



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
DIVORCE CAUSE NO. 34 OF 2002

S B PLAINTIFF

VERSUS

V M..... DEFENDANT

RULING

In a Petition dated 16th October 2002 and filed into the court on the same day, the Petitioner, **S B** who is also the Applicant in the application before me is praying that the marriage formalised between herself and the Respondent **V M** be dissolved; that she be granted the permanent custody of the two children of marriage and that Respondent be ordered to return the Petitioner's motor vehicle plus all its original documents to the Petitioner. That petition was filed together with this Chamber Summons dated the same 16th October 2002. The Chamber Summons is seeking custody of the two children of marriage namely **AM** aged seven years and **D W** aged 2 ½ years, to be vested in the applicant till further orders of this court. The application is also seeking that Applicant's motor vehicle Registration Number [particulars withheld] be unconditionally released to the applicant or in the alternative the same be detained at a neutral place till the hearing and determination of the Petition.

The Applicant is also seeking costs of the application. The grounds for the same application are that the Respondent has denied the applicant access to the matrimonial house, that the Respondent has forcefully taken custody of **AM** aged 7 years from his mother and has denied her access to the said child, and that the Respondent is misusing the motor vehicle and there is danger that it may be taken out of the court's jurisdiction before the applicant's petition is fully determined.

The Respondent opposed the application. He has also filed an answer to the Petition. In his Replying Affidavit, the Respondent denies the allegations made and says he has always supported his family and says further that he still loves his wife and has not been cruel to her; that his son has complained of mistreatment and he explains how he has taken care of the family.

I have considered this application. It is brought under among other provisions Section 88 of the Children's Act No.8 of 2001. That provision states as follows:

"88(1) The Court shall have power to make interim custody orders and may from time to time review, suspend or vary such orders."

Section 83(1) of the Children's Act provides matters which the court shall have regard to in determining whether or not a custody order should be made in favour of the Applicant. I have considered the same and I have called for and received a Report from the District Children's Officer Mombasa which ends by

stating as follows:

“Your Lordship, the children do not seem to lack any basic needs other than the love of both parents as they both live with one parent each.”

The officer has visited and talked to each child. **AM** is living with the father. He is 7 years old while **D W** is living with the mother at their maternal grand parent’s home. Each of them is comfortable according to the report.

I do feel that in such a situation where all things seem to be equal, the age of the children is the deciding factor. The children are still within the ages that dictate that they live with their mother unless the mother is found to be hopelessly unable to take care of them and to give them the moral upbringing required. Here there is no such allegations and the report says **D W** who is living with her is happy and is well taken care of. That in effect means that she may be able to take care of **AM** as well during the interim period.

Doing the best I can in the circumstances, I do allow prayer 2 in the interim basis. However under Section 88 (2), I do order that the interim custody granted to the applicant here shall be for a period of six (6) months from the date hereof. During that time, the Petition should be set down for hearing and the Petition should be disposed of. The Respondent will have access to his children on Saturdays and Sundays of each week. The Applicant and Respondent to arrange for the place and times of such access such that the Respondent’s access granted herein is not in any way hampered. The Respondent shall provide adequate funds for the maintenance of the children during the same period. Each party has liberty to apply.

As to prayer 3, I do not understand why it was included in this application which looks to me purely a matter of custody of the children of marriage and not a matter in the Married Women’s Property Act. In any event it is seeking a mandatory injunction which according to the law is rarely granted except in respect of incontrovertible cases. That was the decision in the case of **Malindi Air Services and Another vs. Halima Abdinoor Hassan Kenya Court of Appeal Civil Application number 202 of 1998** where it was stated:

“A mandatory injunction at an interlocutory stage is rarely granted; only when the Plaintiff’s case is clear and incontrovertible.”

In this case the Petition only mentions the motor vehicle in dispute as one of particulars of cruelty in a petition matter. It is not on its own subject of a suit. I do not think with that pleading, the Applicant can be said to have made a claim for the vehicle separately other than mentioning the vehicle as one of the pieces of evidence demonstrating cruelty in a Divorce Petition. In any event at paragraphs 8 and 9 of the Respondent’s Affidavit, the Respondent has denied Applicant’s allegation and explained his position ending paragraph 10 as follows:

“That in respond to paragraphs 10, 11 and 12 the said motor vehicle is now with the new owner and does not belong to me anymore.”

All these show that this is not an incontrovertible and clear case. It is not a case in which mandatory injunction can be issued. That prayer must fail.

In conclusion prayer 2 is allowed for six months with order for maintenance and access and liberty to apply granted. Prayer 3 is dismissed.

Each party to bear his/her costs of this application. Order accordingly.

Dated and delivered this 9th Day of December 2002.

J.W. ONYANGO OTIENO

JUDGE