



IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Madan, Law & Potter JA)

CIVIL APPEAL NO. 11 OF 1979

BETWEEN

M.....APPELLANT

AND

P.....RESPONDENT

JUDGMENT

Madan JA The appellant is a divorced Muslim wife of the respondent Muslim husband (hereafter referred to as the wife and husband respectively).

The wife instituted the above suit against the defendant claiming divorce by judicial decree on the ground of cruelty. She prayed for her marriage to be dissolved, maintenance for herself and the child of the marriage M N born November 5, 1976, the custody, care and control of the child of the marriage and Kshs 10,000 Haq Mahr, and costs of the suit. While the proceedings were pending the parties reached an amicable arrangement whereby the husband divorced the wife by pronouncing ‘Talak’ three times in succession. The other terms agreed between them insofar as relevant were:

- “1. The plaintiff is given the custody, care and control of M N the male child of the marriage until he attains the age of seven years in accordance with the Shariat.
2. The defendant will have access ...
3. The plaintiff will not remove the said child of the marriage from the jurisdiction of this court without the permission of this court
4. The defendant will pay the plaintiff Kshs 300 per month by way of maintenance of the said child of the marriage... until the child attains the age of three years with liberty to either party to apply thereafter.
5. In the event of remarriages of any party the other shall have the right and liberty to apply to this court for any variation of the order relating to custody and maintenance of the said child of the marriage in accordance with Mohammedan law and customs applicable to the Sunni sect.
6. The plaintiff relinquishes all claims of whatever nature past, present or future in relation to the marriage and its dissolution.
7. Each party bears its own costs of this action.”

A consent judgment was entered on January 16, 1978, in favour of the wife in the terms of a consent letter dated December 8, 1977 which embodied the foregoing terms agreed between the parties.

The husband remarried on July 16, 1978.

The wife on June 21, 1978 filed chamber summons in court asking for orders:

- “1. Allowing her to leave the country with the infant child of the marriage.
2. For the payment of Kshs 2,000 per month by way of maintenance for the child and herself with effect from April 1977.
3. Payment by the husband of Kshs 10,000 Haq Mahr ‘a sum which the respondent (husband) undertook to pay to the defendant at the time of the marriage which sum is payable under the Islamic law’.
4. Costs of the application.”

Miller J dismissed the wife’s application giving the costs of it to the husband. The learned judge during the course of his ruling said:

“This matter bears flavours of procedure, jurisdiction and conflict of laws... As I have perhaps insufficiently already intimated this matter touches a certain aspect of international law particularly as the assimilating rules of Cap 156 (The Mohammedan Marriage, Divorce and Succession Act) have not yet been made thereby leaving occasions of resort to the jurisdiction of this court a matter of will or caprice.

If the assimilating rules were already in existence or the application made under the Guardianship of Infants Act, Cap 144, I incline to the view that I would have found and assumed regularity in differing systems of law and treat the application tempted as I am with reference to Sections 8, 10, 11 and 17 of the Act (Cap 144)...

They have executed the agreement with specific reference and regards to the tenets of their common religious rules and much as I am inclined to the view that the inherent jurisdiction of the court may reach out in aid of any infant whatever within the jurisdiction such a step appears inappropriate in this case as the agreed impositions and restrictions on the aspect of the custody and restrictions on the aspect of the custody and movement of the infant have been made within the framework of the personal law of all three residents within the jurisdiction.

There is also the point made by Mr Vohra that the infant’s father is a Kenyan citizen, and as to this weighty considerations arise.”

The appeal before us is limited to the application for leave to take the child of the marriage out of the jurisdiction of the court.

I cannot see that any question of conflict of laws arose or that the matter before the learned judge touched any aspect of international law. It was a straight forward matrimonial dispute between a wife and her husband both of the Muslim faith and both resident in Kenya.

If the judge felt any differences existed between the personal Mohammedan law of the parties in this case and the provisions of the Guardianship of Infants Act he should have found no difficulty not only in following Savigny’s theory as he expounded it by assuming regularity in the different systems of law, if any, involved here but gone ahead and said so in view of the provisions of Section 17 of the Act which says:

“17. Where in any proceeding before any court the custody of upbringing of an infant... is in question, the court, in deciding the 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... is superior to that of the mother, or the claim of the mother is superior to that of the father.”

It was a misdirection to say that it appeared inappropriate to reach out in aid of the infant in this case as the agreed movement of the infant had been made within the framework of the personal law of all the three residents within the jurisdiction. The paramount consideration should have been the welfare of the infant. The learned judge should have followed his inclination and allowed the inherent jurisdiction of the court to reach out in aid of the infant. There is power in the court to protect the interest of an infant even when there is not a legal right.

If the learned judge's attention had been drawn to the decision in *Abdul Rehman Bazmi v Sultan* [1960] EA 801, he would probably have decided differently. In that case the former Court of Appeal held:

“(i) by Section 17 of the Guardianship of Infants Act 1959, the welfare of the child is the paramount consideration for the court. Per Sir Kenneth O'Connor P: at p 807: The Guardianship of Infants Act applies with full force to Mohammedan, not less than to other, infants and under Section 17 the welfare of the child and not the right under the Mohammedan law of either parent is a paramount consideration in deciding question of custody.”

It was also a misdirection to state that weighty considerations arose because the infant's father was Kenyan citizen for it ran contrary to the express injunction in Section 17 that the court:

“shall not take into consideration whether from any other point of view the claim of the father... in respect of such custody, upbringing, is superior to that of the mother, or the claim of the mother is superior to that of the father.”

The wife swore an affidavit in support of her chamber summons. She deponed inter alia that she stopped working as a secretary upon her marriage and all her savings were taken away by her husband upon their marriage; that she is almost a destitute person depending upon her sister and her husband in Nairobi, having been driven out of the house only in the clothes which she and the child were wearing at the time; that she is a British subject and wishes to settle in England, where, she believes, she will be able to start a new life. The British High Commission have advised her to obtain leave of the court to take her child with her.

As regards leave to take the child out of the jurisdiction of the court, I would respectfully adopt the following words of Lord Scarman in *Duvort Steels Ltd v Sirs* [1980] 1 WLR 142:

“my basic criticism of the learned judge is that in his desire to do justice he failed to do justice according to law.”

I would give leave to the wife to take the child of the marriage, M N, out of the jurisdiction of the court for the following reasons. First, the paramount consideration is the welfare of the child who is, in this case, of tender years and the wife is his natural mother. She must have greater affection for him than any other person including the father; in his replying affidavit the husband made no claim to be given the custody of the child, he did not refer to the matter at all; from the point of view of upbringing, from the point of inducement and natural love and affection, and from the point of view of sympathy and understanding, the child will be much better off left in the custody of his natural mother for the time being and until he attains the age of seven years. To me it is unthinkable that he should be deprived of the care, love and affection of his natural mother at his present tender age. It would be a new and unnatural environment for him to live in the household of the father with a woman who will be his step-mother which would seem to be the only alternative if the wife is not allowed to take him with her to England. The child will also have better and more easily accessible educational opportunities in England. There is no new idea. The parties freely agreed that the custody of the child should remain with the wife up to the age of seven years albeit within the jurisdiction of the court. It is the accepted doctrine that the mother's *hizanat* of a male child ends with the completion of his seventh year (*Ameer Ali, 2 Mohammedan Law*, p 295). The mother is of all persons the best entitled to the custody of her infant children during the

connubial relationship as well as after its dissolution. (2 *Fatawai Alamgiri*, p 728). The mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years. The right continues though she is divorced by the father of the child. (Mulla, *Principles of Mohammedan Laws*, 352, p 295). And when the tenderness of their age or the weakness of their sex, renders a mother's care necessary, the Mohammedan law supports the mother's natural right to the custody of her children and allows it to take precedence of the paternal right for a certain specified time.

The mother therefore is entitled in preference to the father to the custody of her infant male child under seven years of age founded essentially on the interest of the child ... A mother is entitled to the custody of the person of her minor children away from her except (*Ameer Ali* (supra) pp 294, 296, 611 and 292).

I am not prepared to assume at this stage, about four years in advance of the event, that the wife will not observe her obligation when the time arrives for her to do so.

There is one point I would mention. With respect. Miller J ought not to have awarded the costs of the chamber summons to the husband; to the wife, yes, pursuant to the normal practice in matrimonial proceedings. The order of costs against the wife should be set aside.

I would vary the order of the High Court by giving leave to the wife to remove the child of the marriage from the jurisdiction of the court. I would also award the costs of this appeal as well as costs of the chamber summons in the High Court to the wife.

Law JA. I agree with the judgment prepared by Madan JA in all respects. I have no doubt that the welfare of the child, now aged three years and five months, will best be served by him being allowed to leave the jurisdiction in the custody of his mother who is debarred from engaging in employment in Kenya and who has no real alternative but to live in the United Kingdom of which country she is a citizen. It would not be in the interest of the child's welfare for him to be taken away from his mother at his present age. I concur with the order proposed by Madan JA.

Potter JA. I also agree.

Dated and Delivered at Nairobi this 17th day of April 1980.

C.B.MADAN

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JUDGE OF APPEAL

E.J.E.LAW

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR