



**REPUBLIC OF KENYA**

**IN THE KADHI'S COURT AT BUNGOMA**

**MISC APPLICATION 5 OF 2015**

**BI.....APPLICANT/ PETITIONER**

**VERSUS**

**MHA.....RESPONDENT**

**RULING**

1. This is an application by way of notice of Motion dated 15<sup>th</sup> December, 2017 made by the applicant seeking reverse of custody of one JM aged seven (7) years given to the respondent in the Court's Judgement delivered on 16<sup>th</sup> July, 2017 when the couple's marriage was dissolved.

2. The application was premised on the grounds that;

(a). The respondent had denied the applicant access to the child.

(b). The child herein is a minor who needed the mother's (applicant) care until age of 18 years.

3. The respondent opposed the application through his replying affidavit dated 21<sup>st</sup> December, 2017 and contended that the applicant has been allowed access in all holidays and he has been capable of raising the minor before and after divorce. He termed the application as full of falsehood, malice and prayed for its dismissal.

4. As a matter of fact, in divorce 5of 2015 the respondent (as then was) had enrolled the minor at [Particulars Withheld] integrated – Nairobi and with the assistance of his sister and or family paid 2015 fees when the parties were in separation. However the court had found the applicant suitable for custody of the issue owing to the young age of the minor and income she earned compared to the respondent, but the applicant declined custody now seeking to reverse.

5. On 22<sup>nd</sup> December, 2017 the applicant demanded custody because; the child herein was young and required motherly love and care, the respondent delegated custody to his old and sick mother, the respondent denied her access to the child during all holidays except December holidays for the last three (3) years and that she was forced to travel to Nairobi this December 2017 to access the Child after communication with the respondent failed.

6. In Examination, the applicant disclosed that; her mother stayed in Kakamega, she earned Ksh. 13,000/= monthly from Mpesa business on addition to other small businesses and therefore capable of providing the child with School expenses and other basic needs. She said, the respondent's father was bedridden and this mother suffering from diabetes, spine problems, aged and delegating custody to her would cause her more stress. She narrated that apart from the respondent personally having no income, the child needed more motherly love and care. She however submitted that was ready to prepare NHIF Card as the respondent takes care of other responsibilities.

7. It was the testimony of the respondent that; was capable of providing for the Child since the child owned a separate account controlled by his sister and father, the child suffered from allergy and undergoing treatment at Y2K hospital, enrolled the child at [Particulars Withheld] integrated – Nairobi and paid 2018 fees in full, the minor had memorized the 30<sup>th</sup> chapter of the Quran under his custody with assistance of his immediate family and reverse of custody would affect and or interrupt her. He disclosed that the child was only free during December holidays for she attended Madrasa (religious school) during April and August holidays which was in knowledge of the applicant and admitted that his parents especially the mother were sick and can only move within the compound.

8. In examination, the respondent narrated that, he had already paid 2018 fees on 19<sup>th</sup> December, 2017 and that the child depended on Trust/Waqf account for the family and cannot be supported while in custody of the applicant. He however submitted that since, the child was being treated for allergy, already paid 2018 fees on 19<sup>th</sup> December, 2017 and will cause the child access his mother during holidays, he does not want the child to be interrupted.

9. After considering documents filed and evidence adduced by both parties, this court is duly bound to determine:

I. Whether reverse of custody to applicant is necessary.

II. Other reliefs of Parties

10. In determining the issues above, the court is guided by Article 170(5) constitution of Kenya 2010 as read together with section (5) and (6) of the Kadhi's court Act Cap II along with other provisions of applicable Law.

(a). Art 170(5): "The Jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim Law relating to personal Personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim Religion and submit to the Jurisdiction of the Kadhi's court"

(b). Kadhi's Court Act Cap II Section (5) and (6):

**Section (5):** "The Kadhi's court has been given jurisdiction to determine questions of Muslim Law relating to Personal status, marriage, divorce and inheritance in proceedings in which all parties profess the Muslim Religion"

**Section (6):** "The law and the rules of evidence to be applied in a Kadhi's court shall be those applicable under Muslim Law."

#### **I. Whether reverse of Custody to the applicant is necessary.**

11. In divorce 5 of 2015 whose Judgement was delivered on 16<sup>th</sup> July, 2015; the respondent had enrolled the minor at [Particulars Withheld] integrated – Nairobi and with the assistance of his family members paid 2015 fees in full. The court found the applicant suitable for custody because apart from the income she earned, the child was a minor under age of seven (7) years and needed love, mercy, attention and motherly care than anything else as provided for by a report narrated by Ahmad (6707) and Abu Daud (2276) quoted therein (judgment of 16<sup>th</sup> July 2015). The applicant declined custody now seeking to reverse.

12. Accordingly, and in Islamic Law, if the mother has not remarried and the child has reached the age of understanding recognized at seven (7) years as herein;

(a). The male child should be given choice (Opinion) between his father and mother and left to live his choice, because of the report narrated by An-Nasaai (3496) and Abu Daud (2277) according to which a Woman came to the messenger of Allah (PBUH) and said: 'May my father and mother be sacrificed for you. My husband wants to take my son away even though he benefits me and brings me water from the well of Abu 'Anbah.' Her husband came and said; who is disputing with me concerning my son? The prophet (PBUH) said; "O boy this is your father and this is your mother, take the hand of whoever of them you want." And he took his mother's hand and went away with him.

(b). The female child (as herein) is also given choice (Opinion) according to Shaafi (RA) but according to Abu Hanifa (RA) the mother is entitled to custody until marriage or start of menstruation, with Malik (RA) preferring the mother until consummation after marriage. However according to Ahmad (RA), the father is more entitled to custody because it is more appropriate for him to provide care, discipline and protect her from harm and or shame upon her and her family.

13. The child herein was given choice (Choice) in accordance with Shaafi (RA) view and section 4(4) of the Children Act. She disclosed that she was 7 years in standard 1 at Alnur – Nairobi, preferred to study in Bungoma Under Custody of her mother and Promised a visit to her father during holidays. The respondent objected to the custody of the applicant and confirmed that no assistance would be extended to the child while in her custody.

The court discovered that the respondent had other means of paying fees but wondered why he paid 2018 fees in full on 19<sup>th</sup> December, 2017 when he had already been served with this court summons and why he cannot continue to assist his child while in mother's custody when those who controlled the alleged family account have not denied. This was probably to catch the attention of the court for custody.

14. Upon examining and looking at the issue herein, and in consideration of the opinions of the four Muslim scholars aforementioned mostly favoring the mother, the court was convinced that the minor still needed more love, mercy, attention and motherly care. However, the court will consider balancing parental responsibilities for the best interest of the child.

#### **II. Other reliefs of the parties**

15. Irrespective of who has the right of custody, the other party has visitation rights according to mutual understanding and consent.

16. If custody is with her, then maintenance is the duty of the father on reasonable basis and depending on his circumstances and means.

**Quran: 2:233:** "but the father of the child shall bear the cost of food and clothing on a reasonable basis"

**Quran: 65:7;** " let the rich man spend according to his means and the man whose resources are restricted, let him spend according to what Allah has given him. Allah will grant after hardship ease."

- Apart from what is evident that the respondent has means of payment of fees, the court had not established any steady income for him to enable make an informed decision on maintenance.

17. **Orders**

- 1 – Custody of JM to applicant until age of 18 years
- 2 – Maintenance be borne by applicant.
- 3 – School expenses of the child responsibility of respondent.
- 4 – Child be enrolled to school and to also enjoy Islamic Religious studies.
- 5 – Major medical expenses responsibility of both parties
- 6 – Minor medical expenses responsibility of applicant.
- 7 – Applicant to cause the child access respondent during December holidays.
- 8 – No orders to costs.

**Delivered , signed and dated this 29<sup>th</sup> January, 2018**

**HON. D. S. RATORI**

**PRINCIPAL KADHI**

In Presence:

1. CA – Okwaro
2. Both Parties in Person