



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. E030 OF 2021

IWK.....APPELLANT/APPLICANT

VERSUS

PKW.....RESPONDENT

(Being an appeal from the Ruling in the Nairobi Children's Court by Hon. R.O. Mbogo (Resident Magistrate) delivered on 8th April 2021)

RULING

1. The appellant/applicant IWK and the respondent P.K.W. solemnized their marriage on 12th February 2011 at St Mark's Church at Westlands, and have a matrimonial home at Ridgeways in Kiambu. The marriage has two daughters: GWK aged 11 and WK aged 19. The parties live separately, the applicant having moved out of the matrimonial home following disagreement. She lives with her parents. The respondent filed **Divorce Cause No. E281 of 2020** at Milimani Chief Magistrate's Court seeking the dissolution of the marriage. The applicant cross-petitioned for divorce. The matter is awaiting hearing and determination.

2. This application dated 9th April 2021 relates to the orders issued by the Children Court at Milimani in **Cause No. E877 of 2020** that touch on the custody and maintenance of the children of the marriage. The orders were the subject of the appeal dated 9th April 2021 filed by the applicant. She was aggrieved by the ruling and orders issued on 8th April 2021 by the Children Court. The orders were as follows:-

“(1) The Defendant/father shall have actual custody, care and control of the children;

(2) (a)The Plaintiff/mother shall have alternate weekend access of the children. The access shall run from Saturday at 1000 hours to Sunday at 1600 hours;

(b)She shall also have phone access to the children, she shall provide a phone and make calls at least 3 times a week. The calls shall be made and not later than 2000 hours.

(3) Both parties shall provide for the needs of the children equally;

(d) That the parties shall engage and agree on a school for the children in the event they don't agree the children shall be returned to Nova Pioneer;

(e) That there shall be liberty to apply;

(f) That each party shall bear their own costs;

(g) That the Plaintiff to set down the matter for hearing within 90 days' failure of which these orders shall lapse.

(h) That no stay is granted.”

3. In the Memorandum of Appeal, the applicant set out the following grounds: -

“a) THAT the learned magistrate erred in law and fact by granting custody of care and control of a female minor of 11 years and a female child of tender years aged 9 years to the respondent father despite there being no exceptional circumstances that would render the appellant mother unfit or form a basis to grant such orders contrary to established judicial precedents.

b) THAT the learned magistrate erred in law and fact by granting the respondent custody of a minor of 11 years and a child of tender years aged 9 years in contravention of the provisions of the Children’s Act and that minors and children of tender years’ best interests are best served if they are in the care and custody of their biological mothers as the first point of care and primary care giver.

c) THAT the learned magistrate erred in law and fact by granting the respondent custody of a minor aged 11 years and a child of tender years aged 9 years despite clear evidence that the appellant mother had single headedly been taking care of all the needs of the minor and child of tender years and was as such best placed to have custody of the minor and child of tender years in the best interest of the minor.

d) THAT the learned magistrate erred both in law and in fact by failing not to consider and analyse the overwhelming evidence adduced by the appellant confirming that the respondent’s predisposition, actions and temperament are likely to jeopardize the wellbeing and best interest of the minor and child of tender years and threat to physical well-being of the appellant their mother leading to their ongoing divorce and fleeing from the matrimonial home.

e) THAT the learned magistrate erred in law and fact by wholly relying on selective sections of a biased children; Officer’s Report without taking into account the overwhelming evidence adduced on record indicting that the report was in conflict with the discernible interest and best wishes of the minor and child of tender years taken together with the provisions of the Children’s Act while also failing to independently exercise judgment.

f) THAT the learned magistrate erred in law by failing to make learned decision in awarding upkeep and maintenance and by ruling that parties make equal contribution for the upkeep of the children filed to resolve the dispute before the court rendering the ruling vague and incapable of practical enforcement.

g) THAT the learned magistrate failed to appreciate that the impugned ruling had the undesired effect of rewarding the respondent father who had long abdicated his parental responsibility to the minor and child of tender years contrary to Article 53 of the Constitution of Kenya and Section 4 and 23 of the Children’s Act.

h) THAT the learned magistrate applied selective justice by only relying on pleadings of the respondent while ignoring compelling evidence of endangerment of the minors and their discernible interest to arrive at a decision that under the circumstances was wholly unjust.

i) THAT the learned magistrate erred in law by basing his decisions on extraneous factors in granting custody of a child of tender age and a minor to the respondent.”

4. She sought the following prayers in the appeal: -

“(a) The appeal be allowed and the ruling and orders granted by the learned magistrate Hon. R.O. Mbogo Mr. (RM) issued and delivered on the 8th April 2021 in Children’s Case No. E877/2020, Nairobi be set aside;

(b) The appellant be granted actual and legal custody of the minor and child of tender years.

(c) The appellant be awarded maintenance for the minor and child of tender years.

(d) The appellant be awarded costs of his appeal; and

(e) Any other suitable relief that this court deems fit and just to grant.”

5. The applicant substantially seeks that the orders issued on 8th April 2021 be set aside, and that the actual custody, care and control of the children be taken away from the respondent and be given to her. The trial court had on 8th April 2021 granted the actual custody, care and control of the children to the respondent pending the hearing and determination of the cause between them. In the plaint filed in the trial court, the applicant had sought to have permanent custody of the children and an order compelling the respondent to provide for them. In the cause, the applicant had filed an application for temporary order of custody of the children and for orders for upkeep and maintenance, and obtained the orders. It appears that, upon service of the application and orders, the respondent filed a similar application against the applicant. When the court heard the two applications it delivered the ruling of 8th April 2021.

6. The applicant stated that the parties were estranged and therefore it was not possible to sit down and agree on how much each party would provide towards the upkeep of the children. This is something the parties can approach the trial court on to be able to determine, depending on the needs of the children and the means of the parties.

7. The fact that the trial court granted actual custody, care and control of the two children, both girls, to the respondent, their father, and not to the applicant, their mother, has caused me great anxiety. The trial court relied on the Children Officer’s report dated 8th February 2021 wherein the children had expressed their wish to be removed from their maternal grandparents’ home to go back to the parties’ matrimonial

home, the home where the respondent was based. However, in the further affidavit filed by the applicant in this application, she has annexed her telephone conversations with the children. In them, one can see and read that the children fear the respondent, and that they cannot freely talk to their mother because of that fear. Their conversation with the applicant is limited. One of the children is asking God to take her life rather than living in the midst of this misunderstanding and litigation between the parents. I further consider that the same child is attending counselling because of the on-going dispute between the parties.

8. Yet, if I allow the application it will mean that the children will leave the parents' matrimonial home, where the respondent stays with them, to go back to their maternal grandparents' home, where the applicant stays. This may mean the disruption of their school life, and so on. If the court allows the application, that would essentially determine the appeal. It is also noted that the orders complained of were interim orders, as the trial court has not finally heard and determined the matter.

9. If I hear and determine the appeal, because the record is ready, the determination will be on interim orders of the trial court. It will not finally determine the issue of actual custody of the children, as the trial court is still seized of the matter. Under the **Children Act**, it is the trial court that has the primary jurisdiction to hear and determine the issues of custody and maintenance of a child, and the determination is appealable.

10. That being the case, and noting that the best interests of the children under **section 4(2) and (3) of the Act** and **Article 53(2)** of the Constitution are my paramount consideration, and so that not to disturb the current custody, care and control of the children during this interim period, and bearing in mind the decision in **F.G. & Another –v- O.G.M. [2021]eKLR**, I make the following orders:-

(a) the trial court should take immediate steps to hear and finally determine the issue of the actual custody, care and control of the children; and also make definite orders regarding the children's education, medical and upkeep, and the role of either parent;

(b) this application and appeal are compromised by the order in (a); and

(c) each side shall pay own costs on the application and appeal.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JULY, 2021.

A.O. MUCHELULE

JUDGE