REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO 121 OF 1993

P ……..……APPLICANT

VERSUS

K ……..…..RESPONDENT

RULING

In this action by way of originating summons under s 17 of the Guardianship of Infants Cap 144 and rule 2(b) of the Guardianship of Infants Rules the father (to whom I will simultaneously refer as the husband) prays that his 3 infant children with the respondent be given to the custody of their mother (to whom I will also refer as the wife)

The marriage between the parents was contracted under customary law. The parties belong to the Kikuyu ethnic community. At the outset it ought to be said that neither the style in which the marriage was solemnised nor the particular customary law governing the status of the spouses *vis-a-vis* the children is of any real importance. For the factor of paramount importance (though not necessarily the sole one) to be considered in a dispute such as the one in the present case is the welfare of the children. That is what s 17 of the Guardianship of Infants Act says.

The marriage has definitely ended disasterously. It is in the evidence of the husband that prior to the separation there was a quarrel or a fight which was extended to other members of the family; the wife is alleged to have subsequently initiated criminal assault court proceedings against the husband's present wife.

In the present proceedings the husband was openly bitter and hostile towards the wife: and that is the chief reason why he vehemently fought this case: he would not accept any alternative to his prayer. At one time he was asked:

Q: Do you love them (the children)?

A: I say I do not hate them, but I will do anything to get rid of them from my house.

It was evident that the strong hatred he has for the wife has now been transferred to the children. In those circumstances where the husband does not show any modicum of affection towards the children he is undoubtedly incapable of giving the children any right or suitable upbringing. This Court would thus be strongly violating the intention of s 17 of the Act (Cap 144) if it were to leave them in their father's care and control. An allied aspect which must be borne in mind is the very tender age of all the infants in this case. They deserve affection rather than the obvious rejection and hostility to which they are subjected by

their father. They deserve to be nurtured and comforted rather than be kept in state of deprivation and meanness in which they have been compelled to live since the time their parents parted.

In Re S (an infant) (1958) Ch 0783 Roxburgh JA said this:

> " ... the *prima facie* rule (which is now quite clearly settled is that, other things being equal, children of this ages should be with their mother, and where a Court gives custody of a child of this tender age to the father it is incumbent to make sure that there really are sufficient reasons to exclude the *prima facie* rule."

It is relevant to notice that this rule was enunciated in the case where the subject child was aged 5 years. Also see *Karanu v Karanu* [1975] EA 18 for similar view in Kenya on the custody of young children. In the present case two of the children are even much younger than 5. Moreover, these 2 younger children are daughters whose names are given in paragraph 2 of their mother's replying affidavit as E W (aged 3 years) and G W (aged 1 and half years).

In the case of *Githunguri v Githunguri* [1982-88] IKAR 9 it was said that unless exceptional circumstances are shown the custody, care and control of female children should be given to their natural mother. In that case the father of the children, like in the present case, was living with another woman whom he purported to have married under Kikuyu customary law. In that case it was even contended that that woman was a person fit to look after the children together with their father.

I find it pertinent and sufficient for the purpose of this case to quote the following holding from the headnote of that case.

> "The trial judge correctly directed himself that in cases of children the paramount consideration in the welfare of the children: but he misdirected himself on the rule in favour of very young children in the absence of exceptional circumstances"

Turning to the present case I have now to consider whether it is in the best interest of the children that they be committed to the custody of their mother as sought by the application.

In her affidavit she deponed that she is unemployed and is currently being cared for by her parents who, she says, are peasant farmers with no tangible means of income. In paragraph 10 of the affidavit she deponed her parents have expressly said that her children were unwelcome in the home as permanent residents as they would overstretch their meagre financial resources.

In his evidence the husband tacitly acknowledged that the wife is unemployed and has no income, although he said she attained an '0' level standard before her marriage. But he created an impression that according to the custom of his people his children should be raised in the homestead of the wife's parents. That is why he was eager to show that her parents own a plot of 9 and a half acres in Othaya and that "they are well-off".

In my view a custom which conveniently relieves the husband of an estranged wife of his responsibility for the maintanance and upkeep of the children of the marriage and arbitrarily shifts and inflicts that responsibility on the parents of the wife notwithstanding of their views and circumstances is a grievous mischief-maker to all concerned parties in the present-day society; it is an outmodated and counterproductive custom and it is thus legally untenable: A good custom ought to enhance rather than retrogress the aspirations of a society. Courts of law can only uphold good customs not wicked ones.

The husband, in his evidence was not straightforward as to his financial circumstances. To his affidavit in-reply to the wife's he annexed his salary slip showing a gross pay of Shs 4310/= out of which the net pay due to him is Shs 1582/=. He then said he would contribute Shs 1000/= towards the upkeep of the children. Initially he created an impression that the figures on the pay-slip represented all his earnings. But in cross-examination it emerged that he receives service-tips of not less than Shs 2000/= each month. When this figure is added to his regular pay then the figure of Shs 6000/= per month stated in the wife's

affidavit is not a figment of her imagination. Also it emerged that he and his mother and brother are constructing a residential building of substantial value in Kayole Nairobi.

Their intention is for a multi-storey. But as of now the ground floor is virtually completed. It comprises 18 rooms each of which can be rented for a sum of not less than Shs 600/= per month. The construction of the 1st floor is also at an advanced stage. According to the wife's advocate there are already tenants in the completed part of the house. She gave out the names of the alleged tenants and also attributed the hefty water bill of Shs 14,000/= in respect of the plot to the consumption by the tenants. The husband denied that there was truth in those allegations and maintained that there is no part of the building that is ready for occupation by tenants. He said that the names read out to the court were either of the workers on the building site or else of people unknown to him. But viewed against the tenor of his evidence in the entire proceedings I hold that the husband did not tell the truth on that aspect. I therefore find that even if the husband is not now receiving any income from the building, he is bound to receive the same sooner than later. The income will definitely increase when the building is properly completed. Even presently, the 18 rooms on the ground floor can fetch a minimum sum of Shs 10,800/= per month.

In his evidence it also became clear that his mother owns 4.5 acres where she farms coffee, maize, bananas and beans. She also derives rental income of not less than 2000/= per month from residential premises in Dandora and Majengo in Nairobi. It would be totally illogical and irrational not to require something from her when, at the same time, the parents of her daughter in law are expected to bring up her grandchildren.

In the final analysis it is inescapably clear that these children have to be committed to the custody of their mother. But as she has no financial resources of any sort, their father has to pay for their accomodation, their food and their school fees until they all attain the age of majority. The recorded evidence has shown that he is a man of substantial means and so the figure which I have arrived at is by no means excessive.

My orders are these: the three children shall be immediately be committed to the custody of their mother and their father shall pay to mother Shs 6000/= per month for their maintanance. The wife's costs of this application to be paid by the husband.

Dated and delivered at Mombasa this 23rd day of September, 1993

I.C.C. WAMBIYLYANGAH

……..

JUDGE