IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO& SHAH JJ.A & BOSIRE AG. J.A)

CIVIL APPEAL NO. 160 OF 1996

BETWEEN

LMK.....….....……APPELLANT

AND

SCK….....……RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Nairobi (Justice Msagha-Mbogholi) dated Ist July, 1996

in

H.C.C.C. No.59 of 1996)

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JUDGMENT OF THE COURT

The parties to this appeal are husband and wife. Their marriage was solemnized on 15th December, 1989, although cohabitation with each other commenced in 1980. The couple has four children, the first one being a boy aged 17 years. The second and third children, also boys, are aged 15 and 10 years respectively. The last child is a girl, who is aged slightly over 9 years.

The appeal concerns three of these children. They are A K, R K, and A C. Before 24th May, 1996, AK was a form I student at Rongai Secondary School and RK and C were pupils at Kericho Primary School, in Standard 5 and 4, respectively.

Judicial proceedings between the parties commenced on 16th May 1996, when the appellant lodged a petition for divorce at the High Court, Nairobi, to wit Divorce Cause No.59 of 1996. It was grounded on cruelty. The petition also contained a prayer for the ancillary relief of custody of all the four children, above.

It would appear to us that soon after the petition was filed the respondent came to know of it, because on 5th June, 1996, he brought an interlocutory application in the cause praying for interim custody of the four children as well as a peremptory order compelling the appellant to return three of the four children back to their respective schools.

From the affidavit evidence on record we glean that the marriage between the parties had been developing

cracks slowly over the years. In April, 1996, the appellant decided to request for a transfer from Kericho District where she was the District Agricultural Officer, to Nyeri District. When her request for transfer was granted she decided to and ceased cohabitation with the respondent in the same month, namely April, 1996. She had been occupying a government house which was assigned to her by virtue of her status as District Agricultural Officer. It was in that house that, by mutual agreement with the respondent, she lived with R K and C, prior to the date of her transfer. Her transfer meant that she had to surrender that house to be occupied by her successor.

The appellant went to Nyeri leaving the last two children with the respondent, who was then on leave. The respondent was then and we believe still is, a *[particulars witheld]* based at Iten, several kilometres from Kericho town where those two children were studying. Not having any suitable accommodation at Kericho town to shift to, the respondent decided to and shifted to his rural home at *[particulars witheld]*, within Kericho District, with the two children. He arranged for their transportation to and from their school using his personal car.

The respondent's application was prompted by the act of the appellant in removing K from Rongai Secondary School and the two children who lived with the respondent from his home on 24th May, 1996. The uncontroverted affidavit evidence on record is that the appellant first went to K's school, asked to talk to him without seeking the permission of the school authorities to do so and without notifying the school that she was taking away the boy. Thereafter, she went with the boy to *[particulars witheld]* and used him to lure the other two children out of the respondent's home. When she got them she decided to and went with them, together with K, to a hideout in Nairobi. It is noteworthy that when she did all that she had filed her divorce petition and did not seek the court's aid in getting the three children.

The respondent's case in that application was that the appellant was, prior to 1992, a loving and caring mother of the subject children, was a good and strong Christian, but her behaviour changed in that year after she was promoted to become a *[particulars witheld]*. She became lavish in her expenditure, was often drunk whenever she arrived home in the evenings, abandoned church activities and became a lady of loose morals. Efforts to counsel her to reform bore no results.

Eventually, she deserted the matrimonial home without caring that her departure would mean depriving the last two children of convenient accommodation near their school. It was further his case that the appellant's act of uprooting three of their four children from their respective schools, where they were doing well academically, and from familiar environment was detrimental to their welfare. He, therefore, prayed for orders in terms of his application arguing that he had already made suitable transport and care arrangements for them. Additionally he had requested to retire early so that he could devote more time to the children.

The appellant as respondent, opposed the application. She filed an affidavit in reply. In it she denied all allegations of ill behaviour by her and further deponed that she was forced to seek a transfer to Nyeri to escape the frequent beatings from the respondents. She also deponed that having for the most part of their lives to date lived with her, the children would be better off continuing to live with her instead of living under the care of the respondent's old and sick mother. She explained that she took away the three children in issue because when she went to visit them on 24th May, 1996, they refused to return whence they had come. She admitted she hid the children so that the respondent could not reach them.

In a carefully written ruling the superior court (Mbogholi, J.) stated, inter alia, that he was conscious he was handling a delicate matter, that he was aware that he did not have all the apply, brought a fresh application under the review provisions of the Civil Procedure Act, and rules made thereunder, and S.30 of The Matrimonial Causes Act. We wish to observe here that the Matrimonial Causes Act, and rules made thereunder contain sufficient statutory provisions for moving the court for necessary reliefs. It would not therefore, be necessary to have recourse to the provisions of other law unless otherwise specifically stipulated.

The application in question bears the date 24th June, 1996. The superior court proceeded with it on the basis that it was grounded on the discovery of new and important matter. We will proceed to consider the

appeal on the merits on that basis.

In her affidavit in support of the application the appellant annexed copies of documents to show she had found new schools for all the three children, and that she had also found suitable accommodation for herself and the children within Thika Municipality. She deponed that she was assigned special duties in the Thika area, but did not state for how long she would be working there. She also exhibited a handwritten letter to her by A K complaining about Rongai Secondary School. Among his complaints, was that the school lacks adequate and appropriate text books, and that some subjects he wished to pursue were not being offered there.

The superior court did not think the additional evidence would affect its earlier ruling even assuming it had been tendered before that earlier ruling had been delivered. In that court's view, the fact that the appellant had, even after presenting a petition for divorce which had a prayer for custody of the children, uprooted the subject children from their respective schools disentitled her to the court's assistance. In its view the appellant wanted the court to uphold what she did after improperly disrupting the original status quo. It therefore dismissed the application and thereby provoked this appeal.

The memorandum of appeal contains four grounds. However, at the commencement of the hearing of the appeal, Counsel for the appellant, Ms Mwaura, abandoned grounds (2) and (4) thereof. Grounds (1) and (3) are as follows:-

(1) The Learned Judge erred in finding that the evidence sought to be introduced on review would have made little difference to the ruling dated 18th June, 1996.

(3) That the Learned Judge erred in failing to appreciate that the interests of the children were paramount.

In her submission in support of the appeal, Ms Mwaura, urged the view that the finding by the court below that the appellant usurped the authority of the court, when she went for the children from their schools during the pendency of her petition and without a court order, was extraneous to the matter under consideration, and, that it improperly and unduly weighed in the mind of the court. In her view, the children had all along been living with her, except for a period of about one month during which time she was looking for living accommodation for them and herself and schools for them. The only change which occurred to the children is the fact that they moved to a new area and joined new schools.

Counsel for the respondent, Mr Kibet did not think the appellant placed before the court acceptable and sufficient evidence to show that the children would be better off remaining at schools which she had found for them. Nor had she demonstrated to the court that the evidence she relied upon to seek review was indeed new and important. He urged us to consider the circumstances of the children before being uprooted from their familiar environment and presently to see what is best for them.

In matters relating to custody and guardianship of children, the first and paramount consideration is their welfare (see S.17 of The Guardianship of Infants Act). Contrary to what counsel for the appellant stated in her submission before us, the superior court bore that fact in mind in its ruling of 18th June, 1996, and the one which gave rise to this appeal. It is quite clear from both the rulings that the learned Judge who delivered them was careful not to trespass on the jurisdiction of the Judge who will ultimately hear the appellant's petition. He was concerned that as at the date of the first ruling the children were not in school. They had been improperly uprooted from their respective schools without good reason. He was also concerned about the bona fides of the appellant's action in uprooting them.

We are mindful of the fact that the decision under attack, and the one before it, were based on affidavit evidence. The deponents will eventually be examined and cross - examined on them and generally on matters touching on custody and guardianship of the children of the marriage.

Like the court below, we are in the dark about the present circumstances of the children. We have no material to act on in favour of the appeal. The mere fact that new schools had been found for the children could not cause the court to review its ruling. The court needed to know much more. Moreover the

authority of the court is at stake here. The court below did not think the appellant was deserving of its assistance. She had presented a petition to that court, praying, inter alia, for an order granting her custody of the children in issue here. Having done that, we think she was aware of her rights with regard to the children and the procedure to be followed to get them. We, also, think that, considering the manner in which she went about collecting them from their respective places, the appellant wanted to create a basis for bargain in court. She wanted to steal a march on the respondent. That and the fact that the lower court considered, as we also do, that the appellant by resorting to self-help measures was, in effect depriving that court of its right and duty to decide the issue of whether or riot the children should be moved. We think that the court below was right in ordering the return of the children back to their respective former schools.

We wish to state, however, that we are not here concerned with the suitability or otherwise of either party being awarded custody of the children. That will ultimately be dealt with by the Judge who will eventually hear the appellant's petition for divorce. We are concerned about the education of the children which was interrupted by the appellant without sufficient cause.

Several familiar authorities were cited to us. We wish to refer to only one of them viz Halbury's Laws of England, 3rd Ed. Vol.21, paragraph 429. Counsel for the appellant, while relying on that authority, submitted that one of the children, Andrew Kibet, did not like his school and had written to his mother to request to be removed from that school to any other but better school. The relevant passage in the authority reads, in pertinent part, as follows:-

"If an infant is of an age to exercise a choice, the court will take his wishes into consideration. The court cannot make an order against the wishes of an infant of age of sixteen years or upwards, unless the infant is award of court."

With due respect to learned counsel the wishes of any child are not necessarily in his best interests. The passage, above, is clear that the court will take them into account, but riot necessarily act accordingly. So whatever wishes K may have had, if at all, did not bind the court.

We find no basis for interferring with the lower court's decision. In the result this appeal fails and is dismissed, with no order as to costs

Dated at Nairobi this 8th day of November , 1996

R.S.C. OMOLO

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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AG- JUDGE OF APPEAL