



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL SUIT 374 OF 1998

J. M. N..... PLAINTIFF

VERSUS

M.N. K..... DEFENDANT

RULING

On the 9th December 1998 J. N. M, whom I shall hereafter refer to as "JOSEPH" moved the court for injunction restraining M. N.K, whom I shall hereafter refer to as "MARGARET" from taking custody of L. N., whom I shall hereafter refer to as "the child" until further orders of the court on the ground that Margaret abandoned the child when she was only 10 months and had now secretly taken the child away. The child was now 5 years old.

I ordered that Joseph should have the custody of the child and that Margaret was at liberty to move for any necessary orders she deemed fit.

On the 15th December 1998 Margaret applied to have the Orders of 9.12.98 set aside and that she be given custody of the child.

The parties appeared before me on the 17.12.98 and I ordered that the child should remain with Joseph pending the full hearing of the application to set aside the Order of 9.12.98. The parties were given liberty to file further affidavits.

It is Margaret's case that the child was born on 13.10.93 when she was cohabiting with Joseph. That she was under a great deal of harassment, mental torture and distress during the cohabitation. That on the night of 31.8.94 and 1.9.94 something strange happened to her and she lost her memory and went missing for about 13 months. That she has been informed by her brother Kiruma and her sister Anne that her disappearance was announced over the radio and published in the newspapers. She was eventually located at Nanyuki and taken to hospital in Nairobi. That she never abandoned the child. That when she recovered she reported the issue of the child to Nyeri Children Officer. That she went to take her child when Joseph's wife, came to her place of work and ordered her to collect her child from her house saying that she is not prepared to look after somebody else child.

That she has another child I.L. who was born on 8.4.95, 8 months after her disappearance. She was pregnant by the time she disappeared. That she has got her job back and is working with Nyeri Co-operative Union Saving and Credit Society. She lives at home with her mother and is capable of looking after her children.

One SIMON WAIGWA KIBIRA, an elder, deponed that Joseph and Margaret were not married and as such under Kikuyu customary law, Margaret was entitled as of right to have the child. His statement was

supported by that of E.W. KAMANGU, Margaret's uncle, who deponed that Joseph and Margaret were not married even under Kikuyu Customary law and as such the child belongs to Margaret.

Margaret's mother and sister also deponed how Margaret went missing and steps they took to trace her. Mother deponed how she was traced looking frail. Margaret's boss, Branch Manager of Nyeri Farmers Sacco, also deponed how she disappeared and what sort of employee Margaret was.

Margaret's advocate Mr A.J. Kariuki deponed how he obtained the Medical Report of Margaret from F.G. Njenga & Nguithi Associates. The Report is prepared by Dr. A.N. Nguithi, Consultant Psychiatrist.

Joseph's case is that in October 1991 he started cohabiting with Margaret. That they were not married. That out of the said cohabitation L.N was born on the 13.10.93. That on 1.9.94 and without any apparent reason Margaret deserted him and abandoned the child who was then 10 months only. The child was left in his custody. That he made desperate attempts to trace her but all in vain. He caused her disappearance to be aired on the Kenya Broadcasting Corporation on three different dates. He even placed a notice in the Nation of 26.9.94. On the 12.10.95 he met Margaret at her parents' home after hearing that she had reappeared. She was unable to give any satisfactory explanation feigning total loss of memory. He carried out his own investigations and discovered that she had been cohabiting with one J. KARIUKI at Likii and had a child out of the said relationship. That the child is now 5 years and has remained in the exclusive custody of the Plaintiff until 2.12.98 when Margaret abducted the child from his home.

J. N. N, the wife of Joseph, deponed that it was not true that she went to Margaret's place of work and ordered her to take the child. She denied subjecting the infant to any harassment. She went on to depone that she is ready, able and willing to discharge her duties, responsibilities and obligations towards the child and that the relationship between her and the child is that of mother and child.

When Joseph applied to this court on the 9.12.98 seeking to have custody of the child as Margaret had abducted her, this court granted him the Order and he took over the custody of the child. I also ordered that Margaret was at liberty to move the court for any orders she wished. She accordingly applied to set aside the Order granting Joseph custody of the child.

The matter came up before me on the 16.12.98 and I ordered the matter stood over to the 17.12.98 and ordered that the step mother and the child should attend in Chambers. I remained in Chambers with my clerk and the child after sending all the people concerned out of my chambers.

I found the child healthy and she talked freely. She said that J. N was her mother while Margaret was her aunt. She confirmed that neither Jane nor Joseph ever beat her. She had a positive attitude. I ordered that she remains in custody of Joseph pending the hearing of the application by Margaret.

The matter in dispute is as between Joseph and Margaret who should have custody of the child L.N?

At the outset I must make it clear that having talked to the child in the absence of other people, she is happy in her present position. I gathered from her that she has never been mistreated by her father or her "mother".

I also talked to her about her "aunt", Margaret and she told me that for the time she was with her "aunt", her "aunt" treated her nicely and was kind to her. Joseph, in his affidavit, did not throw any aspersions at Margaret as a mother. There was no allegation that for the 10 months she lived with the child, she was a bad mother.

On the evidence before me I hold that both Joseph and Margaret are suitable parents to look after the child. The circumstances have since intervened in that Joseph is married to Jane. Nobody would blame him for doing so. He could not wait for Margaret forever.

I now turn to consider the behaviour of Margaret. It is her case that she does not remember what happened to her. She lost her memory and did not know where she was.

The Consultant Psychiatrist after examining her concluded that:

"In my opinion, the history and clinical findings that Margaret presented with are suggestive of a diagnosis of a Dissociative Fugue. This is a condition in which a person may suddenly leave home and live in a new place while having amnesia of their former life, for weeks or months. This type of condition is usually a symptom of severe depression or it may be precipitated by an extremely stressful environment, such as a difficult marriage".

The doctor's evaluation was incomplete because she did not have the opportunity to interview the people Margaret was living with prior to her disappearance and after her disappearance. One thing is however clear, that despite what we non medical people might think, Margaret's behaviour can be explained in medical terms.

Margaret had a job prior to her disappearance and if she wanted to leave Joseph, she could have done so and continued with her job. Her behaviour was unusual but the doctor has satisfactorily explained the position. I hold that Margaret did not leave the child on her accord. She was sick.

The next issue for consideration is what action did she take about the child from October 1995 till December 1998 when she abducted the child? The doctor states in her Report that:

"She was hospitalized at Avenue Hospital for observation from 18th to 25th October 1995. No abnormal behaviour was noted and her memory continued to improve". It is clear that her memory was on the mend and was improving as time went by resulting in her abducting the child. In the end she realised that she had a child to go to the extent of abducting her. I hold that her sickness should not be held against her. I was referred to Section 17 of the Guardianship of Infants Act, Cap 144 which provides as follows:

"17. Where in any proceeding before any court the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof is in question, the court, in deciding that question shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father". L.N is a girl aged 5 years and it is settled law that in cases involving very young female children custody will always be given to the mother unless there are exceptional circumstances - JOYCE MUTHONI GITHUNGURI -VS- STANLEY MUNGA GITHUNGURI. [1982-88] 1KAR9. Having held that both Joseph and Margaret are suitable parents, when it comes to custody the balance tilts in Margaret's favour. L is a very young female child.

Both Joseph and Margaret are Kikuyus and it has not been challenged that under Kikuyu customary law Margaret is entitled to the custody of the child. Section 3(2) of the Judicature Act, Cap 8 states as follows: "The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay". L is used to stay with her father but with time she will adjust. It is in her interest to know her mother now than discovering the truth some years later. It is consoling that Joseph has a wife and a child with his wife.

I therefore set aside my order of 9.12.98 and grant M. N.K custody of the child L.N. Each party shall bear its own costs.

Delivered this 19th day of **March 1999**.

J.V.O
JUDGE

JUMA