REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU
Civil Appeal 131 of 2006

JOHN KIMANI MUTHIORA. ……. APPELLANT

VERSUS

CHARITY WANJIRU MAINA ……...…… RESPONDENT

J U D G M E N T

1. What necessitated this Appeal is an order made by Hon. E.G. Mbaya, Senior Resident Magistrate at Nanyuki made on 10.11.2006 whereby she reviewed earlier orders granting custody of the minor son of the parties, DMK, to his father and instead granted custody to his mother. The father was dissatisfied and instituted the instant Appeal and prior to hearing I granted him a stay order and the effect was that he retained custody of the child.

2. The Appeal is premised on the following grounds as set out in the Memorandum of Appeal dated 11.12.2006;

"1. **The learned magistrate erred in law and fact in reviewing the decree given on 3.9.2003 without any materials warranting review.**

2 The court failed to consider the principals applicable in review/setting aside of a consent order or decree.

3.The court failed to consider that the respondent abandoned the child rendering the appellant to seek custody of same which she conceded.

4. **The court never considered the welfare, interest and the circumstance of the child in view of the facts that the appellant has been with the child for the last 9 years todate***;(sic)*
5. **The court never determined the application on material before it but on mere guesswork and feelings.**
6. **The ruling was unfair to the appellant in all circumstances of the matter**."

3. When the Appeal was argued, I noted that only two questions needed to be determined and these are;
    a. was the order for review properly made?
    b. Is the Respondent a fit and proper person to have custody of the child.

4. In answer to the first question, the record of the lower court would show that the original suit i.e. **SRMCC No.90/2002** was for dissolution of the marriage between the parties and for custody of the minor who was then aged (5) years old. In answer to the claim that she had abandoned the child, the Respondent denied the fact and averred in her Statement of Defence that she was in fact having custody of the minor and the Appellant "**should continue maintaining"** both her and the child. The final decree in the matter is dated 3.9.2003 and the orders were that;-

"1. **The marriage between the Plaintiff and the Defendant is hereby dissolved.**

2. The Plaintiff shall have custody of the child of the marriage namely DMK.

3. **Each party to bear its own costs.**

4. **Any party be at liberty to apply for review".**

5. On 30.9.2005, the present Respondent sought orders of review of the above orders for reasons that the Appellant had remarried and the child was being mistreated by the Appellant and his new wife. That therefore it would be in his best interest if the orders granting custody given to his father were reviewed and custody given to his mother. The orders were granted and thence the Appeal.

6. Before determining the issue before me, I consider it my duty to point out what I consider to be a serious anomaly in the proceedings before the Nanyuki Court. On 19.4.2003 advocates for the parties recorded a consent order in terms set out above to finalize the divorce cause pending before the court. The consent order was received in the registry on 3.6.2003 and on 6.6.2003 one "**J.M. Mahinda in-charge Civil"** wrote to the advocates for the parties and stated as follows:-

"**I have been instructed by the S.R.M. to inform you that it is not possible to enter a consent to dissolve marriage in a divorce case**."

7. The consent was minuted in the court file on 3.6.2003 but was not signed by the Senior Resident Magistrate and on 12.6.2003 parties fixed the case for hearing on 3.9.2003 when it was adjourned to "**later**". What is intriguing is that details of what transpired "**later**" are not in the court record and even a copy of the original decree is not in the original record of court. What decree there is, is a copy attached to the affidavit in support of the present proceedings. The point is that I see no record of what led to the consent order being recorded inspite of the letter dated 6.6.2003 which so far as I know is the correct expression of the law as far as divorce matters are concerned. Nonetheless, the issue that confronts me is quite simple irrespective of my views about how the final decree was obtained. Order No. 4 in the decree (and since parties agree that the basis for the orders on appeal is that decree) states as follows:-

"**Any party be at liberty to apply for review."**

8. Once the above order existed, it did not take genius to see that the Application dated 2.9.2005 was premised on that liberty and any party so applying had to invoke Order XLIV Rule 1 of the Civil Procedure Rules which provides as follows:-

"1(1) **Any person considering himself aggrieved-**

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain review of the decree or order, may

apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

9. I have seen the application for review and in light of Order XLIV Rule 1 above there was "**sufficient reason"** for the Respondent to have moved the court for review of the orders of custody. The court similarly had powers to hear the application and to make the orders that it eventually made. I see no basis for the arguments made on behalf of the Appellant and I shall answer the first question above, in the affirmative.

10. The suitability or otherwise of the Respondent to have custody of the minor was argued extensively in the lower court and it was argued that the child had no reason to want the company of a mother who had abandoned her while he was 5 years old. Similarly the Respondent made strenuous arguments as to why the child should be with her, chief of which is that the Children's Officer at Homa Bay had noted mistreatment of the minor by the Appellant and his new wife and advised her to seek review of the custody order. In her Ruling, the learned trial magistrate appreciated the law well when she stated that a child of tender years should be in the custody of his mother unless there are special circumstances to warrant another decision. I share the same view and I should quote Law J.A. in **Githunguri vs Githunguri [1982 –1988]** I KAR 9 where he stated firmly as follows:

……..the prima facie rule (which is now quite clearly settled) is that other things being equal, children of tender age should be with their mother, and where a court gives the custody to a child of this tender age to the father it is incumbent on it to make sure that there are really sufficient reasons to exclude the prima facie rule".

11. I have read the record in this matter and nowhere has it been said as was said in Githunguri (supra) that the mother of the minor in this case is a woman of no capacity to bring up her child well because she has any exceptional circumstances that would affect the prima facie rule that she should have custody. It has not been argued that she has remarried or that she has other children. The Appellant has accepted the fact that he re-married and that his wife lives with him. At the time of the divorce that situation was not obtaining. It is those circumstances there would be a good and sufficient cause for the initial orders to be reviewed. I dare add that s.83(1) (d) of the Children's Act, 2001 enjoins any court making a custody order to take into account the "ascertainable wishes of the child" and in s.83(1) (j), "the best interest of the child" and in agreeing with the learned magistrate's Ruling, these words are foremost in my mind.

12. In the end, I should answer the second question I posed above in the affirmative and should conclude by stating the words of Madan J.A. in Mehrnissa vs Parvez [1981]KLR 547 at 557 where the learned judge said that in granting custody to the mother of the minor in that case:- "First, the paramount consideration is the welfare of the child, who, in this case, is of tender years and the wife his natural mother. She must have greater affection for him than any other person including his father…..To me it is unthinkable that he should be deprived of the care, love and affection of his natural mother at his present tender age. It would be a new and unnatural environment for him to live in the household of the father with a woman who will be his step- mother….."

Barring a few differences, the above words would squarely fit the circumstances of this case.

13. I see no need for disturbing the orders of the learned magistrate in review and the Appeal herein is dismissed on all grounds. The orders of stay of execution are discharged forthwith.

14. Costs shall be borne by each party separately.

15. Orders accordingly.

DATED SIGNED, AND DELIVERED AT MERU THIS 2nd DAY OF August 2007

ISAAC LENAOLA,

JUDGE

In the presence of:

Mr. C. Kariuki Advocate for the Appellant

-N/A Advocate for the Respondent

ISAAC LENAOLA,

JUDGE