



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 86 OF 2019**

NST.....PLAINTIFF

**VERSUS**

AN.....DEFENDANT

MNM.....INTERESTED PARTY

**(Being an appeal from Children's Case No. 112 of 2019**

**by Hon. M. W. Kibe (RM) delivered on 19.7.2019 at Nairobi)**

**RULING**

1. This Appeal was filed pursuant to an order in Children's case No. 112 of 2019 issued on 19.7.2019 in the following terms:

**(i) THAT the Plaintiff/father shall have physical custody of the minor pending hearing and determination of this suit. The minor shall reside in Nakuru with the father.**

**(ii) THAT the defendant/mother shall have reasonable access to the minor upon prior notice to the Plaintiff/father. The Defendant/mother is hereby restrained from removing the minor from the physical custody of the Plaintiff/father pending hearing and determination of this suit.**

**(iii) THAT the defendant to move the relevant court on the issue of the matrimonial dispute. In the alternative, the defendant/mother to look for accommodation for the minor pending hearing and determination of this suit.**

**(iv) THAT the Mention be on 31.7.2019.**

2. The Respondent in this Appeal had filed Nairobi Children's case No. 112 of 2019 in which the said order was issued. The Respondent was seeking a custody order vesting in him legal/physical/actual custody, care and control of the minor the subject of this appeal (hereafter referred to as the child) and a structured right of access to be given to the Appellant.

3. The Appellant was aggrieved with the order dated 19.7.2019 and filed this appeal together with the Notice of Motion dated 29.7.2019 under Certificate of urgency seeking the following orders:

**(i) THAT the Application be certified as urgent and be heard ex-parte in the first instance**

**(ii) THAT this Honorable Court be pleased to quash the order of 19<sup>th</sup> July 2019 by Hon. M. W. Kibe (Ms) RM and grant the Applicant herein full custody of the minor herein pending the hearing of the Application and the appeal herein.**

**(iii) THAT the Respondent be granted supervised access to the minor herein.**

**(iv) THAT an order do issue restraining the Respondent from stalking and/or harassing the minor and the applicant.**

(v) THAT an order do issue ordering that the minor not be removed from Nairobi by any of the parties herein.

(vi) THAT this Honorable court be pleased to order the minor's passport be deposited with this Honorable Court immediately.

(vii) THAT this Honorable Court be pleased to order the OCS Muthangari Police Station ensure full compliance with these orders.

(viii) THAT the costs of this Application be born by the Respondent.

#### GROUND OF APPEAL

(i) THAT the trial magistrate erred in law and in fact in issuing the Orders of 19<sup>th</sup> July, 2019 without reviewing evidence before Court.

(ii) THAT the trial magistrate erred in law and fact in allowing the Respondent to keep the 2 year old breastfeeding girl.

(iii) THAT trial magistrate erred in law and fact by granting orders that cannot be complied with being that the Respondent is not domiciled in Kenya as he works in the USA.

(iv) THAT trial magistrate erred in law and fact in condoning the Respondent's behavior in denying the Applicant access to the minor yet when the Applicant had custody she granted him unlimited access.

(v) THAT the trial magistrate erred in law and fact in ignoring evidence before the Court as to the behavior of the Respondent.

(vi) THAT the trial Magistrate erred in law and fact in making decision based on unproven claims by the Respondent and ignoring facts and proof brought before Court by the Applicant.

(vii) THAT the Trial Magistrate erred in law and fact in giving contradictory and confusing orders.

(viii) THAT the trial magistrate erred in law and fact in failure to consider proven facts in making orders.

(ix) THAT the trial magistrate erred in law and fact in failing to protect the rights of the minor.

(x) THAT the trial magistrate erred in law and fact in granting audience to the Respondent when he had not complied with Court Orders, was in contempt of Court Orders and failed to come to Court with clean hands.

4. On 1.8.2019, this court granted interim orders in the Application dated 29.7.2019 in the following terms.

(i) THAT pending inter-parties hearing of the matter the minor a girl child be in the custody of its mother pending further orders of the court.

(ii) THAT the minor do reside and remain in the meantime with the mother in Nairobi.

(iii) THAT the Respondent be and is hereby restrained from harassing the Applicant or interfering with her custody of the child pending further orders.

(iv) THAT the matter be argued inter-parties on 16.9.2019.

5. On 14.8.2019, the Appellant filed another Application seeking the following orders:

(i) THAT the Application be Certificate urgent.

(ii) THAT pending the hearing and determination of this suit, the Respondent and/or his servants or agents be restrained from restricting Applicant's access, evicting and/or excluding the Applicant and/or in any way interfering with the Applicant's peaceful, quiet occupation of the matrimonial home being Apartment No. [particulars withheld] Olive Gardens situated at Land Ref LR No. XXX/XXXX.

(iii) THAT a temporary injunction do issue against the Respondent restraining him, his agents and/or servants or anyone acting under his instructions from alienating, selling, transferring, disposing, leasing, interfering, wasting or howsoever dealing with house No. Apartment No. [particulars withheld] Olive Garden situated at Land Ref LR. No. XXXX/XXXX in a manner denying the applicant and the minor peaceful occupancy of the house pending the hearing and determination of this application inter-parties.

(iv) THAT pending the hearing and determination of this application, an urgent temporary injunction do issue excluding the

**respondent from use of the said Matrimonial house/Property.**

**(v) THAT the Costs of the Application be borne by the Respondent.**

6. The Application dated 14.8.2019 was supported by the Affidavit of the Applicant in which she deposed that despite the Court order issued on 1.8.2019, the Respondent in the company of unknown people broke into the house at 1am when the Applicant was in the house with the minor and forcefully removed them from the house and put a court order on the door rendering the Applicant and the minor homeless.

7. The applicant also deposed that the house is their matrimonial home where they had been living with the minor and the Respondent after their marriage being apartment No. [particulars withheld] Olive Gardens situated on Land Ref. No. LR. No. XXX/XXXX (hereafter referred to as the suit property)

8. The Applicant further stated that the suit property being their matrimonial home was purchased in the joint names of the Respondent and his mother but it was the Respondent who was paying the mortgage towards the purchase of the suit property at all material times.

9. She also stated in her Supporting Affidavit that the Court granted her an order to reside and remain with the minor pending inter-parties hearing on 16.9.2019 and the Respondent was also restrained from harassing and/or interfering with the Applicant and the minor.

10. The Applicant further said in the affidavit that the order Respondent used to evict him was obtained by the Respondent's mother against the Respondent whereas the two are the registered proprietors of the house.

11. She further deposed that she had been rendered destitute without shelter, food and clothing and had taken refuge in her Counsel's chambers with nowhere to go.

12. Further that the Respondent had taken possession of all their belongings leaving her and the minor with no change of clothes and with no one to turn to.

13. The Respondent filed a Replying Affidavit dated 27.8.2019 in which he deposed as follows:

**(i) THAT he is the biological father of the child the subject of this suit.**

**(ii) THAT he is not married to the Appellant/Applicant and that the said issue is before the trial court for determination.**

**(iii) THAT the trial Court gave him custody of the child and the Appellant was given was granted unlimited access to the child.**

**(iv) THAT the trial Court granted the Respondent Interim orders of custody after making demonstrations that there were exceptional circumstances that put the Child's life, health and general welfare at risk to warrant the custody of the child to be with the Respondent.**

**(v) THAT the Respondent went with the child to his home at Nakuru but the applicant went with police officers on the night of 5<sup>th</sup> and 6<sup>th</sup> July, 2019 and collected the child on the grounds that the Respondent had taken the child outside the jurisdiction of the Court.**

**(vi) THAT he was subsequently granted interim custody of the child and agreed to find a place in Nairobi to grant the Appellant ease of access to the child.**

14. MNM, the mother of the Respondent also filed an application dated 12.9.2019 seeking to be enjoined as an interested party to these proceedings and also seeking to have the Appellant's Affidavit in Support of the Applicant dated 14<sup>th</sup> August 2019 be struck out for being false, misleading and scandalous.

15. The intended interested party also sought to vary, vacate and/or vary and set aside the order of this Court dated 15.8.2019 issued on 19.8.2019 which declare the suit property matrimonial property but that it belongs to the same as the property of MNM.

16. The Application dated 12.9.2019 by the intended interested party is supported by her affidavit of even date in which she has deposed that she jointly owns the suit property with the Respondent and that she financed it with a mortgage from Kenya Commercial Bank which she is still servicing single handedly.

17. The intended interested party further deposed in her affidavit that the Appellant applicant deliberately misled the Court by concealing material facts which if brought to the attention of the Court would not have warranted granting of the ex parte interim orders asserting the suit property as matrimonial.

18. Further, that the order of 19.8.2019 anchored in the Application dated 14.8.2019 effectively served to deprive her of her constitutional right to property and she is seeking an order setting aside and/or vacating the order in its entirety.

19. The parties filed written submissions in the Applications dated 29.7.2019, 14.8.2019 and 12.9.2019 which I have duly considered. I find that there is no dispute that the appellant and the Respondent are the biological parents of the child the subject of these proceedings while the

intended interested party is the Respondent's mother.

20. The issues this Court must determine are as follows:

**(i) Whether the Interested party should be joined as a party to this Appeal.**

**(ii) Whether the Appellant should be granted interim physical custody care and control of the minor pending the hearing and determination of Children's case No. 112 of 2019.**

**(iii) Who pays the costs in this Application?**

21. On the issue as to whether the interested party should be enjoined as a party to this suit, the said issue is the subject of the interested party's Application dated 12<sup>th</sup> September 2019.

22. The interested party in her affidavit and written submissions before this Court has stated that she is the mother of the Respondent herein and she jointly owns apartment No. [particulars withheld] Olive Gardens situated at Land Reference No. XXX/XXXX (hereafter referred to as the suit property).

23. The interested party further deposed that she solely purchased the property in 2014 and on her own volition registered it in the joint names of the Respondent and herself.

24. She denied claims by the Appellant that the Respondent was paying for the house and further stated that the suit property does not qualify to be declared matrimonial property as it was not acquired by the Respondent.

25. The interested party is now seeking to be enjoined as a party to this Court as she stands to suffer if the orders of this court dated 19.8.2019 declaring the suit property matrimonial property have effectively served to deprive her of her constitutional right to property.

26. The Appellant in her response and submissions stated that she has lived in the suit property with the Respondent for five years even before they got married in 2018 and that the child the subject of this Appeal was born in the said house.

27. The Appellant further submitted that the interested party colluded with the Respondent to eject her from the suit premises under the pretext that the Respondent was a tenant of the interested party.

28. I have considered the submissions by both parties together with the averments in their respective affidavits. I find that is not in dispute that the Respondent and the Appellant are the biological parents of the child the subject of this Appeal and that the three were living in the suit property prior to filing of children's case No. 112 of 2019.

29. It has not been denied that the child the subject of the Children's Case No. 112 of 2019 and also this Appeal was born and raised in the suit property.

30. I find that the issue before this court is not ownership of the suit property but the welfare of the child the subject of these proceedings. The Children's Court gave custody to the Respondent in the impugned order dated 19.7.2019 which order was reversed by this Court on 30.7.2019 on interim basis pending inter-parties hearing.

31. On 30.7.2019, when the Court gave interim orders restoring the child to the mother, it also gave orders restraining the respondent from harassing the Appellant and the child. The orders were granted pursuant to an application dated 30.7.2019. The issue was not ownership but maintaining status quo.

32. In blatant disobedience of the orders of this Court, the Respondent forcefully ejected the Appellant and the child from the suit premises pursuant to orders issued in Misc Application No. 627 of 2019 in a matter where the interested party is the Applicant together with an auctioneer against the Respondent herein who is named as the Tenant in the suit premises.

33. This is a classic case of collusion to defeat the ends of justice and this Court reserves the right to have the interested party and the Respondent charged with the Criminal offence of obstruction of justice.

34. The Application by the Interested party to be enjoined as an interested party to these proceedings is misplaced as the Appeal is on the issue of custody of the child and the welfare of the child and not ownership.

35. The **Constitution of Kenya** (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, defines an interested party as;

***"A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation"***

36. Whereas, the **Black's Law Dictionary 9th Edition, page 1232** defines an interested party as;

***"A party who has a recognizable stake (and therefore standing) in the matter"***

37. In **MOSES WACHIRA VS NIELS BRUEL & 2 OTHERS** the court quoted the Supreme Court in **COMMUNICATIONS COMMISSION OF KENYA & 4 OTHERS VS. ROYAL MEDIA SERVICES LIMITED & 7 OTHERS** wherein the Supreme Court pronounced itself on who an interested party is and held as follows:

*“In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this Court’s decision in the **Mumo Matemo** case where the court (at paragraphs 14 and 18) held:*

*“An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. Similarly in the case of **Meme v. Republic, [2004] 1 EA 124**, the High Court observed that a party could be enjoined in a matter for the reasons that:*

*(i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;*

*(ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;*

*(iii) Joinder to prevent a likely course of proliferated litigation.*

38. Article 53 of the Constitution states that in any issue touching on a child, the welfare of the child is of paramount importance. The interested party and the Respondent who ejected the child out of the suit property acted contrary to the constitutional mandate and in disobedience of an order of this Court dated 30/7/2019 which clearly gave custody to the Appellant and stated that the child and the Appellant should not be interfered with pending the inter-partes hearing of the Application dated 30.7.2019.

39. The interested party does not deny that she is the mother of the Respondent and that the suit property is registered in both names of the interested party and the Respondent. The order she obtained to evict the Appellant is an attempt to circumvent the orders of the Court which gave custody of the child to the Appellant and ordered status quo pending inter-partes hearing of the Application dated 30.7.2019.

40. I find that the interested party will not be prejudiced by the outcome of the Appeal as the said Appeal is on the custody and welfare of the child and not ownership of the suit property. The interested party has a right to file the ownership suit in the right forum.

41. On the issue as to whether the Appellant should be granted custody of the child, I find that on 30.7.2019 this Court already reversed the order of the trial Court issued on 19.7.2019 when interim custody was given to the Appellant.

42. I find that the Court also gave those orders exparte and directed that the case be heard inter-partes on 16.9.2019. The Court also directed that the Appellant and the child should not be interfered with pending the inter-partes hearing. The eviction of the Appellant from the Suit Property amount to contempt of Court and the same is punishable under section 12 (i) of the penal code.

43. The Parties filed submissions in the Applications dated 30.7.2019 and 14.8.2019 which I have considered together with their averments in several affidavits filed herein. I find that no exceptional circumstances have been disclosed to warrant the child, a female minor of tender years to be given to the Respondent.

44. It is trite law that Mothers are best suited to take care of the children of tender years unless there are exceptional circumstances to warrant the child to be given to the father.

45. **Section 83** of Children Act stipulates the principles to be applied in making a custody order as follows:

*“83(1) in determining whether or not a custody order should be made in favor of the applicant, the court shall have regard to—*

*(a) The conduct and wishes of the parent or guardian of the child;*

*(b) The ascertainable wishes of the relatives of the child;*

*(c) The ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;*

*(d) The ascertainable wishes of the child;*

*(e) Whether the child has suffered any harm or is likely to suffer any harm if the order is not made;*

*(f) The customs of the community to which the child belongs;*

*(g) The religious persuasion of the child;*

*(h) Whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation*

to the child concerned and whether those orders remain in force;

(i) The circumstances of any sibling of the child concerned, and of any other children of the home, if any;

(j) The best interest of the child.”

46. I also find that all institutions and Governments Agencies and other bodies dealing with children matters are mandated to uphold the best interest of the child.

47. The relevant sections of the Children Act and international conventions are all in favour of protecting the rights of the child. The constitution of Kenya 2010 allows application of International Law.

48. In addition to Article 53 which mandates the best interest of the child to be of paramount importance, the child has a right to live and be cared for by his parents (**Section 6**) of the Children Act. The Constitution of Kenya 2010 requires that in all matters concerning children, the best interest of the child shall be of paramount importance. **Article 53(2)** of provides:

“(2). A child’s best interests are of paramount importance in every matter concerning the child.”

Section 4(2) and (3)(b) of the Children Act echo the constitutional imperative:

“(2). In all actions concerning children whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) Safeguard and promote the rights and welfare of the child;

(b) and promote the welfare of the child;

49. Section 85 of the Children Act also provides for custody of a child. The said Section provides for principles to be applied in making custody order and the said principles include the best interest of the child.

50. In Re S (an infant) [1958] 1 All ER 783, at 786 and 787, Roxburgh J said:

“I only say this; the prima facie rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule.”

51. The Court of Appeal in J.O. v S.A.O. [2016] eKLR stated:

“There is a plethora of decisions by this Court as well as the High Court that in determining matters of custody of children, and especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother, because mothers are best suited to exercise care and control of the children. Exceptional circumstances include: the mother being unsettled; where the mother has taken a new husband; where she is living in quarters that are in deplorable state; or where her conduct is disgraceful and/or immoral.”

52. In Civil Appeal No. 30 of 1978 at Nairobi: [2008] I KLR G – vs – G at page 497, the court of appeal held:

“...Basically, these reasons are that the custody of very young female children should be granted to their mother, in the absence of exceptional circumstances which do not in my opinion exist in this case. The learned judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children. He rejected the proposition, advanced before him by the mother’s advocate, that there was a ‘rule’ in favour of the mother. With respect, this was misdirection. When dealing with the paramount consideration of welfare, especially where young female children are concerned, there is a rule that the mother is normally the person who should have custody. As Roxburgh J said in Re S (an infant) [1958] 1 ALL ER 783, at 786 and 787:

“I only say this; the prima facie rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule”.

53. In Re L (infants) [1962] A11 ER 1, Lord Denning MR said:

“I realize that as a general rule it is better for little girls to be brought up by their mother.”

54. In **Wambua v Okumu [1970] EA 578**, Mosdell J had this to say:-

***“I do not think it can be controverted that in absence of exceptional circumstances, the welfare of a female infant aged four years ... demands that the infant be looked after by its mother rather than its putative father.”***

55. I accordingly find that it is in the best interest of the child that custody remains with the Appellant and that the Appellant is not interfered with until the determination of Children’s Case No. 112 of 2019.

56. I accordingly find that both the applications dated 30.7.2019 and 14.8.2019 have merit and I allow them in the following terms:

**(i) THAT the Application dated 12.9.2019 seeking to enjoin the interested party to this Appeal is dismissed with costs to the Appellant for want of merit. The reason being the subject of this Appeal is the welfare of the child and not ownership.**

**(ii) THAT the custody of the child will remain with the Appellant until Children Case No. 112 of 2019 is heard and determined.**

**(iii) THAT the Appellant will remain in the suit property until the Children’s Case No. 112 of 2019 is heard and determined or on the alternative the Respondent to provide alternative accommodation.**

**(iv) THAT Children’s Case No. 112 of 2019 will be heard by a different Magistrate other than the one who gave the impugned orders.**

**(v) THAT the Respondent pays the Costs of the Applications.**

**DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 11<sup>TH</sup> DAY OF OCTOBER,2019**

**ASENATH ONGERI**

**JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.**