case was on nothing else but custody and maintenance of the child Clinton Odhiambo. I think he expressed himself clearly, and what he sought from the court was equally clear. I don't think that anything turns on the first two grounds of appeal.

The third ground of appeal was that the magistrate had failed to consider the best interests of the child, and that if she had done so, she would have come to the conclusion that the appellant was better placed to cater for those interests. A reading of the judgment does not support this ground. Paragraph 2 of the trial magistrate's judgment opens with the words:-

"*The fundamental principle in deciding who gets the child … herein is the best interest and welfare of the child as enshrined in Cap. 586 …*"

The rest of the judgment is devoted to a consideration of the child's welfare in the context of the surrounding circumstances. She considered the child's right to be named by his parents; the appellant's attempt to change the child's name unilaterally; the acrimonious relationship between father and mother; and the subsequent marriage of the appellant to a third party. All this was done in a bid to ascertain who of the two parents was better placed to have the custody of the child in the best interests of that child and the learned magistrate concluded her judgment by saying:-

"*Considering all the abuse (read 'above') I find that it would be in the best interest and welfare of the*

child Clinton Otieno that he resides with the plaintiff …"

I therefore find that the learned magistrate did consider what she perceived to be the best interests of the child before granting its custody to the respondent.

The question which the appellant should have posed, but which she did not, was whether the court ought to have come to the conclusion which it did after considering all the relevant facts placed before it. The conduct of the appellant in relation to the child is very crucial. According to her affidavit evidence in the interlocutory applications, she first married a Mr. Wasonga in 1994 after which they fell out. Going by the copy of her National Identification Card which is attached to the application for the late registration of Clinton Otieno Odhiambo's birth, the appellant was only 14 years old when she alleges to have married Mr. Wasonga. By any standards, she was still a child herself. But that is neither here nor there. After living with the respondent for five years, she went back to Mr. Wasonga, but this time accompanied by the child Clinton.

In the appellant's affidavit sworn in reply to the respondent's application dated 21st August, 2006 for custody of the child, the appellant referred to the child as Clinton Otieno Wasonga. She also averred that she had separated with her husband while expecting that child, and that the respondent had mistakenly assumed that the subject child was biologically his. In her sworn oral testimony in court, she said:-

"*Wasonga is indeed Clinton's father."*

But in cross examination by the plaintiff, she changed grounds and said:-

"*Yes, you are the father of Clinton."*

And in re-examination by her advocate, she said, inter alia:-

"*The name Wasonga appears as the child's name because we lived together."*

This is not proper. Mr. Wasonga is not Clinton's father, and will never be, and all the interested parties know it. Having admitted in court that the respondent is the father of Clinton, the significance of her replying affidavit sworn on 11th September, 2006, and her oral testimony in court become that she lied on oath and thereby perjured herself. That casts her in bad light.

While the learned trial magistrate found that the appellant had taken steps to have Wasonga's name appear on the child's birth certificate, I must quickly say that there is no evidence on record to support such a finding. However, there is evidence that the respondent has actually referred to the child as Clinton Otieno Wasonga in one of her affidavits. And that is not good for the child who hitherto had known himself as Clinton Otieno Odhiambo. It is likely to cast uncertainty to his young, inquiring mind as to his true identity. If the appellant were living alone, I would not hesitate to find that would be, indeed, the best suited person to have the custody of Clinton. But living with Mr. Wasonga does not help matters. To Clinton's mind, it only complicates the equation. The problem is well summed up in the last paragraph of the appellant's written submissions wherein it is stated:-

"*As regards access, the defendant is of the view that going by the tender age of the child things he may not be able fully adjust to moving from one house to another (sic). It is our humble view that this a matter (sic) that should be left to lie as the child would be greatly affected if he had to at this early age try to juggle with the issues of "two fathers". Our submission is that the minor would be maintaining the status quo as at now negatively affected psychologically."*

It is not clear what the last sentence means because the child is actually in the custody of the appellant. But reference to the juggling by the child with the issue of two fathers is as apt as it is a double edged sword. The respondent herein is Clinton's biological father. It is the entry of Mr. Wasonga on the scene that causes the complication, as the child was born and grew up to five years knowing that the respondent was his father. There may be other children in his father's home who have different mothers,

but whereas polygamy is accepted and commonly practiced in many parts of Africa, polyandry is not and as long as the little boy lives with Mr. Wasonga, and is accessed regularly by the respondent, this is likely to confuse Clinton even more for quite some time to come.

The last ground raised by the appellant was that the learned trial magistrate did not consider the appellant's counterclaim. The main claim by both sides was the custody of the child. Having considered and come to the conclusion that it was in the best interest and welfare of the child Clinton to reside with the respondent, the prayers in the counterclaim were duly considered and, by the necessary implication, automatically rejected. It was not necessary to say so expressly.

Being of the above persuasions, I uphold the decision of the Children's Magistrate and dismiss the appeal. Each party will meet its own costs.

Dated and delivered in open court this 18th day of April, 2007.

L. NJAGI

JUDGE