



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 157 OF 2016

JGN.....APPELLANT

VERSUS

NWK.....RESPONDENT

JUDGMENT

(Being an appeal against the Judgment of Hon. W.Kitur, Resident Magistrate, delivered on the 26th day of October 2016 in Nakuru Children's Case No.81 of 2016)

JUDGMENT

INTRODUCTION

1. The plaintiff/respondent filed a suit against the Appellant/defendant who is her daughter in-law seeking custody of three children sired by the appellant and her son **GNW** (now deceased). She stated that the appellant got married to her son sometimes in the year 2003 and in the year 2011 she run away leaving children with her late son who in turn left them with the respondent/plaintiff. Further, that her deceased son died on 24th June 2016. Plaintiff added that she has been taking care of the children since the appellant/defendant left her matrimonial home.
2. The appellant/defendant filed defence in which she denied the plaintiff's allegations. She stated that she left her matrimonial home when the plaintiff left her own home in Solai, went to live in defendant's matrimonial home, and refused to go back. She further stated that the plaintiff solely relied on her late husband who worked in G School to maintain the children. She prayed that the plaintiff/respondent depart from her matrimonial home to give her room to take care of the children.
3. The trial magistrate gave custody of the three children **DN**, **EN** and **NW** to the plaintiff with unlimited visitation rights to the appellant/defendant. He further ordered both plaintiff/respondent and defendant/appellant to provide basic needs to the children.
4. The defendant/appellant being dissatisfied with trial court's decision filed appeal on the following grounds:-
 - i. That the learned trial magistrate erred in law and fact in upholding the plaintiff's suit and dismissing the defendant's defence.
 - ii. That the learned trial magistrate erred in law in finding that the appellant had deserted the children not taking into consideration that the husband was alive.
 - iii. That the learned trial magistrate erred in law and fact in failing to appreciate that the children ought to remain with the biological mother.
 - iv. That the learned trial magistrate erred in law in not considering the evidence led by the appellant thus arriving at a wrong conclusion.
 - v. That the learned trial magistrate erred in law in considering extraneous matter that didn't arise during the hearing.
 - vi. That the learned trial magistrate erred in law and fact in holding that the plaintiff's case stood unchallenged whereas there was sufficient evidence to the contrary.
 - vii. That the learned trial magistrate erred in law and fact in failing to consider and apply the well-established principles of law in

respect to custody in children's case.

viii. That the learned trial magistrate was out rightly biased against the appellant.

ix. That the learned trial magistrate erred in law and fact in believing the plaintiff's case and rejecting the appellant's case.

ANALYSIS AND DETERMINATION

5. This being the first appellate court I am required to reevaluate evidence adduce in the trial court and arrive at an independent determination. I note from record that, after hearing the plaintiffs and defendants case, the court directed that the appellant's 2 children, 1st and second born aged 12 and 6 years respectively be availed in court. The two children were heard in camera.

6. The children informed the court that the defendant left after their late father beat her. They said their grandmother/plaintiff takes care of them well. They said their mother rarely visit them and that she is drunkard.

7. From the children's testimony it's clear that defendants act of leaving the home was not occasioned by plaintiff's presence in the home as she alleged. Further, in her testimony, defendant/appellant stated that she later learnt from her late husband that the respondent/plaintiff had gone to their home to take care of the children.

8. The trial magistrate rightly appreciated the fact that children of tender age should be in custody of surviving parent if the other is deceased save for exceptional circumstances being proved. I agree with the trial magistrate that the interest of the child is paramount. Under normal circumstances, a child should be allowed to stay with surviving biological parent. However, one has to consider whether the stay will affect the children's welfare negatively. The two children interviewed confirmed that since their mother left them in the year 2011 they have lived with their grandmother. Though their father may have provided financial assistance during his lifetime, their grandmother moved in to stay with them and take care of them.

9. It is not disputed that their father was a drunkard and may not have been in a position to take care of the children more so the first born who is mentally incapacitated. While interviewed by court, the children indicated that they are comfortable staying with their grandmother. They accused their mother/Appellant for abandoning them and being a drunkard. Plaintiff's evidence was buttressed by evidence of the two children who preferred to stay with her.

10. From the foregoing, I find that the plaintiff demonstrated the children's best interest is to place them in her custody. The mother/appellant has been given unrestricted visitation and ordered to provide basic needs together with the respondent.

11. My view is that the current status quo should not be disturbed as the same is justified by circumstances of this case.

FINAL ORDERS:-

1. Appeal is hereby dismissed
2. custody of the three children to remain with the plaintiff/respondent as earlier ordered by the trial court
3. order for unrestricted visitation of the children by the appellant/defendant to remain
4. Appellant and respondent to jointly provide basic needs for the children as ordered by trial court.
5. Appellant to pay the respondent costs of the appeal.

Judgment Dated, signed and delivered at Nakuru this 9th day of May 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Jared/ Schola Court Assistant

Mburu Holding Brief for Nancy Njoroge Counsel for Appellant

N/A Counsel for Respondent