



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 38 OF 2014

J M M.....APPELLANT

VERSUS

P E A.....RESPONDENT

JUDGMENT

Background

1. In the year 2005, the appellant herein, J M M, married the respondent herein, P E A, through a church wedding. Their union was blessed with one issue, OGM (*name withheld*). The respondent filed a divorce cause at the Principal Magistrate's at Ogembo being Divorce Petition No. 14 of 2013 in which she sought *inter alia*, the dissolution of their said marriage and the custody of the child of the marriage. The appellant, on his part, filed another suit in the Principal Magistrates Court at Ogembo being civil case no. 15 of 2013 wherein he also sought orders for custody of the same child.

THE PLEADINGS

2. In Divorce Cause No. 14 of 2013 the defendant (petitioner) herein P E A sought for orders that:

- 1. The marriage between the petitioner and the respondent be dissolved forthwith.**
- 2. Custody of the minor issue be granted to the Petitioner and the Respondent be compelled to provide Care and Maintenance.**
- 3. Costs of the Petition.**
- 4. Any other orders be granted as the court may deem fit and just to grant.**

3. The suit was brought under the provisions of the Children's Act 2001. The appellant claimed that he got married to the respondent Out of the marriage, they were blessed with one issue namely, O G M in the month of February, 2007. The appellant brought this suit against the defendant (respondent) one P E A in his capacity as father and next friend to the minor.

4. The respondent's claim was that during the subsistence of their marriage, the appellant treated her with cruelty before finally deserted her. She listed the particulars of desertion as follows:

- I. Abandoning the Matrimonial home without the consent of the petitioner**
- II. Failing to step on their matrimonial bed in spite of the pendency of the legally solemnized**

marriage

III. The appellant has totally failed to show love and affection to the petitioner and he brings nothing into the marriage but hurt and humiliation upon the petitioner.

She also particularized cruelty as follows:

I. The appellant has failed to provide the petitioner with any emotional support for a period of more than one year.

II. That the appellant has associated himself with the acts of immorality contrary to the marriage oath.

III. Not having any regard to the welfare and customs of the appellant and carrying himself with behaviours and mannerisms that are disrespectful to the petitioner's customs and the larger family.

IV. Exposing the Petitioner to emotional torture, public ridicule, humiliation and odium.

V. Failing to provide the Petitioner with basic and logical needs including conjugal rights for years on end.

VI. The respondent created circumstances under which the petitioner could not be reasonably expected to bear leading to their marriage irretrievably breaking down.

5. The appellant filed a reply to petition dated 19th August 2013 in which he denied all the averments contained in the petition.

The appellant cause of action in civil suit no 15 of 2013 mentioned hereinabove was captured in paragraph 5 of the plaint wherein he alleged that that the respondent took off from the matrimonial home on February 2013 and got married to someone else leaving behind their child only to come back for her later in July 2013 despite the fact that the children officer-Gucha district had given him custody of the said child, giving custody to the plaintiff. The appellant prayed for the custody of the child while stating that he was her biological father and was capable of taking care of all her needs.

7. The respondent on her part filed a written statement of defence and counter claim dated 5th August 2013 in which she denied every single allegation made by the appellant in the plaint and confirmed that the minor was happy in her custody. She added that she was a graduate teacher by profession and was therefore financially capable of taking care of the minor's needs. In her counterclaim the respondent stated that parental responsibility is a joint one in which both parents should provide for the child and therefore it would be in the best interest of the minor that the appellant be ordered to pay for her school fees and upkeep. She however claimed that the appellant was a person of no fixed abode and for that reason she was in a better place to be granted the custody of the child.

8. When the case came up for hearing before the trial court, the parties agreed to consolidate the divorce petition and the plaint. The parties further agreed that the two cases be heard by way of written submissions. Advocates representing both parties both filed their respective submissions after which the trial court rendered its judgment in the following terms:

1. "That the marriage between the petitioner and Respondent solemnized on 20th December 2005 be dissolved.

2. That custody of the issue of the marriage OGM (*name withheld*) be vested on (upon) the petitioner P E A.

3. Each party shall bear their own costs of this cause."

9. The appellant herein is aggrieved by the trial court's findings on the issue of the custody only of the subject minor and has filed the instant appeal and listed the following grounds of appeal in the Memorandum of Appeal:

1. The Learned Trial Magistrate erred in Law and in fact in not putting into consideration the Appellant's humble desire to have grant for the access of the child.

2. The Learned Trial Magistrate erred in Law and in fact in not putting into consideration the facts presented before it in the Appellant's affidavit which is dated 3rd December 2013.

3. The Learned Trial Magistrate erred in Law and in fact in not putting into consideration the Appellant's Written Submissions and grounds for the desire by the appellant to divorce dated 3rd December 2013.

4. learned trial magistrate erred in law and in fact in that the Appellant did not give the court enough reason as to why the child should not be kept at his custody but in the affidavit he has explained the manner in which the child was snatched from his home by the respondent.

10. When the appeal came before me for hearing on 11th October 2016, the parties agreed to canvass it by way of written submissions. Parties thereafter highlighted their submissions on 5th December 2016.

Appellant's submissions

11. The appellant who appeared in person submitted that that falsehoods were presented before the lower court that resulted in the judgment being rendered against him. He contended that the minor did not stay with the respondent all along as he is the one who lived with the child soon after she was born when the respondent had to join the university. He stated that even after the delivery of the trial court's judgement, the child was not in the actual custody of the respondent who lives and works at [Particulars Withheld] School in Kisii County while the minor lives with strangers and goes to school at [Particulars Withheld] School in Bungoma County. The appellant's case was that the minor was suffering emotionally due to her abandonment by the respondent who was already married to another man.

12. He reiterated that he works with the SDA church as a pastor and he was therefore capable of maintaining the minor instead of the strangers that she was now living with.

Respondent's submissions

13. Mr. Nyambati learned counsel for the respondent submitted that it is now settled law that the interests of a child of tender years is of paramount importance and that custody of such a child should be given to the mother unless there are peculiar reasons/circumstances to warrant denying the mother custody. He further submitted that this court should focus on the time when the case was filed before court and not when the respondent was still in college as at that time, the parties had not separated. He contended that the documents attached to the appellant's submissions are not properly before court as the appellant did not seek the court's leave to file them.

14. He further argued that the issue of the respondent's remarriage to another man was not material in this case because the parties were already divorced and in any event, the appellant was equally married to another woman. Lastly he submitted that the facts in this case are in favour of the respondent having the custody of the minor and therefore prayed for the dismissal of the appeal

15. After the highlighting of submissions this court opined that it would be necessary for the minor to be brought before the court for the purposes of being interviewed by the court before it arrives at a decision on the appeal.

16. On 19th December 2016, the minor appeared before this court. The court observed that the minor appeared healthy and happy. Upon being interviewed by the court on how she feels about the school that

she attends and her living conditions, the minor stated that she was happy with the school that she currently attends as a day scholar while living with her step father. The court also had a chance to peruse the minor's school report forms and noted that she was performing fairly well.

17. The respondent, who was also present in court, stated that the minor had been staying with the aunt in Webuye since she was a small child and that is how she ended up in the current school. She further explained that she feared for the minor going to stay with the appellant because the appellant had apparently married her former colleague who does not have a good heart.

Determination

18. As a first appellant court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused by the Court of Appeal in the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Another (1968) EA 123**, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to arrive at my own findings. No oral evidence was tendered in this case as the parties opted to rely on their respective affidavit evidence in support of their cases. The appellate court will not normally interfere with a lower court's findings of fact unless the same is founded on wrong principles, misapprehension of evidence or based on no evidence. The court of Appeal in the **Selle** case (supra) held thus:

"A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion,"

19. As I have already stated in this judgment, however, the trial court did not take the oral evidence of the parties who instead agreed to rely on their affidavits and thereafter canvassed both the divorce petition and the child custody case by way of written submissions.

20. In the appellant's affidavit before the trial court sworn on 3rd December, 2013 he averred that after separating with the respondent following her alleged adulterous behaviour, the respondent took the subject minor away from the matrimonial home without his consent thereby prompting him to file the child custody case before the trial court. He further averred that while he did not object to the minor staying in the custody of the respondent due to her tender age he prayed to be granted access to the child for at least 2 weeks during the school holidays.

21. In the respondent's replying affidavit before the lower court sworn on 5th August 2013, she deposed that the appellant had previously exhibited immoral behaviour and she was therefore skeptical of her young daughters' safety in the custody of the appellant. She added that the child was a girl aged 7 years and that she was therefore better placed to be granted her custody. She further averred that the minor had all along been in her custody and she was capable of taking care of all her needs. It was the respondent's case that the appellant was not capable of taking care of the minor having been dismissed from his job as a church due to bad behaviour associated with improper conduct with school girls.

22. As I have already stated in this judgment, oral evidence was not tendered in this case and therefore the veracity or truth about the allegations that the parties made against each other were not tested through cross examination. Under the above circumstances, the trial court was also denied the opportunity to observe the demeanour of the witnesses. I note that while the respondent raised very weighty allegations on the appellant's unsuitability to be granted the custody of the child, the appellant in his said affidavit dated 3rd December 2013 conceded that the respondent was better placed to take care of the child. The appellant stated as follows at paragraph 15 of the said affidavit.

"That I have no problem of her staying with the child because of her tender age but I am praying for access during school holidays as per the Children Act."

23. After considering the record of appeal and the parties respective written submissions, I note that the only issues that this court needs to determine are:

a) Whether the trial court considered the best interests of the minor before awarding custody to the respondent?

b) Whether the appellant has a right of access to the minor?

24. With regard to the first issue, **Article 53(2) of the Constitution of Kenya 2010** provides that:

" A child's best interests are of paramount importance in every matter concerning the child."

25. Although the best interests standard can be hard to define in some situations, some factors are common in "best interest" analyses in most custody situations. **Section 83(1) of The Children Act** lists the following factors to be critical in "best interest" analysis:

- 1) Wishes of the child (if old enough to capably express a reasonable preference);**
- 2) Mental and physical health of parents;**
- 3) Religion and/or cultural considerations;**
- 4) Need for continuation of stable home environment;**
- 5) Support and opportunity for interaction with members of extended family of either parent;**
- 6) Adjustment to school and community;**
- 7) Age and sex of child;**
- 8) Parent use of excessive discipline or emotional abuse; and**
- 9) Evidence of parental drug, alcohol or sex abuse.**

26. In **Sospeter Ojaamong vs Lynnette Amondi Otieno Court of Appeal Civil Appeal No, 175 of 2006** the court held:

" The principles that guide the court in custody of children are that except where exceptional circumstances exist, the custody of such children be awarded to the mother, because mothers are generally best suited to exercise care and control of the children."

The exceptional circumstances would include if the mother is unsettled, has taken a new husband or her living quarters are in a deplorable state."

27. In the instant case it is undisputed that the marriage between the appellant and the respondent was solemnized in December 2005, one issue was born out the marriage who is the minor in this case and by 2013 the said marriage had broken down irretrievably. At the time the respondent was filing for a divorce petition to end the marriage between her and the appellant the minor was aged 7 years old. Clearly the minor was a child of tender years within the meaning of the Children Act in view of her age. No evidence was brought before the trial court to show that the respondent was an unfit mother, I find that the trial court correctly gave custody of the minor to the respondent and I further find that there is no reason to interfere with the trial court's decision in this regard.

28. The appellant has now challenged the said decision by the trial court while arguing that he took care of the minor single handedly when the respondent was at the university and that the minor does not currently live with the respondent but with strangers under whom he claims that the minor is suffering. He also claimed that the respondent has since remarried In my humble view, the respondents claims

cannot stand because as correctly submitted by Mr, Nyambati learned counsel for the respondent, the decisive period to look at is not be during the subsistence of the marriage between the appellant and respondent but the period when the marriage between the appellant and respondent disintegrated. In any event, the appellant had conceded in his affidavit in the lower court to custody of the child being granted to the respondent. The fact still remains that the minor had always been with the respondent during the trial in the lower court and the trial court correctly found that there was no good reason to remove the said minor from the respondents care. Even though the appellant had vehemently highlighted the fact that the respondent was now remarried, there was also a claim made by the respondent to the effect that the appellant had also remarried. At the same time the respondent expressed her fears that the minor will not be safe in the custody of the appellant as she knew his new wife, who was her former colleague, to be a woman with a bad heart. This court interviewed the minor when she was brought to court and observed that, contrary to the appellant's submissions that the child was suffering and in dire straits as it were, the child stated that she was happy at her school in [Particulars Withheld] where she resided with her step father. It is therefore this court's finding that the custody of the minor shall remain with the respondent.

29. On the issue of the appellant's right of access to his child this court notes that the this prayer, even though not contained in the appellants plaint filed before the trial court, was clearly stated in his affidavit filed before the said court apart from being a constitutional right of both the child and his father. It is therefore my finding that the trial court erred in failing to address this very fundamental aspect of the child custody case. Taking cue from the appellant's suggestion in his affidavit before the trial court that he be granted right to access his child during school holidays, I hereby allow the appeal partly on this point and consequently make final orders as follows:

- 1. The custody of the minor shall remain with the respondent.**
- 2. The appellant shall have right of access to the minor for 2 weeks during school holidays and may also visit the child in school but on prior notice to the respondent and, in respect to the school visits, upon prior notice and with the permission of the minor's school's administration/management.**
- 3. This order of access maybe reviewed after six months with a view to extending or reducing the limits thereof at the instance of either party should they deem it necessary.**
- 4. The issue of maintenance of the minor by the appellant may be referred to the Children's Court should the respondent deem it necessary**
- 5. Each party shall bear his/her own costs.**
- 6. Orders accordingly.**

Dated, signed and delivered in open court this 20th day of February, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

Appellant in person for the Appellant

Mr. Bosire for Nyambati for the Respondent

Omwoyo court clerk