



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

DIVORCE CAUSE NO. 2 OF 2016

EMN.....PETITIONER

VERSUS

JNM.....RESPONDENT

RULING

BACKGROUND

1. By a Petition dated 5/5/2016 the Petitioner **Mr. EMN** petitioned for the dissolution of marriage and custody of the only child of the marriage **PN** and the Respondent **JNM** filed an answer to the Petition dated 26/10/2015 together with cross petition in which she sought the dissolution of the marriage and that the maintenance of the issues of the marriage be by both parties but custody be granted to her with unlimited access to the Petitioner.
2. By a Judgement dated 30/01/2017 Justice S.N. Riechi dissolved the said marriage but ruled that the issue of the custody of the issues of the marriage await the report from the Children's Officer before determination.
3. On 8/11/2018 the Children's Officer **MR. ALEXANDER MUNYES** appeared before the court together with the Petitioner and the Respondent and presented his report dated 5/11/2018 in which it was stated that the issue of the marriage **PN** had no clear recollection of why her parents separated and divorced save that she remembered her mother picking her belongings and left never to return. The father stated that the Respondent in January 2013 left behind the child with him peacefully without a quarrel and he assumed parental responsibility to date. The Respondent is reported to have stated that she was under distress and did not want to have challenges in her academics for she was expectant at the time of separation.
4. From the assessment it was stated that the subject was far away from life threatening risk and under fatherly care. It was recommended that it was in the best interest of the subject to remain in the current care arrangement where she can continue enjoying fatherly care for having her at this point in time with the mother means that her way of life will be disrupted especially her education and Christian life with the mother being given limited access to her since she had no attachment to her.

DETERMINATION

5. The **Children Act No. 8 of 2001** defines custody as so much of the parental rights and duties as relates to the possession of the child and **Section 83** states the principles to be applied in making custody orders with the best interest of the child being paramount. The court with jurisdiction in respect of children matters which includes custody is the Children's Court under **Section 73** of the **Children's Act** and therefore this matter should have been handled by the Children's court which has the jurisdiction in the first instance. See **C.C.S. v J.K. [2017] eKLR** and **C.P.K. v C.J.M. [2015] eKLR**.
6. That notwithstanding the High Court under **Article 165 (3) (a)** of the **Constitution of Kenya 2010** has original unlimited jurisdiction to determine all cases of criminal and civil nature save for those limited by the Constitution. **Article 159 (2) (a)** provides that in exercising judicial authority, the courts shall administer justice without undue regard to procedural technicalities and therefore where custody has been sought for in a petition for dissolution of marriage the High Court can grant legal custody of the child. See **N.M. v D.O.O. [2017] eKLR**.
7. **Article 53 (2)** of the **Constitution** states that a child's best interest are of paramount importance in every matter concerning the child, and having taken into account the Children's officers report and the submission of both parents in court. I hereby grant the custody of the child to the father who has lived with and taken care of her for all these years with limited access to the mother at her convenience with prior consent of the Petitioner.
8. Since the Petitioner has not sought for order of maintenance I shall make no order thereon but the mother is at liberty to provide for her if

she so wishes.

9. This being a family matter each party shall bear their own cost and it is so ordered.

Dated, delivered and signed at Lodwar this 6th day of December, 2018.

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J. WAKIAGA

JUDGE

In the presence of:-

_____ *for the Petitioner*

_____ *for the Respondent*

Petitioner _____

Respondent _____

_____ *- Court assistant*