REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL 21 OF 2019

HKM .....APPELLANT

VERSUS

BKC.....RESPONDENT

JUDGMENT

(An Appeal from the Ruling of Hon. L. K. Sindani, Resident Magistrate of 2.5.19 in Tononoka Children's Court Cause No. 390 of 2016)

1. The Appeal herein arises from the Ruling of Hon. L. K. Sindani, Resident Magistrate of 2.5.19 in Tononoka Children's Court Cause No. 390 of 2016 (the suit) in which the Respondent BKC, sought certain orders against the Appellant HKM in his plaint dated 2.11.16.

2. The background of this case is that the parties were married on 1.1.11 and are blessed with 2 daughters, TEK and TPK born on 24.5.11 and 20.9.15 respectively. The parties are presently engaged in divorce proceedings. The Respondent filed the suit seeking in the main, actual and legal custody care and control of the children. He also prayed that the Appellant be restrained from removing the children from his custody without his consent. He further prayed that the Appellant be required to make contribution towards the educational and medical expenses of the children as and when the same arise.

3. The record shows that the matter before the trial Court is highly contentious. Efforts at negotiations have failed. There have been numerous applications and orders in the trial Court. There have also been incidences of the parties disobeying Court orders and being required to purge their contempt. The Appellant had failed to hand over children to the Respondent while he had failed to pay their school fees. As a result of this disobedience, the children had at one point not been able to go back to school. All these interlocutory events and applications have occasioned delay in the conclusion of the suit in the trial Court which was filed in 2016. Consequently, the trial Court directed that no further applications should be filed.

4. The impugned Ruling related to an application by the Appellant dated 14.2.19, for the review of orders made by the trial Court on 23.11.19, that *status quo* be maintained, *to wit* that the children remain with the Respondent who would cater for all their needs, pending the conclusion of the main suit. The Appellant had sought that custody of the children be granted to her. **In its Ruling,** the trial Court declined to review the orders and directed that *status quo* be maintained and reaffirmed the orders on access made on 23.11.19.

5. Being aggrieved by the said Ruling, the Appellant preferred the Appeal herein. The summarized grounds are that the trial Magistrate erred in law and in fact in that she:

> ***1. failed to appreciate that the children herein are girls of the tender age of 3 and 7 years and ought to be with the Appellant.***
>
> ***2. found that the Respondent, and not the Appellant was better placed to have actual custody of the children.***
>
> ***3. totally disregarded the submissions and authorities cited by the Appellant.***

6. The Appellant prayed that the appeal be allowed and that the ruling of 2.5.19 be set aside. She also prayed that she be granted custody of the children.

7. Contemporaneously with the appeal, the Appellant filed an application dated 3.5.19 seeking stay of the orders of the trial Court pending the hearing and determination of the Appeal. The Court did on 9.5.19 order by consent of the parties, *inter alia* that the Appellant would have actual physical custody care and control of the children. The Respondent would have access to the children every alternate weekend from Friday to Sunday as well as half the school holidays.

8. Parties filed their written submissions in respect of the Appeal Sas directed by the Court.

9. For the Appellant, it was submitted that the trial Magistrate was biased in favour of the Respondent and did not exercise her discretion judicially. The cases of Mbogo & Another v Shah [1968] E.A. 93, and Githiaka v Nduriri [2004] 1 KLR 67 were cited to buttress this submission. It was further submitted that the children being female children of tender years, the trial Magistrate erred in granting actual physical custody to the Respondent and not the Appellant. The trial Magistrate further erred by not giving reasons for departing from the well-established principle that children of tender years ought to be with their mother. The Appellant relied on the cases of Wambwa vs Okumu [1970] E. A. 578 and Karanu vs Karanu [1975] E. A. 18. Further, on account of the age and gender of the children, and citing the case of Githunguri v Githiunguri [1979] eKLR, the Appellant submitted that she was the right party to have custody of the children in their best interest. She further argued that there existed no exceptional circumstances to deny her custody of the children.

10. For the Respondent, it was submitted that the trial Magistrate's decision was based on the totality of the obtaining circumstances, affidavit of means and the social inquiry reports filed in the trial Court. As such this Court should be guided by the holding in the Mbogo case (supra) and refrain from interfering with the trial Court's exercise of its discretion. Further, relying on the Githunguri case (supra), it was submitted that exceptional circumstances did exist to warrant the grant of interim custody of the children to the Respondent and not to the Appellant. Citing the case of Martha Olele & Another v Jackson Obier Civil Application No. NAI.16 of 1979, the Respondent contended that the Appellant exhibited violence, immoral behavior and a bad influence to the children.

11. I have given due consideration to the submissions by the parties. It is to be noted that this appeal is from an interlocutory order and the main suit is still pending in the trial Court. The custody of the children is one of the main issues for determination in the suit and therefore still live before that Court. Accordingly, this Court must refrain from delving into the rival arguments of the parties, as to which of them is best suited to have custody of the children. To do so would preempt the outcome of the proceedings therein. I therefore direct that *status quo* be maintained pending the hearing and determination of Tononoka Children's Case No. 390 of 2016. For the avoidance of doubt the *status quo* is as contained in the consent order of this Court of 9.5.19.

12. Section 76 of the Children Act sets out the general principles with regard to proceedings concerning children. Subsection (2) provides:

> ***In any proceedings in which an issue on the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child.***

13. Already, 4 years have passed since the suit was filed in the trial Court. The delay in concluding the matter has no doubt been prejudicial to the welfare of the 2 children herein. In keeping with the foregoing general principle, I find that the best interests of the children will be best served by expediting the hearing and disposal of the main suit.

14. This being a matter concerning children, I direct that each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 5th day of May 2020

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M. THANDE

JUDGE

In the presence of: -

……. for the Appellant

……. for the Respondent

……..Court Assistant