



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS CIVIL CASE NO 58 OF 1985 (OS)

N.....APPLICANT

VERSUS

K.....RESPONDENT

RULING

The Applicant is the ex-wife of the Respondent. There are two children of the marriage – J.A.K a boy aged about 9 1/2 years and S.A.K – a boy aged about 5 1/2. The applicant filed this application for custody of J.A.K on 27/8/85 and obtained an *ex-parte* interim order of custody on the same day. The application was to be heard inter-parties but it was never fixed for hearing until October 1988. The original application has never been amended but it is clear that the applicant is praying for custody of both children. The parties separated in February 1985 and the applicant went to live with her parents with the eldest child. The second child had not been born. When the second child was born, the Respondent continued living with the two children in her mother's house.

Later, the applicant filed a divorce case before the Kadhi and the marriage was dissolved on 26/6/85.

In 1987, the applicant filed a maintenance case before the Kadhi and the respondent was ordered to pay Shs.500/- per child per month for their maintenance.

In November, 1987, the applicant and one SJSS got married. They are currently still married.

It is the applicant's case that she still lives with the two children with her current husband and that the eldest child is in school – class II while the youngest child is in nursery school. She states that the respondent has remarried and has one child but he does not live with his wife.

Mr SJSS (PW 2) the current husband of the applicant states that he lives with the applicant and the two children in issue at his five bed-roomed house at VOK Mombasa and that he has been educating the children. He is in business and also lives with children from his previous marriages. PW 2 has also sworn an affidavit and he states in para 10 that he took the children when they were very young, that he has become fond of them and treated them with love and tender as if they were his own natural children and that he considers them as his natural children.

The Respondent (DW 3) states that he re-married in June 1985 and has one child but his wife now works in Nairobi. He states that he looks after the child of the marriage and has employed a maid. He has his own massionette where he lives. He has also a residential house which he has rented and receives rent of Shs 2,500/- pm. He has also a 6 acre farm at Kikambala. He also produced certificates of ownership of

three plots which he states has bought for each of his three children including the two the subject matter of this dispute. According to him, he has been sending money and clothes to the children when he was abroad and has been paying school fees for the eldest child until 1987. He stopped paying school fees when the maintenance case started before the Chief Kadhi. He states that he was ordered to be paying shs 3,000/- pm as maintenance which he paid from January 1988 to September 1988 but when he defaulted his residential house which he has leased was attached for sale till this Court came to his help. He states that the two children live with the applicant's mother and not with the applicant and the applicant's mother has denied him access to his children. He asks that the custody of the two children be awarded to him.

The applicant admits that she is a house wife and when cross-examined she stated that she has brought the case because the respondent as the father of the two children should maintain them and asks that the Respondent be ordered to continue paying maintenance. Mr S (PW 2) the applicant's current husband admits that his marriage with the applicant is his fourth marriage and he lives with some of the children from his previous marriages.

The applicant states that there are two children from her current marriage but she also lives with five children from her husband's previous marriages and also with her husband's parents and sister. One of the most hotly contested issue is whether or not the two children live with the applicant and her current husband. The respondent maintains that the two children live with the applicant's mother at Kibokoni. The applicant concedes that at first the children were living with her mother but that she started living with them 3-4 months after the re-marriage. She further concedes that the eldest child goes to lunch at the applicant's mother's house but she says this is so because the child's school is near his grand-mother's house.

T N (PW 3), the applicant's mother denied that she lives with the children but she accepts that the eldest child takes lunch in her house. She agreed that she was interviewed by the Children's Officer. She thinks that the custody of the children should be given to her because the children are very used to her. She objects to the respondent being awarded custody on the grounds that the respondent's mother is not alive and also because the respondent does not live with his wife. She admits that there are problems regarding access.

Mr. N H A (PW 4), the applicant's father, says that he lives with his wife and his two children at Kibokoni and that the two children in issue do not live with him. He contradicts the applicant's evidence that after the re-marriage, the two children stayed with him for sometime. S A S (DW 1) is the respondent's brother and states that he lives in Old Town like the applicant's parents and that the two children stay with applicant's parents at Kibokoni. He states that he has been seeing the eldest child attend Madrassa (school) at Kibokoni. M A M (DW 2) lives in Kibokoni. He states that the applicant's parents are his relatives and that he has been seeing the two children at Kibokoni.

The respondent states that he visited the two children at the applicant's parent's house last August and found the two children still living with the applicant's parents. He says that the applicant's mother refused to allow him to see the children and asked him to get permission from their mother. The respondent has in his affidavit filed on 6/10/90 annexed a copy of children's officer's report made to the Chief Kadhi. That report is made by Jane W Njera. In that report, she states that she found the two children living with the applicant's mother on 22/8/88 in an untidy crowded room. She recommended that the custody be given to the respondent as the children looked thin and uncared for.

There is a further report dated 16/8/88 prepared by one Said R Mohamed. He came to the same conclusion that the two children were living with applicants mother and that their health was poor as they were not well looked after. In the course of these proceedings, I asked for a children's officer's report and one F N Njoroge at Provincial Children's Office filed the Report dated 21/8/90. The Report states among other things –

“The children of the marriage have been living with their maternal grandmother who claims that they are more comfortable at her home as she has always taken care of them. She, however, claims that the

children spend the nights with their mother in Kisauni but they are in her home during the day. Neighbours say the children stay with their grandmother...”

The respondent’s complaint that children have been alienated from him by being denied access seems to be true. She found the children to be terribly scared of their father. She found it unfair to only demand money from the respondent as has been the case while denying him participation in parental duties. She recommended that the custody should be given to the father to look after his children and acquaint himself with them. While undertaking that the Children’s Officer will closely supervise the children. The paramount consideration in this type of case is the welfare of the children. It has been held that to deprive a parent of access is to deprive a child of an important contribution to his emotional and material growing up in the long run.

Also, in case of very young female children, there is a rule in favour of the mother in the absence of exceptional circumstances – *Joyce Muthoni Githunguri v Stanely Munga Githunguri* CA No 90 of 1978 – Hancox’s reports Vol VI, page I.

Firstly, it is clear that as between the applicant, her parents and her current husband on one side and the respondent and his relatives on the other side, there is disagreement as to whether the applicant is physically living with the children. There is bound to be such a disagreement in custody cases because the parties become emotionally involved. The best help to the Court is from the disinterested people.

Three different Children Officers have investigated the dispute and concluded that the two children are currently living with their grandmother the applicant’s mother. They have found that the children live in a crowded place and are not well looked after.

The applicant’s mother says that the children are very used to her. That could only be so if she has been living with them. I will accept the respondent’s evidence as supported by the Reports from the Children Officers that the children in fact live with the applicant’s mother.

Even if they are living with the applicant, it is clear that the applicant has two other children from her current marriage and also that she lives with five other children from her husband’s previous marriages, her husband’s parents and a sister. The applicant has no source of income and she is at the mercy of her husband. Her husband has another large family to look after. He has not disclosed his income. I find this even pretentious that he is capable of loving and looking after the two children as his own natural children. The children’s father is alive and it is morally wrong to take over the place of their father.

I find that if the children are living with the applicant, her house is not a suitable place for the two children to live. There will always be conflicts. The respondent is a suitable parent and has properties. He has sufficient income to guarantee the children a good life, better education and a sense of belonging. He does not have a large family. If the children live with their grandmother, the respondent can also be able to look after them. He has ability to look for a suitable maid or if his current wife has left him to look for a caring wife to look after the two children.

At present, the children have been alienated from the respondent and it is not for their long term well being that they should be made to forget their father.

It is implicit from the evidence of the applicant that she is motivated by the amount of the maintenance that she will be receiving from the respondent. Even if she is living with the children, there is no guarantee in that crowded atmosphere that the money will exclusively be used for the maintenance of the two children. It may end up feeding other hungry mouths.

The respondent has shown that when he defaulted paying maintenance. The applicant caused the respondent’s house to be attached for sale. This is the house which the respondent has leased and from which he derives his income. She did not stop to think that the house is a good security for the life of her two children. One cannot help believing that the applicant’s application for custody of the children is motivated by the expected maintenance that the respondent is bound to pay if the children are in her

custody and not by the welfare of the children.

The two children are boys and are big enough. It is for their short term and long term welfare and as recommended by the Children Officers that they should live with their father. I believe that this is one of the exceptional cases where the mother should be denied custody of young children.

I dismiss her application with no orders as to costs.

I award the custody of the two children to their father the respondent but give access to the applicant.

The applicant or the applicant's mother to hand over the two children to the respondent under supervision of OCS Central Police Station and the Provincial Children's Officer on or before 30/11/90.

Liberty to apply regarding access.

Dated and Delivered at Mombasa this 26th Day of October, 1990

E.M.GITHINJI

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JUDGE