



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 23 of 2007**

**JIBSAM MWAURA NGUGI .....PLAINTIFF/APPELLANT**

**VERSUS**

**LEAH WANJIRU GATHI.....DEFENDANT/RESPONDENT**

**RULING**

By notice of motion dated 16.05.07 stated to be brought under Order XLI rule 4 (1) of the Civil Procedure Rules, the plaintiff/appellant applied, *inter alia*, for the following orders, namely:-

- ‘2. That pending the hearing and determination of this application the Appellant be granted a stay of execution against the decision of the Nairobi Children’s Court Civil Case Number 425 of 2005 (J.E. Ragot Mrs) of 10<sup>th</sup> May 2007.**
- 4. That pending the hearing and determination of this Appeal, the Appellant be granted interim custody of TREVOR NGUGI MWAURA & ABIGAIL NYAMBUGI MWAURA.**
- 5. That the cost of this application be in the cause.’**

The grounds upon which the application is based are that:-

- i. On 10.05.07 the Nairobi Children’s Court in case No.425 of 2005 granted custody of TREVOR NGUGI MWAURA & ABIGAIL NYAMBUGI MWAURA (the children) to the Respondent herein.
- ii. The Appellant herein is the father of the children.
- iii. The respondent abandoned the children with the father on 18.09.05 when the younger child was 5 months old.
- iv. The appellant was granted interim custody of both children by the lower court in October, 2005 but interim custody of the younger child was granted to the Respondent in May 2007, about 7 months later through misrepresentation to court.
- v. The appellant has had custody of the elder child and has single – hardedly taken care of him since September 2005 when the Respondent abandoned them.
- vi. The elder child has been enrolled in school for about 2 years near the Appellant’s home in Matasia Ngong.
- vii. The Respondent lives with her parents in Juja, Thika District where she has no regular source of income.

viii. The respondent is neither competent nor capable of taking care of the children as she has previously assaulted the elder son.

ix. The life of the elder child may be drastically affected should he be taken out of the environment he has been in for the last almost 3 years or from a school he has been attending for the last 2 years.

x. The appellant lives in his own house in Matasia Ngong with sufficient space where the children would be better placed to grow up in unlike with their maternal grandparents.

The application is supported by the plaintiff's/appellant's 33 – paragraph affidavit sworn on 17.05.07.

On 28.05.07 the defendant/respondent filed a 49 – paragraph affidavit sworn on 28.05.07 essentially denying the accusations levelled by the plaintiff/appellant against her and laying the blame for the problems between the parties on the plaintiff/appellant.

On 06.06.07 the plaintiff/appellant filed an 18 – paragraph supplementary affidavit sworn on 06.06.07 basically reiterating the contents of his supporting affidavit sworn on 17.05.07. Among other documents, the plaintiff/appellant annexed to this supplementary affidavit a 10 – paragraph supporting affidavit by his househelp, Grace Njeri Njoroge sworn on 06.06.07 vide which the househelp denied accusations of improper conduct levelled against her by the defendant/respondent through her replying affidavit sworn on 28.05.07.

Finally, on 07.06.07 the defendant/respondent filed another replying affidavit sworn on 07.06.07 containing 11 paragraphs whose purport was to reiterate the contents of her replying affidavit sworn on 28.05.07.

At the *inter-parties* hearing of the notice of motion application on 28.09.07, the plaintiff/appellant was represented by learned counsel, Mr R.K. Macharia while the defendant/respondent was represented by learned counsel, Miss J.K. Omwenga.

I have given due consideration to the numerous accusations and counter-accusations traded between the parties, which may be highlighted as under.

According to the plaintiff/appellant, the defendant/respondent abandoned the two children between herself and himself on 18.09.05 when she packed up her belongings and left the matrimonial home and told the plaintiff/appellant that she was leaving him for good. This is deponed at paragraph 6 of the plaintiff's/appellant's supporting affidavit sworn on 17.05.07. Defendant/respondent acknowledges vide paragraph 7 of her replying affidavit sworn on 28.05.07 that she indeed left the matrimonial home on 18.09.05. She adds vide paragraphs 8, 9, 10, 11, 12 and 13, however, that the plaintiff/appellant had prior to 18.09.05 disappeared from home without information as to his whereabouts; that when he came back home he told the house-girl that he had been admitted at Mater Hospital for typhoid fever; that he had all along stopped talking to her and had shifted from the common main bedroom; that on the morning of 18.09.05 the plaintiff/appellant started making noise at her (defendant/respondent) and started inquiring why she had not left the matrimonial home; that the plaintiff/appellant immediately removed Kshs.200/= and asked the defendant/respondent to leave, otherwise he would make sure she left; and that she, defendant/respondent, took the Kshs.200/= and left the matrimonial home on 18.09.05 out of fear of the unknown and went to inform her parents.

At paragraph 14 of the defendant's/respondent's aforesaid replying affidavit, she deponed

**'14. THAT in October 2004 I called the parents so that we could sort out the problem but his (plaintiff's/appellant's) father told me that I am a woman and we are there to be used, so I should shut up and forget what he (plaintiff/appellant) is doing and that I was living in a beautiful house, so what did I want?'**

In answer to paragraph 30 of the plaintiff's/appellant's supporting affidavit sworn on 17.05.07 which

suggested that if the defendant/respondent had been interested in the welfare of the children she would have moved to court immediately she left the matrimonial home on 18.09.05, the defendant/respondent deponed vide paragraph 38 of her replying affidavit sworn on 28.05.07 as follows:

**'38. THAT in reply to paragraph 30, I took steps by informing both our parents who tried to set up meetings to resolve the issues but I was served with court summons before any meaningful progress was made.'**

It is not clear which summons the defendant/respondent was alluding to in the above paragraph. If she was alluding to the granting of interim custody of the children by the lower court, note is made that paragraph 21 of the plaintiff's/applicant's supporting affidavit sworn on 17.05.07 shows that from the time the defendant/respondent left the matrimonial home on 18.09.05, she never bothered to find out about the welfare of the children and that the only time she showed interest in the children was when she filed her papers before the Children's Court on 02.11.05, i.e. about 1½ months later. There is no evidence from any of the parties' parents that the defendant/respondent had sought their intervention in the dispute between the parties hereto.

Vide paragraph 14 of the plaintiff's/appellant's supporting affidavit sworn on 17.05.07, he deponed that his house-help, Njeri or mama Kamau had informed him that the defendant/respondent had been verbally and physically abusing the first born son of the parties hereto and that he plaintiff/appellant was also informed by the boy, Trevor Ngugi Mwaura born on 06.09.02 (now aged around 5 years) that he was being subjected to physical abuse (pinching) by his own mother, i.e. the defendant/respondent. The defendant/respondent denied assaulting the boy vide paragraph 24 of her replying affidavit sworn on 28.05.07. She accused the house-help, vide paragraph 39 of her replying affidavit sworn on 28.05.07, of brewing illicit brew and of stealing food from the parties' matrimonial home on several occasions. The house-help, Grace Njeri Njoroge denied, vide her supporting affidavit sworn on 06.06.07, brewing illicit brew or stealing from her employers' house – see paragraphs 4 and 5 of her aforesaid affidavit.

The defendant/respondent made various serious accusations against the plaintiff/appellant. These include the following:-

- a) That 6 months after their marriage and also during the defendant's/respondent's second pregnancy, the plaintiff/appellant infected her with sexually transmitted infections (STI<sup>s</sup>) – see paragraph 17 of defendant's/respondent's replying affidavit sworn on 28.05.07. The defendant/respondent did not furnish independent evidence of the said infections. The plaintiff/appellant denied both accusations. He countered that when the defendant/respondent was pregnant with the third child Abigail, the defendant/respondent was diagnosed with Urinary Tract Infection (UTI). He furnished a medical claim form 'JMN1' annexed to his supplementary affidavit sworn on 06.06.07 which establishes that on 27.12.04 the defendant/respondent was indeed diagnosed with Urinary Tract Infection. Plaintiff/appellant added, in fairness to the defendant/respondent, that such infections are 'synonymous' with most pregnant women as a result of hormonal changes.
- b) That the plaintiff/appellant on most occasions would come home drunk and strip naked in the sitting room and that on one occasion he opened the fridge and urinated inside. The plaintiff/appellant denied the allegations vide paragraph 7 of his supplementary affidavit sworn on 06.06.07.
- c) That the boy, Trevor Ngugi Mwaura has not attended school for the whole of second term and that she, defendant/respondent had obtained admission for him at St Peter's School [see paragraph 34 (c) of the defendant's/respondent's replying affidavit sworn on 28.05.07]. Defendant/respondent annexed 'LW 2' which she described as a letter from St. Peter's School. The plaintiff/appellant refuted the defendant's/respondent's allegations vide paragraph 10 of his supplementary affidavit sworn on 06.06.07 to which he annexed a letter of 05.06.07 ('JMN 3') from Naramat Academy, Ngong Hills confirming that Trevor has been attending school regularly since January, 2006; that the school has had no problem with the boy's attendance; that his academic performance is satisfactory; that he associates well with his peers in class; and that he relates positively with his class teacher. This court notes that Annexure 'LW2' to the defendant's/respondent's replying affidavit sworn on 28.05.07 is not a letter of admission of Trevor to

Juja St. Peter's School but a general fee structure, which anybody seeking information about financial requirements of the school can pick from the school.

d) That Trevor told the defendant/respondent that the plaintiff/appellant travels a lot and that the child is left alone (see paragraph 37 in the defendant's/respondent's replying affidavit sworn on 28.05.07). The plaintiff/appellant denied traveling a lot and deponed vide paragraph 11 of his supplementary affidavit sworn on 06.06.07 that he only goes to work so that the children can have a good life. This court notes that there is a copy report in the file dated 03.10.05 compiled by the Director of Children's Services to the effect that after the plaintiff/appellant reported the defendant's/respondent's departure from the matrimonial home and abandonment of the children, the Director directed that a visit be made to the parties' matrimonial home. The Director's report records, *inter alia*, as follows:

**'...Mr Ngugi (plaintiff/appellant) made this report to the Director, Children Services on 27<sup>th</sup> September 2005 who thereafter directed that a home visit be carried out to ascertain the status/welfare of the said children. The same was conducted on 28<sup>th</sup> September 2005 and the children were found to be in good condition under the care of a mature married house help who lives in the neighbourhood.'**

The older boy child, Trevor Ngugi Mwaura is currently with the plaintiff/appellant while the younger girl child, Abigail Nyambugi Mwaura is currently with the defendant/respondent. The plaintiff/appellant has complained that the defendant/respondent was given interim custody of Abigail through misrepresenting to the Children's Court that the child was malnourished while in the plaintiff's/appellant's custody. It is the plaintiff's/appellant's case, however, that he took good care of both children while they lived with him. He accused the defendant/respondent of having misled the Children's Court in order to get interim custody of Abigail by producing a report from Thika District Hospital to the effect that the child was malnourished, a report which he deponed was compiled by a doctor who had not even seen the child (see paragraph 23 of plaintiff's/appellant's supporting affidavit sworn on 17.05.07). There is no specific response by the defendant/respondent to this complaint by the plaintiff/appellant. This issue will require to be elaborated upon during the impending appeal.

The defendant/respondent stated at paragraph 43 of her replying affidavit sworn on 28.05.07 that the children are of tender age and that she does not appreciate that they sometimes have to stay with her parents-in-law while she can take care of them. The court notes that the defendant/respondent stays with her parents and apparently finds it in order for the children to stay with her alongside those particular parents but that she finds fault with the children sometimes staying with their paternal grandparents.

Defendant's/respondent's counsel referred the court to Joyce Muthoni Githunguri -vs- Stanley Munga Githunguri (1982 – 85) I KAR 9 to make the point that in cases of custody of children, the paramount consideration is the welfare of the children and that unless there are exceptional circumstances to justify depriving a mother of her natural right to have her children, she should not be so deprived. That case was decided by the Kenya Court of Appeal. The basic principle enunciated therein is sound. However, the facts in that case were different. There, Mr Githunguri wanted the children between him and Muthoni to be in the joint custody of himself and another woman he was living with. That other woman was eventually cited by Muthoni as joint respondent with him in divorce proceedings filed by Muthoni on the ground of adultery between Mr Githunguri and the other woman. That is not the scenario in the proceedings now before this court. Here the defendant/respondent left the matrimonial home on 18.09.05 leaving the two children behind with the plaintiff/appellant. There is no allegation that the plaintiff/appellant is living with another woman. No concrete evidence has been shown to this court of any immediate action taken by the defendant/respondent to seek custody of the children after the defendant/respondent left them with the plaintiff/appellant. Indeed, it is the plaintiff/appellant who filed proceedings for custody of the children and he was granted their custody. The defendant/respondent showed interest in having custody of the children when she filed her papers in response to the plaintiff's/appellant's application for custody. That was about 1½ months after the defendant's respondent's departure from the matrimonial home. On those facts the plaintiff/appellant would appear to be the more serious in terms of having the children's interests at heart. But these are matters requiring to be addressed more comprehensively during the appeal.

The plaintiff/appellant has at this stage demonstrated that the boy child, Trevor Ngugi Mwaura born on 06.09.02 and now aged around 5 years is well settled at Naramat Academy in Ngong Hills and making satisfactory academic progress there. Section 4 (2) of the Children Act, 2001 is clear that in all actions concerning children, the best interests of the child shall be a primary consideration. And section 4 (3) of the same Act commands as follows:

**‘4. (3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are executing any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to –**

- a) safeguard and promote the rights and welfare of the child;**
- b) conserve and promote the welfare of the child;**
- c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.’**

Section 7 of the Children Act aforesaid provides that every child shall be entitled to education and that the responsibility for providing the child with education rests with the Government and the child’s parents. The boy child, Trevor is currently settled in Naramat. Academy through the sustained efforts of the plaintiff/appellant. Unless the contrary can be demonstrated during the appeal that this boy should shift to another educational institution, I am clear in my mind that the boy’s learning activities should not be disrupted as that would not be in the boy’s long term interests. The boy also needs a father figure and the plaintiff/appellant seems to be providing that.

Now that the girl child, Abigail Nyambuigi Mwaura has been entrusted into the interim custody of the defendant/respondent, whether rightly or wrongly, and having regard to her gender and tender age, I am of the view that the defendant’s/respondent’s interim custody of the said girl child should equally not be disturbed during the pendency of the appeal.

The best environment for children to grow up in is under the wings of their parents. That presupposes that the parents agree to live together in harmony. The parties hereto appear to have failed that test. They have taken to describing each other in uncomplimentary terms and each demands to have custody of both children. The decision on whether either should have custody of both children or of only one of them on permanent basis would be better made when the appeal has been fully argued. For now the balance of convenience seems to dictate that the boy child, Trevor Ngugi Mwaura stays with the plaintiff/appellant while the girl child, Abigail Nyambuigi Mwaura stays with the defendant/respondent, pending hearing and determination of the appeal.

I make the following orders:-

- a) Pending the hearing and determination of the appeal herein, the plaintiff/appellant is granted interim custody of the boy child, TREVOR NGUGI MWAURA while the defendant/respondent is granted interim custody of the girl child, ABIGAIL NYAMBUGI MWAURA.
- b) Each party shall, however, have visitation rights in respect of the child in the interim custody of the other party.
- c) Costs shall be in the cause.

Orders accordingly.

**Delivered at this 23<sup>rd</sup> day of November, 2007.**

**B.P. KUBO**

**JUDGE**