



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

HCCA NO. 11 OF 2016

(CORAM: J.A. MAKAU – J.)

V A.....APPELLANT

VS

I W.....RESPONDENT

JUDGEMENT

1. The Appellant **V A** was the plaintiff at the trial court. Through a plaint dated 26th August 2016 she sued the respondent seeking the following orders: -

a) Permanent custody of V Pand C M.

b) Maintenance of: -

V P currently at [particulars withheld] Boarding School,

C M currently at [particulars withheld] Academy.

Maintenance for all the two children for food and education and clothing at Ksh. 20,000/= per month.

c) Any other relief this honourable court deems fit,

d) Cost of this suit.

2. The Appellant simultaneously at the time of filing, the suit filed a Notice of Motion seeking the following orders.

a) THAT the court grants the plaintiff/applicant temporary orders of custody pending the hearing and determination of this matter.

b) THAT the court do issue an order of injunction restraining the defendant from interfering with the custody of the minors and the plaintiff.

c) THAT the minor V P be transferred from [particulars withheld] BOARDING SCHOOL to [particulars withheld] ACADEMY she initially schooled and where she can be under the plaintiff's care.

d) THAT the defendant caters for maintenance of the minors which amounts to Kshs. 20,000 per month for food, education and clothing.

3. On 26th August 2016 the notice of motion was heard *ex parte* and the application was granted under prayer number 1 pending *inter partes* hearing on 31st August 2016. The application was subsequently heard *inter partes* and a ruling delivered on the 7th September 2016, allowing the Appellant's, application partially.

4. The appellant aggrieved by the trial court's ruling denying her prayer no. 3 as per the Notice of Motion dated 26th August 2016 preferred this appeal through the firm of M/S. Ashioya and Company Advocates setting out four grounds of Appeal being as following:-

a) THAT the Learned Trial Magistrate erred in law and in fact in making Orders of transfer of V P a minor girl aged 9 year old back to [particulars withheld] Girls Boarding Primary School without regard to her best interests and ignoring the fact that the girl had rejoined [particulars withheld] Academy, a school that was a walking distance to the homes of both her parents and in particular the Appellant and Respondent herein.

b) THAT the Learned Trial Magistrate erred in law and in fact in uplifting interim orders of injunction she granted to the Appellant to the Appellant barely 1 (one) week previously.

c) THAT the Learned Trial Magistrate erred in law and in fact in not allowing herself to be guided by provisions of the Children's Act.

d) THAT the Learned Trial Magistrate erred in law and in fact in failing to find that it would be in the best interest of V P a girl and minor aged 9 years to be close with the appellant her mother in view of the fact that she requires warmth, love, care and guidance.

5. That before the appeal could be heard, the appellant filed notice to act in person dated 25th November 2016 and set the Appeal down for hearing on 14th November 2016. The Appellant filed affidavit of service dated 6th December 2016 stating that the Respondent was duly served. The Respondent did not attend the hearing hence the Appeal proceed *ex parte*.

6. During the hearing of the appeal, the appellant relied on the grounds of appeal as drafted by her former counsel. Under ground no. 1, she urged the trial magistrate erred in law and fact in making orders of transfer of V.P, a minor girl aged 9 years old back to [particulars withheld] Girls Boarding Primary School without regard to the best interest of the child and in ignoring the fact that the child had rejoined [particulars withheld] Academy, a school that was within walking distance to the homes of both her parents herein.

7. In determining the application, the trial court relied on the affidavits of both the Appellant and the Respondents. The court noted the Appellant's averments were that the child was enrolled in school which is 120 kilometres from her home without the prior knowledge of the Appellant and that the respondent did so after consulting with his fellow teachers on the best school to take his daughter to, contending that [particulars withheld] Boarding School is academically better than [particulars withheld] Academy. He urged that after consulting his fellow teachers, he enlisted the child V.P at the aforesaid school where he averred she is doing well. This court also upon perusal of the supportive affidavit, no doubt found that the appellant on going to the school to check on V.P, the [particulars withheld] Boarding School authority denied the Appellant access to her daughter V.P on the grounds that she was not one of the persons who had been listed as the parent /guardian of V.P and that she was only allowed to see V.P her daughter, after she created a scene.

8. **Section 23 of the Children's Act** dealing with parental responsibility defines, parental responsibility as follows: -

“In this Act, “parental responsibility” means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child’s property in a manner consistent with the evolving capacities of the child”.

9. Further **Article 53 of the Constitution of Kenya 2010** provides:-

a) "Every child has the right: -

a) to name and nationality from birth;

b) to free and compulsory basic education;

c) to basic nutrition, shelter and health care;

d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;

e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and

f) not to be detained, except as a measure of last resort, and when detained, to be held: -

(i) for the shortest appropriate period of time; and

(ii) separate from adults and in conditions that take account of the child’s sex and age.

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

10. In the instant case, in determining the issues before trial court, that court was bound by the provisions of **Section 23 of the Children’s Act and Article 53 of the Constitution of Kenya 2010**. The guiding principle in dealing with children matters is to bear in mind the child’s best interest is of paramount importance in every matter concerning the child. That the parents have parental duties in ensuring that a child’s best interest are taken into account but not only those listed under **Section 23 of the Children’s Act**.

11. In the instant case, the trial court based its the decision on the grounds that as the Appellant was nowhere to be consulted be the Respondent could take the child to the school he found appropriate and further on the grounds that no school admission documents had been produced by the Appellant showing the child V.P, has been admitted at [particulars withheld] Academy. The trial court further stated V.P, having been continuing with her education at [particulars withheld] Primary School her continuing at the same school will not interfere with her school/academic curriculum and that school is academically better than the [particulars withheld] Academy and the Respondent did that in the best interest of VP.

12. I have considered the reasons for rejecting the Appellant’s application and grounds on which the same was dismissed. The trial court stated the Respondent should have liberty of taking VP to the school he found appropriate. This is not what the **Constitution and Children’s Act** advocates for as it states specifically that the child’s best interests are of paramount importance in every matter concerning a child. A good school is important of course but it does not guarantee best interest of a child nor does it guarantee that every child in the school shall excel in her examination. The school that conspires with one parent to deprive the other parent access of his or her child as is the case in respect of [particulars withheld] Primary School which acted in cahoots with the Respondent and denies the parent (the Appellant) to see her child till she makes a scene in the school in presence of the child and all other students is not good school for the best interest of a child and does not in my view have the best interest of the child nor is the child’s interest or welfare in such an institution taken as of paramount importance to the child concerned. Such a school may even be despised by the very child it assumes to be protecting

and providing the best welfare. The order by the court that V.P continue with education at [particulars withheld] Boarding Primary School on condition that the Appellant, her parent be authorized to be visiting her and attending school meetings as per school regulations was not solicited for by Appellant nor does it conform with the **Constitution** and the provisions of the **Children's Act**. This was an ice coating order to justify the continuing of V.P, at [particulars withheld] Primary School. I find V.P, knowing the embarrassing situation her mother, the Appellant was put into, it would not be in her best interest to continue being in the same school. The prayer no. 3 should not have been rejected.

13. As the main suit is yet to be heard and determined on merits and as the Appellant urged that she abandoned all other grounds of appeal, I shall not deal with the other grounds and shall treat them as having been abandoned.

14. The upshot is that this appeal partially succeeds. I direct the orders by the lower court are partially set aside, in that ground no. 3 of the application canvassed before the trial court succeeds: -

a) I order that the minor V.P be forthwith transferred from [particulars withheld]Boarding School to [particulars withheld] Academy where she initially schooled and where she can be under the Appellant's (her mother) care, pending the hearing and the outcome of the main suit.

b) The matter to proceed to hearing on the issues raised in the plaint dated 26th August 2016 before the same trial court.

c) Costs of the appeal to the appellant at the lower scale and costs at the lower court shall abide by the outcome of the case.

DATED AT SIAYA THIS 2ND DAY OF FEBRUARY 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 2ND DAY FEBRUARY, 2017.

In the presence of:

Appellant - Present

Respondent - Absent

Court Assistants:

1. Kevin Odhiambo

2. Leonidah Atika

J.A. MAKAU

JUDGE