



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO.41 OF 2017

SMW.....APPELLANT

VERSUS

EWM.....RESPONDENT

(Appeal against the Judgment of Hon. B.M. Ekhubi-Senior Resident Magistrate

in Othaya Children Case No.9 of 2016 of 16th October, 2017)

FINAL ORDERS

The orders hereunder are pursuant to the orders of this court of 22nd February 2019 in compliance with Section 78 of the **Civil Procedure Act Cap 21** Laws of Kenya which provides for the 'Powers of appellate court' in the following terms.

(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

- (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require the evidence to be taken;
- (e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

Upon hearing the appeal, I found that I could not give final orders without the requisite report from the children's officer and the affidavit of means of the parties herein.

The grounds of appeal were set out as follows: -

1. *The learned Senior Resident Magistrate erred in law and in fact in failing to consider that what the Appellant told the court in respect of his intention to have the **custody of the children** was not recorded during the hearing of the said children's case.*
2. *The learned Senior Resident Magistrate erred in law and in fact in taking to consideration that the Appellant in the so called "**parental responsibility agreement**" made in the children's office **under pressure while as the children's officer** was totally biased against the Appellant and she could not allow the Appellant to express himself.*
3. *The learned Senior Resident Magistrate erred in law and in fact in failing to consider that because the **Respondent is a student** in [Particulars Withheld] Teachers College she cannot maintain the children and at the same time she pays her college fees, and as such the children will only suffer more and under the hands of the Respondent.*

4. *The learned Senior Resident Magistrate erred in law and in fact in failing to consider that the Appellant cannot refuse the custody of his children while as the children are suffering at the home of the Respondent who does not live with them because she is a boarder at [Particulars Withheld] Teachers College and **the children are staying with their grandmother, who has no source of income.***

5. *The learned Senior Resident Magistrate erred in law and in fact in considering that the Appellant was **earning** some money simply because he was shown a **balance in the MPESA account** of the Appellant of Kshs. 30,300/- which was not his.*

6. *The learned Senior Resident Magistrate erred in law and in fact in taking to consideration that the **Appellant is employed** while as the said sum of Kshs. 30,300/- was money entrusted to him by his brother, otherwise there was nothing else to show that the money credited to the Appellant was brought their monthly or not and he cannot afford Kshs.6000/-.*

7. *The learned Senior Resident Magistrate brought some **extraneous matters** to support the argument of the Respondent has true and worthy of any credit in the said children's case No.9 of 2016 Othaya.*

The issues that arose were:

1. Whether the appellant can have custody of the children and take care of them.
2. Whether the parental responsibility agreement entered before the children officer was oppressive to the appellant
3. Whether the respondent's status as a student is such that she cannot maintain the children, as well as pay her fees.
4. Whether the children are suffering by being left with the respondent's elderly mother who cannot maintain them
5. If the answer to 3 and 4 is true whether the children should not be placed in the custody of the appellant
6. Whether the appellant is unemployed and can afford the Kshs.6000/- per month ordered by the trial court.
7. Whether the trial magistrate considered extraneous matters in determining the case.

Although the report from the DCS Nyeri dated 10th April 2019 and filed on 12th April 2019 did not address all the issues as directed by the court, it revealed that the respondent was no longer a student but a high school teacher. She indicated in her affidavit of means that she earns Ksh.11,000/- which she spent as follows: House Rent Ksh.3000/-, electricity and water Ksh.1000/-, food Ksh.6000/- and personal effects Ksh.1000/-. She wanted the court to order the appellant to pay Ksh.6000/- per month as school fees and other educational need.

It also revealed that the appellant is a casual labourer and peasant farmer, remarried with one child.

In his affidavit of means he did not state what he earns, but that when he and his wife lived together he was able to provide for them. He deposed in the affidavit that he was capable of providing for his children so long as they were in his custody. The respondent had taken the children to a private school yet he could not afford it. He wanted the children back in the public school.

Evidently, one's MPESA account balance may not necessarily be proof that the person has a regular income, unless the whole account is produced and sources on the moneys coming in established. the learned magistrate's deduction that the balance in the respondent's account was proof of earnings was there for unfounded.

In responses to the report, the respondent told the court that there was a public school near her home but the appellant had told the head teacher that he was paying their school fees in a public school hence, they were not to be admitted in the public school. That based on that lie the head teacher had refused the two children admission to the school.

I have carefully considered the reports, the affidavits of means and submissions by both parties;

The children officer's observations are that the children are living with their maternal grandmother, 60, but who is loving and motherly. There was no evidence of suffering.

He also reports that the school fees is Ksh.6000/- for the older child and Ksh.4000/- for the younger child. No document is attached to confirm the same.

That at the appellant's home there appears to be no life and the home appears abandoned as he has moved to Syokimau. His Syokimau home was not visited neither was his new wife interview. The court does not know whether it would be in the best interest of the children to move there in terms of their welfare, education etc.

The respondent wants the prevailing circumstances of custody to remain but the appellant to pay maintenance as ordered by the lower court.

The appellant wants custody. He maintains that will be in a better position to maintain the children while they are in his custody.

From the foregoing I find that:

1. The respondent is no longer a student. She has a regular source of income.
2. The appellant's income is unknown, and as a casual it may not be steady.
3. The children are attending private school which neither the appellant nor the respondent can afford. There was no agreement on this.
4. While the maternal grandmother may not have any objection in taking care of her grandchildren, she has no parental responsibility over the children and it is unfair for the respondent to remove the children from their father to take them to her mother to take care of them. Allegations of assault of the older child by the father's girlfriend in the Children Officer's report is not substantiated.
5. It is the two parents who have parental responsibility.

Hence the orders that follow from this are:

1. The parents will have joint legal custody.
2. The respondent will have the actual custody of the children taking into consideration their ages 6 and 11.
3. The appellant will have unlimited access. And actual custody over half the school holidays.
4. The children have a right to education, and there is Free Primary Education in Public Schools. The head teacher has no legal basis to deny them admission on the alleged objections of the appellant.
5. The parents to transfer the children to the public school named by the respondent.
6. The parents to ensure that their children appear in the NHIF cards for purposes of medical attention.
7. The appellant to pay the Ksh.3000/- per month he proposed on or before the end of each month towards the maintenance of the children. (Coincidentally this is ½ of what the respondent says she spends on food)
8. Both parents to provide for educational needs of the children. If they can afford private schools, to agree on the school and their financial obligations.
9. These orders be executed through the Children's Court, Othaya.
10. The file be remitted to the Children's Court Othaya for progress reports and any necessary reviews.
11. Mention on 31st May 2019 before the children's Court Othaya to confirm compliance.

Dated, delivered and signed at Nyeri this 13th May 2019.

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant: Jerusha

Both parties.

Judge