



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**Misc Appli 247 of 2006**

**(FORMERLY NAIROBI MISC. APP. NO. 811 OF 1997)**

**N S I.....PLAINTIFF**

**VERSUS**

**A S A.....DEFENDANT**

**JUDGEMENT**

**N S I**, the plaintiff/applicant in these proceedings divorced the defendant **A S A** on 27<sup>th</sup> April, 1997 before the **Kadhi's Court** in Civil Case No. 22 of 1997.

It would appear that upon the dissolution of the said marriage the defendant had the custody of the seven (7) children of the marriage. On 25<sup>th</sup> August 1997 the plaintiff initiated the present proceedings by way of an originating summons seeking for orders, principally for the custody care and control of the seven (7) children of the marriage between the plaintiff and the defendant.

Simultaneously with the filing of the originating summons, the plaintiff filed an application under certificate of urgency seeking for restraining orders against the plaintiff to be restrained by an order of injunction from sending the seven (7) children of the marriage to the United Kingdom.

Interim exparte orders against the children travelling out of the country were issued but the records will show that application was never prosecuted any further. It is clear from the records that the trip by the children to the United Kingdom was a scheduled educational exchange programme that was arranged between the plaintiff, the children's school and the defendant.

The defendant also filed a counter application seeking for orders or custody of the seven (7) children of the marriage and similarly he sought for restraining orders against the plaintiff from removing the children from his resident without notice and consent and from creating disturbance at his residence. This application was dated 2<sup>nd</sup> October 1997 and it was similarly filed under the certificate of urgency.

At the time of filing these applications that is nine (9) years ago the children the subject of these proceeding were all minors. Due to passage time four (4) of the children are now of the age of majority and this application will only concern the issue of custody of the last three children namely:-

1. **A A - born in September, 1989**
2. **A A - born 1991**
3. **F A – born in 1992**

On 3<sup>rd</sup> December 1997, a consent order was recorded as follows:

**By consent**

1. *“That all matters in dispute regarding the infant children of the applicant and respondent be and are hereby referred to a panel of 3 Islamic Elders namely:-*

*(a) Chairman of the Supreme Council of Muslims.*

*(b) Imam of the 6<sup>th</sup> Street Mosque Eastleigh.*

*(c) The Imam of South “C” Mosque.*

2. *That the Panel of Elders shall hereby determine all the questions relating to custody and welfare of the children and shall give their recommendations to the Court on or before 28<sup>th</sup> February, 1998.*

3. *That the advocates on record be at liberty to extend this period if found necessary by mutual consent.*

4. *That the Court shall take into account the recommendations of the Muslim Elders in its final decision.*

5. *That each party be at liberty to apply for any necessary order from Court.*

6. *That this matter be mentioned on 9<sup>th</sup> March 1998.*

7. *Status quo to be maintained.*

8. *That the respondent to have full access to the children during school holidays and at weekends.*

It would appear the matter was never referred to the panel of Islamic elders for arbitration, there are letters on record by the defendant’s advocates trying to constitute the panel but there seem to have been no corresponding effort or response on the part of the plaintiff. Thus the matter was never referred for arbitration and the parties seemed to have gone into a lull until another application by way of chamber summons was filed by the defendant seeking to enjoin **A M A** as a third party.

By an order issued on 6<sup>th</sup> January, 2000 the said third party was enjoined and both the third party and the plaintiff were restrained from interfering with the defendant’s custody of the children or from removing or taking the children from their place. The parties went into another lull again until January 2004 when the plaintiff filed an application seeking to review vary and/or set aside the consent order of 3<sup>rd</sup> December, 1997 and also the restraining order of 6<sup>th</sup> January, 2000.

By a ruling dated 13<sup>th</sup> February, 2004 that application was not granted. The Court however noted with concern that an application involving the custody of children should have taken so long until the custody and welfare issues concerning some of the children was over taken by events. The Court therefore directed that the substantive application to determine the issue of custody of the children should be determined on priority basis and since there were allegations and counter allegations, the court directed that the issue be determined by way of oral evidence. The hearing of this matter therefore begun on 12<sup>th</sup> May, 2004 and after several adjournments caused principally by the plaintiff the matter was concluded on 25<sup>th</sup> May, 2006. The plaintiff gave evidence in support of her application for custody. She gave the details of how she was treated by the defendant with cruelty and physical violence that led her to seek for the dissolution of the marriage.

Since the dissolution of the marriage, the defendant remarried another wife who has been cruel to the

children. The plaintiff alleged that the children had been mistreated by the defendant's wife and they were forced to run away and seek refuge in her house. She contended that she lives in a large house in a good neighbourhood and therefore she is best suited to have the custody of the children to provide them with motherly care and love.

During cross-examination she admitted that she shares a house with a friend the third party one **A M A** who lives in the guest wing while her and the children live in the house together with other relatives such as **PW 2** and other relatives including a relative of the defendant. The plaintiff also relied on the evidence of **A H** her own cousin who said that he regularly resides in the house of the plaintiff. He started associating with the parties herein since 1986 while working for them as a cook. He however did not witness any violence against the plaintiff perpetrated by the defendant. He started living with the plaintiff again in 1994 and in the course of his stay he has accompanied the plaintiff to pick the children from the defendant's house on several occasions or to drop them. He said that when the children are with the plaintiff they are happier.

**C M (PW 3)** a former house girl employed by the parties herein also gave evidence. The evidence dealt on the duties she performed and the only issue that torched on the parties is that she witnessed the defendant beating the plaintiff.

However since the couple separated she also stopped from working for the plaintiff and she has not been in touch with them so she does not know about the welfare of the children.

On the part of the defendant he gave evidence and denied the allegations of cruelty. He maintained that he had been an exemplary father for the children despite interference by the plaintiff to frustrate his efforts to give the best education and environment for the children's well being, the plaintiff has always frustrated his efforts. The defendant produced numerous letters that were written by his advocates either to the plaintiff personally, her lawyers or her companion regarding the interferences with the children and their education. These complaints were also recorded with the local police and the Children's Office who sought to intervene but to no avail. The police were also involved when the plaintiff is alleged to have physically assaulted one of the daughters **F A** and inflicted her with physical injuries from which she was treated at the Nairobi Hospital. This incidence caused the intervention of the director of children services who wrote a letter to the Muthagari Police Station requesting them to intervene and ensure the child was provided with security to retrieve her school accessories from the plaintiff's house.

According to the plaintiff, he has provided the children with a stable home and taken them to the top schools where they attend Private Schools. The first four children are in college the first one having completed his degree course in America, while the second and 3<sup>rd</sup> born are pursuing their degrees in the United Kingdom it was the defendant's view that despite all the problems none of the children have dropped out of school.

As regards the plaintiff's ability to look after the children, it was the defendant's view that she is not serious and she has not demonstrated any seriousness with her case since the matter was filed almost ten years. Besides she cohabits with a third party who is not even her husband.

From the contradictory evidence by the third party's affidavit and the plaintiff's evidence it is not clear who owns the house where the plaintiff lives and where she would keep the children. What is clear is that the two are cohabiting and this would not be an ideal environment for the children if the third party is not known whether he is a stepfather or not.

The defendant urged this court to allow the three minor children to remain in his custody as the last born who was 4 years when this matter was filed is now 14 years. The second last child is 15 years and the third last child is 17 years.

I have carefully considered the evidence and all the material that was placed before this court by way of documentary evidence. The single issue for determination in this matter is who should have the custody of the remaining three (3) minor children of the marriage between the plaintiff and the defendant. It is

trite law that in determining the issue of custody the best interest of the child is of paramount consideration. In determining the best interest of a child Section 83 of the Children Act 2001, sets out the guiding principles to be applied in making a custody order as follows:-

- a) ***the conduct and wishes of the parent or guardian of the child;***
- b) ***the ascertainable wishes of the relatives of the child;***
- c) ***the ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;***
- d) ***the ascertainable wishes of the child;***
- e) ***whether the child has suffered any harm or is likely to suffer any harm if the order is not made;***
- f) ***the customs of the community to which the child belongs;***
- g) ***the religious persuasion of the child;***
- h) ***whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;***
- i) ***the circumstances of any sibling of the child concerned, and of any other children of the home, if any;***
- j) ***the best interest of the child.***

The children involved in this case are no longer of tender years atleast when the application was made they were of tender age but now they have aged while the matter is still pending. Counsel for the defendant submitted that under the Islamic Law, which governed the marriage and the parties to this application a mother is entitled to custody (**hizanat**) of her male child until he has attained the age of seven (7) years. It is the accepted doctrine that the mothers custody of a male child ends with the completion of his seventh year (*See Ameer Ali, Mohammedan Law, P. 295 and Mulla, Principle of Mohammedan Laws 352*) which was quoted in the case of *Mehrunnistu d/o late Mohamed Shaji –Vs- Mohamed Pavez s/o Mohamed Muwaz 1982 – 88) 1 KAR.*

In the present case the guiding principle is how this court can safeguard the best interest and secure the welfare of the minor children and who among the plaintiff and defendant can be best suited to be trusted with that responsibility.

**As it was held in the case of YAMIN –VS- MOHAMED [1973] E.A. page 372 Maden J. (as he then was held)**

*“This court is especially endowed with jurisdiction to safeguard the interest of infants. As Mr. Khanna said the court is the parent of all infants. The welfare of infants is paramount and it is clear to the heart of the court. There could not be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community; tribe or sect fell within the guardianship of Infants Act and the court is charged with the sacred duty of ensuring that their interest remain paramount and duly preserved.”*

It is in the above context that I intend to evaluate the suitability of the parties herein. It would have been of tremendous help if the children were availed to court so that the Court could see them but since none of the parties did so, and the children are not so young, perhaps it is not necessary to interrupt their programme of studying and call them to Court all the way in Nakuru. Despite the court order by **Hon.**

**Aluoch, J** directing the Children's Officer to provide this Court with an evaluation report of the parties herein, this was not possible as the Court was informed that the plaintiff was adamant that Mrs. Ndungu would be a biased officer and refused to co-operate for this purpose. In the circumstances I will consider the evidence on record.

According to the plaintiff the defendant is a cruel man and violent and his wife has tortured the children. However the plaintiff or her witnesses did not make any allegation about the defendant having been cruel to the children. Not a single incident was mentioned when the defendant was alleged to have been cruel or negligent to the children.

On the part of the plaintiff, there were numerous allegations of violence against the children which was extended even to the innocent teachers of the children. This Court had an opportunity to observe the demeanour of the plaintiff who displayed emotional instability, during the course of the proceedings she would burst out and throw tantrums. This Court had occasion to caution her against attacking counsel for the defendant along the Court corridors.

Besides the above, it is not known whether the plaintiff owns the house where she lives in, or it is owned by the third party. It is also not the opinion of this Court that it will be in the interest of the children to disturb the status quo prevailing which has been there for the last 9 years without justiable cause.

Having carefully considered all the factors and circumstances, I came to the conclusion that the best interest of these three children will be in the status quo that has been prevailing for the last 9 years being maintained.

It is in the interest of these minor children that their future and their current upbringing and education should not be disturbed. The plaintiff shall however have unlimited access to the children during the school holidays and the weekends as it has always been the case.

These are therefore the orders of the Court.

The defendant shall have the custody, care and control of:

- a) *A A – son aged 17 years*
- b) *A A – son aged 15 years*
- c) *F A – son aged 14 years.*

Until they attain the age of majority. The plaintiff shall have unlimited access of the children during the school holidays and during weekends namely Friday after school upto Sunday 3.00 p.m. Any party shall be at liberty to apply. Each party to bear their own costs of these proceedings.

It is so ordered.

**Ruling read and signed at Nakuru on 28<sup>th</sup> July, 2006.**

**MARTHA KOOME**

JUDGE