



**REPUBLIC OF KENYA**

**HIGH COURT, AT NAIROBI**

**CIVIL CASE NO. 3144 OF 1987**

**A. O .....APPLICANT**

**VERSUS**

**K .A.....RESPONDENT**

**RULING**

The proceedings have been brought by way of originating summons under the Guardianship of Infants Act Cap 144 of the Laws of Kenya for the custody of the following infants to be granted to the applicant, their father or in the alternative, for the infants to be made wards of this court. They are F.O aged 9 years, A.O aged 8 years, H.O aged 6 years and O.A.Omari aged 4 years.

The father, and the mother of the children whom I shall call the mother, are both muslims and were married under muslim law in 1976. The father is a migrant worker who spends nine months of the year working in Kuwait. As a result, the mother, and the children were parked at the house of the father's mother in Kajiado where they lived with the old lady. Nearby, and in a different house, also lived a brother of the father, I, with his wife and six children. The father manages to spend two or three months only in a year with his wife and children at his mother's house. The care of the children was left entirely to the mother.

In early 1986, the mother left her mother in-law's house with all her children to go and stay with her own mother, after a quarrel with Ibrahim and a sister in law who taunted her that she was only a maid in the house and that their brother did not want her. Upon the father's return on leave from Kuwait, he found the mother and the children gone. He went to Biafra, a suburb of Nairobi where the mother was and gave her Exhibit 11, a letter, in which he informed her that he had divorced her because she departed without permission from the place where he had left her and the children.

The Kadhi in Nairobi attempted a reconciliation and the mother went back to Kajiado. Having asked the father for a place of her own, she was taken by the father to a small room which he had rented for this purpose, and dumped her there with her two younger children. The father never went to visit them there, never slept there and did not keep any of his belongings there. The mother never saw him again before he left for Kuwait. I too never visited the mother in her new place. It is not quite clear how the two older children went to their grandmother's house at Kajiado. The mother said that they were taken there against her will. However, she later moved from the small room that had been rented for her by the father, into two large rooms nearby. According to her, and this I accept, she was neglected by the father and not allowed to see her older children. She was threatened by A another brother of the father, with a hiding if she tried to see her older children. She was miserable and decided in April, 1986 to leave Kajiado with her two younger children and petitioned the Kadhi's Court for the dissolution of her marriage to the

father. When all this took place, the father was away in Kuwait. It was upon his return that he applied to this court for custody of all four children and for a temporary injunction restraining the mother from removing the two older children from Kajiado until these proceedings are determined.

The father's application asks that he be given custody for all the children. His affidavit in support of this application is to the effect that they live and be brought up together in his mother's house and that his brother, Ibrahim, who also lived nearby, would help in their religious and educational upbringing. He concluded that it would also be detrimental to the children's interest if they lived with the mother because she lived in cramped and overcrowded quarters and lead an immoral life. In the father's affidavit in support of his application to have this suit heard during the vacation, the true position seems to emerge. The father is in a hurry to get back to Kuwait and his affidavit continues.

"would like to leave all my children together settled in proper care of my brother Ibrahim Omari and my mother before I leave."

His evidence on oath has not altered my conviction that all that the father wanted and still wants, is to have the children live with his mother, with his brother nearby to keep an eye on them, whilst he goes off to Kuwait, coming home three months in a year to see them like he had always done. He has no job to come home to or a home of his own in Kajiado. This kind of attitude shows disregard for the love and care which children of tender age require, something which the father because of his long absence from home, is not likely to have shown or even appreciated.

To achieve his aims, the father has gone so far as to cast aspersions on the morals of the mother.

I was not impressed by his evidence and that of the private detective employed by him, that the mother was living with a man called Geoffrey who lived in a flat next door to the mother's own sister. First, it would take a really shameless mother who had only recently left the matrimonial home, to openly live in sin with a man nobody appears to have previously heard of, under the very nose of her married sister. I find from my observation of the mother, that she is far from being that kind of immoral woman that she was being made out to be. Secondly, I find the evidence of the private detective as to the identification of the mother as the one who was in Geoffrey's flat, ridiculous because it is difficult to have a good look at any one who merely pokes his head out of a door and in again; the same is true about someone who standing in an unlit room, draws the blinds of a window. As I have already stated, I find it most improbable that the mother would live openly in sin with the mystery man, Geoffrey, as alleged, and do not believe the father's evidence on this score.

On the other hand, the other has in her affidavit and evidence drawn attention to facts which make brother Ibrahim and the father's mother who to all intents and purposes, are intended by the father to have the actual custody and care of the children, less suitable from the point of view of the interest of the children, than the mother to have custody of the children. Brother Ibrahim has been twice married and has six children of his own to look after. The mother of the father is old, somewhere between 67 and 70 years of age and, looking after four children with the help of a maid, could be too much for her. Neither of these can replace adequately the love and care which a young, well-built and healthy looking woman like the mother could give her own children.

I am satisfied from the evidence before me that the mother is a good woman and has a place of her own which is adequate for the care and upbringing of all her children. She is gainfully employed and in addition, has some means of her own. In her evidence, she asked for the custody of the children so that she can look after them as she had always done all along by herself during the father's long absences in Kuwait. She has arranged for the third child to go to school and will no doubt be able to do the same for the first two.

On the other side of the scales the father will, because of his long absence from Kenya, not be able to be with the four children. He has no experience whatsoever in caring for children. Moreover, he was quite prepared to let his two younger children live with their mother in one small rented room in Kajiado. Even if he were to return to Kenya for good, he has no job to come back to and no home of his own. To my

mind, his true intention is to leave all the children with his elderly mother and go away.

Whilst I had the opportunity of observing the mother and assessing her suitability on the question of custody, I did not have the advantage of doing the same in respect of the father's mother who did not give evidence. As against the claims of the mother of the infants, those of Ibrahim and his mother must also surely take second place.

I must consider the law as to the guardianship of infants. Section 17 of cap 144 enjoins me in coming to a decision in cases such as the first and paramount consideration. This has been reaffirmed in well known case of *Abdul Rehman Bazmi v Sughra Sultana* (1960) EA p 801 and I am bound by it. In considering the effect of the Guardianship of Infants Ordinance 1959 which is identical in wording to section 7 of the Guardianship of Infants Act under which the present application has been brought, Sir Kenneth O'Connor, P in his judgment in that case put the matter beyond doubt, when he stated:-

"In my opinion, the Legislature of Kenya, in enacting the Guardianship of Infants Ordinance, 1959, must be taken to have known the then state of law. I did not see fit to make any exception from the provisions of that Ordinance regarding the custody of Mohamedan infants. In my view, that Ordinance applies with full force to Mohamedan, not less than to other, infants, and, under section 17 the welfare of the infant and not the right under Mohamedan Law of either parent is a paramount consideration of custody".

I would respectively adopt the same words as applying to section 17 of the Guardianship of Infants Act, Cap 144 of the Laws of Kenya. In the same judgment, Sir Kenneth O'Connor, P referring to the applicability of English Law in matters of this sort stated:

"I think that the Law in Kenya must be taken to have been settled by *Nana binti Mzee v Mohamed Hassan* (1) in favour of the application of the English Law".

It is therefore necessary to consider the English Law on the issue and in this regard, my attention has been drawn to the later English case, *In re F (an infant) F v F* [1969] 2 Ch p 238 in which Megarry J interpreted section 1 of the English Guardianship of Infants Act 1925 which contains the same wording as section 17 of Cap 144, as implying that though other relevant circumstances should be considered in a custody case, special weight must be given to the welfare of the infants concerned. In *Re F (An Infant)* (*supra*) is not in conflict with *Abdul Rehman Baxmi v Sughra Sultan* (*Supra*). The decision in the former case is an amplification of the decision in the latter case and leaves undisturbed the proposition that the right of a parent to the custody or upbringing of an infant under Mohamedan or other law, should not be taken into consideration when deciding which parent shall have custody of the infant.

Furthermore, section 7(1) of Cap 144 empowers this court in making a decision as to the custody of an infant, to have regard to the conduct of the parents and their wishes. In weighing the scales between the father (and his mother and brother Ibrahim) on the one side and the mother on the other side, the result seems to be as follows:

As regards the home, the mother has a substantial advantage, the father has no home of his own; as to parent substitute the mother has a substantial advantage over the father whose work will keep him away from Kenya and who has never really kept home for the children, and an even greater advantage over the father's elderly mother and brother Ibrahim who has six of his own children from various marriages, to look after; as to the need of the children for the parents, the mother by natural ties and the fact that she has been the one that has always cared for the children, has a substantial advantage over anybody else; as to the upheaval of the children, the mother has a substantial advantage as she is the one who has always cared for and had the custody of, the children except for a relatively short period when the two older children were kept away from her; as to justice between the parents in the responsibility for the break up of the marriage, the responsibility is about even: as to the wishes of the parents, whilst the mother wants the children so that she can care for them and look after them as she had always done and did not even ask for any maintenance support from the father, the latter really wants the children so that they can be left in the care of other persons; and as to the rights of the father under Mohamedan Law to the custody and upbringing of the children which Mr Hayanga has urged me to consider, this is not a matter which I

can consider in such a case. (see *Abdul Rehman Bazmi v Sughra Sultana (Supra)*). On considering those factors which overwhelmingly are relevant to the welfare of the children, I have come to the conclusion bearing in mind that special weight must be given to the welfare of the children that the custody of all four children of the marriage between the father and the mother should be given to the mother.

Madan J as he then was, enunciated in the case of *Yasmin v Mohamed* [1973] EA at p 370 the role of the High Court as regards the guardianship of infants in the unforgettable words:-

“This court is especially, endowed with the jurisdiction to safeguard the interests of infants, as Mr Khanna said the court is the parent of all infants. The welfare of infants is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe or sect fall within the ambit of the Guardianship of Infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved.”

I have been most mindful of this sacred trust in coming to the conclusion that I have arrived at that custody of all the four children be given to the mother. It is so ordered and the father’s application for the custody of all the children is dismissed with costs.

This court is empowered under section 7 of cap 144 to make orders as to access to the children and for their maintenance where, as in this case, the court, makes an order giving custody of infants to the mother. I hereby grant to the father the right of reasonable access to the children. As regards maintenance for the children, I would like to recall that the father in his evidence stated that he sent every month for the maintenance of his wife and four children whilst they were all at Kajiado, the sum of Kshs 1,000 a month and sent a similar sum a month to his mother. I think that his children deserve more than his mother now that they will be living with their mother in Nairobi which is a more expensive place to live in than Kajiado, and in premises for which the mother will pay rent and for utilities. In the circumstances, I order that in the interest of the welfare of the children, the father should pay to the mother every month for the maintenance of the four children, the sum of Kshs 1,200 starting from the date of this judgment. For the period from April, 1986 till the day of this judgment, the father shall pay to the mother for the maintenance of the two younger children who were in her care, the sum of Kshs 600 for each complete month and *pro rata* for part of a month. It is so ordered.

Dated and Delivered in Nairobi this 15<sup>th</sup> day of October, 1987

**A.M. AKIWUMI**

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**Ag. JUDGE**