REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 31 OF 2010

N K C…….....……..……PETITIONER

VERSUS

P A M…….....……RESPONDENT

S C…….……CO-RESPONDENT

RULING

1. This matter was placed before me on 22nd May 2014 for mention so that I could give directions. Mrs. Mbanya, for the petitioner, stated that the parties required an interpretation of the order made on 21st June 2013. She informed me that the parties were giving discordant interpretations the order; and appeared to suggest that the child the subject of the order was not being taken by the respondent, who has legal custody of the child, to the home of the petitioner incompliance with the said order.

2. Ms. Kalsi, for the respondent took the view that the issue at had really nothing to do with the petitioner and the respondent as such, but rather that it had something to do with the child himself. She stated that there was reluctance on the part of the child to visit the petitioner and that he has remained reluctant despite encouragement from the respondent. She invited the court to interview the child with an eye to ascertaining his views before any directions are given.

3. Mrs. Mbanya was not opposed in principle to the child being interviewed by the court. I set aside 29th May 2014 2.30PM for the purpose of having audience with the child.

4. On 29th May 2014 the child was availed. He came in the company of the petitioner and the respondent and their respective counsel. I held a session with him in my chambers in the absence of the petitioner, the respondent, their counsel and my clerk. I took note of the views he expressed on the matter.

5. The child is twelve years old and in school. He impressed me an intelligent boy, way too mature for his age. He expressed strong sentiments about the matter. The reluctance on his part to visit and stay with the petitioner came out quite clearly. The environment at the petitioner's residence and her general attitude and conduct towards him appear to have made the child feel like an unwelcome there.

6. The order I made in my judgment of 21st June 2013 on the child was in the following terms:-

"That custody of the child of the marriage is granted to the respondent, but the petitioner shall access the child on alternate weekends and school holidays with prior arrangements with the respondent. The respondent shall drop the child at the residence of the petitioner at 9.00a.m. on the appointed days , and the petitioner shall thereafter drop the child at the residence of the respondent at 5.00PM."

7. The said order on custody is the subject of two applications filed by either party. There is the Motion by the petitioner dated 3rd July 2013 and another by the respondent dated 8th July 2013. The application dated 3rd July 2013 sought review of my orders of 21st June 2013 on custody. I granted temporary orders on 3rd July 2013 and fixed the matter for hearing on 25th July 2013. The application dated 8th July 2013 seeks discharge of the stay orders that I granted on 3rd July 2013.

8. On 9th July 2013 and 11th July 2013 orders were made by consent to the effect that the child was to remain in the custody of the respondent, with access by the respondent. Further orders were recorded regarding his passport and phone access to the child by both parties. The applications were never argued, and *status quo* remained as per the orders of 11th July 2013 until the issue came up again on 22nd May 2014.

9. Where a dispute touches on a child, the overriding principle is the paramountcy of the best interests of the child. This position is clearly spelt out in the Constitution and in the Children Act. Article 53(2) of the Constitution states:-

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

Section 4(2) of the Children Act provides:-

"In all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

10. I set out of the above provisions to underline the fact that the consent dispute touches on the interests of the child. The order made in the judgment of 21st June 2013 on custody of the child was founded on this principle, guided by the material that was before the court at the time. The best interests of the child in my opinion lay with the child being with the respondent, but with reasonable access extended to the petitioner.

11. I am conscious of the reality that the making of access orders in both matrimonial causes and children's cases is after founded on the rights of the parents as the primary consideration with the interest of the child being secondary. Often the rights of the parents to access and the views of the child clash. Such a clash has happened in this case. Whereas the court has upheld the rights of the parents to access to the child the views of the child in this case are contrary to rights that the court has upheld, for although the court has granted access to the petitioner, the child to be accessed is not keen on being so accessed by the petitioner.

12. So the petitioner has a decree in her hands which grants her certain rights to the child. The decree is made in a suit between the petitioner and the respondent in which the child is not a party. It is enforceable against the respondent but not the child. The decree is capable of enforcement as against the petitioner and the respondent. The respondent can be compelled to drop the child at the petitioner's residence. Given the child's reluctance this can only be achieved by use of strong arm tactics literally dragging the child by the scarf of his neck kicking and screaming to the residence of the petitioner. The question that arises is whether such approach would be in the best interests of the child.

13. I am reluctant to find that the respondent has failed to comply with the access orders made on 21st June 2013. It is my view that the enforcement of the decree has been frustrated by the reluctance of the child to cooperate rather than the wilful refusal on the part of the respondent to comply with the order.

14. The law takes the position that whatever disputes there may be between parents over children, the views of the children are of importance. Indeed, taking into account of the views of children in cases concerning them is part of the best interests of the child principle. ***Section 4(4)*** of the Children Act states this aspect of the principle in the following terms:-

"In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the decree of maturity."

15. The Children Act does not provide a criteria for assessing the decree of maturity of the child in question. Indeed, there are no provisions in that law on the matter. I have however found guidance on the subject from the Penal Code. ***Section 14*** of the Penal Code defines immature age, and treats the age of twelve as the threshold of maturity. ***Section 14*** of the Penal Code states as follows:-

"14 (1) A person under the age of eight years is not criminally responsible for any act or omission.

(2) A person under the age of twelve years is not criminally responsible for an act or omission unless it is proved that at the time of doing the act or making the omissions he had capacity to know that he ought not to do the act or to make the omission.

(3) A male person under the age of twelve years is to be presumed to be incapable of having carnal knowledge."

16. By virtue of ***Section 14*** of the Penal Code, a child under eight years is of tender and immature age, and their opinion is likely to carry little weight so far as decisions touching on their welfare are concerned. Children of twelve and above are considered to be of mature age. They are at an age of discretion and can be held accountable or responsible for their actions. Their opinions on matters affecting their welfare will therefore carry quite a lot of weight. Children in the age bracket between eight and eleven are in the border line between maturity and immaturity. They are in transition. They may or may not be held responsible for their actions depending on the circumstances. It is in respect of this category that the court ought to assess the child's degree of maturity before assigning weight to their opinions or views. The views of children in this category could therefore carry some weight.

17. The child in this case is now aged twelve. Going by the categorisation in ***Section 14*** of the penal Code, and even without relying on the interview that I had with him, I find that he is of mature age. He is at the age of discretion and can be held criminally responsible for his actions or omissions. His views and opinions on his welfare should carry weight. When I interviewed him, he expressed himself a very strongly on his interests. As he is of mature age, I cannot ignore his views, nor impose upon him the views, desires and whims of his parents.

18. The order on custody in the decree I pronounced on 21st June 2013 is not final. It was pronounced in a divorce cause and therefore it is ancillary to the order dissolving the marriage between the parties. Ancillary orders are reversible from time to time depending on the circumstances. The circumstances of this case render the order in question amenable to revision.

19. The order that I am therefore disposed to make in the circumstances is that the child in question shall remain in the custody of the respondent but he, the child, has liberty to make a choice on whether or not he shall be with the petitioner on alternate weekends and during school holidays. Should he choose to be with the petitioner at the due time then the time stipulation on when he is to be dropped at the residence of either the petitioner or the respondent shall remain those set out in order (4) of the decree pronounced on 21st June 2013.

DATED, SIGNED and DELIVERED at NAIROBI this 6th DAY OF June 2014.

W. MUSYOKA

JUDGE

In the presence of Mrs. Mbanya advocate for the petitioner.

In the presence of Mr. Kamau for Mrs. Thongori advocate for the respondent.