



REPUBLIC OF KENYA

IN THE KADHI'S COURT AT ISIOLO

DIVORCE CASE NO. 46 OF 2018

H G G.....PLAINTIFF / APPLICANT

VERSUS

G G G.....DEFENDANT / RESPONDENT

RULING

1. The applicant through her Notice of Motion application dated 18th October 2018 seeks orders inter alia for restraining the defendant from evicting her from the matrimonial home and custody and maintenance of the minor children. She deponed that the respondent has threatened to take the children from her and is threatening to evict her from the matrimonial home.

2. The respondent opposes the application through his replying affidavit dated 24th October 2018. He deponed that the divorced the plaintiff in December 2017 and gave her KES 15,500 to facilitate her leaving the matrimonial home. He deponed further that the plaintiff is cruel and violent and has been abusing the children and that she cannot be able to provide the best environment for the good upbringing of the children.

3. The plaintiff appeared in person while the defendant was represented by D.K. Lekoona & Company advocates. Mr. Nyenyire argued the application on behalf Mr. Lekoona.

Background

4. The parties were married under Islamic law in 2004 and apparently divorced in 2017. They are blessed with three children: GGG [12 yrs], AGG [10 yrs] and ZGG [3.5 yrs] The defendant is a Police officer. The defendant lives in Nairobi where he works and since the divorce he left the plaintiff to live in the matrimonial home with the children. The defendant is apparently not employed.

Submissions

5. The plaintiff submitted that she has been living with the children at their matrimonial home, that the respondent has been abusing and insulting her and that he was going to marry another wife and take the children from her. She submitted that the respondent brought elders and asked her to leave the matrimonial home and hand over the children. She argued the house was built during their marriage and supervised some constructions while the respondent was away at work.

6. Mr. Nyenyire holding brief for Mr. Lekoona submitted that it is not contested that the respondent has divorced the plaintiff as per Islamic law on 9th May 2017 and that according to Islamic law a wife is supposed to leave the matrimonial home after three months but the respondent had been gracious and allowed her to stay for ten [10] months. He argued the respondent is better salaried and has been taking care of the children's needs and would be better placed to have custody of the two elder children. He argued the applicant had asked for money to enable her to move out of the house 's but when she was given she instead filed this case. He

submitted further that this court is not the right forum for the hearing and determination of the issue of the matrimonial matter.

Issues

7. The issues for determination in this application are custody and maintenance of the children and whether or not the respondent should be restrained from evicting the applicant from the matrimonial home.

Analysis and Finding

8. I have carefully read the application and reply and affidavits and annexures thereto and upon hearing the parties, it is not contested the parties were married under Islamic law and have since divorced. It is not contested that the children have been living with the applicant at the matrimonial home even after divorce. The respondent had unilaterally taken the children to his Nairobi home in effect taking away natural actual custody from the applicant with whom they have been living all their life. The applicant's apprehensions materialised. Fortunately the respondent complied with the interim orders and returned the children to her.

9. In considering issues relating to children the best interests of the child are paramount. Article 53 (2) of the Constitution of Kenya (2010) provide:

"A child's best interests are of paramount importance in every matter concerning the child".

10. Section 83 (1), of the Children's Act, Cap 141 laws of Kenya provide:

In determining whether or not custody order should be made in favour of the applicant, the court shall have regard to:

- (e) whether the child has suffered any harm or is likely to suffer any harm if the order is not made**
- (j) the best interest of the child.**

11. The court is bound to consider and protect the children's physical, emotional and educational needs and comfort and would shun any disruption likely to affect their wellbeing. Section 76(3) of The Children's Act which states:

76(3) Where the court is considering whether or not to make an order with regard to a child, it shall have particular regard to the following matters—

- (a) The ascertainable feelings and wishes of the child concerned with reference to the child's age and understanding;**
- (b) the child's physical, emotional and educational needs and in particular, where the child has a disability, the ability of any person or institution to provide any special care or medical attention that maybe required for the child;**
- (c) the likely effect on the child of any change in circumstances;**
- (d) the child's age, sex, religious persuasion and cultural background;**
- (e) any harm the child may have suffered, or is at risk of suffering;**
- (f) the ability of the parent, or any other person in relation to whom the court considers the question to be relevant, to provide for and care for the child;**
- (g) the customs and practices of the community to which the child belongs;**

12. The general principle regarding custody of minor children is that unless there exist peculiar and special circumstances, the mother has priority. **In Mehrunisa v. Pravez (1982-88) 1 KAR 18 the court of Appeal stated:**

"The general principle of law is that custody of such children shall be awarded the mother unless special or peculiar circumstances exist to disqualify her from being awarded custody'.

13. In *Githunguri v Githunguri* [1979] eKLR the court held that:-

"...the custody of very young female children should be granted to their mother, in the absence of exceptional circumstances which do not in my opinion exist in this case. As Roxburgh J said in *Re S (an infant)* [1958] 1 All ER 783, at 786 and 787: ... I only say this; the *prima facie* rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the *prima facie* rule." "

14. Under Islamic law, the same principle of priority of custody of children of tender age to mothers applies. It is based on traditions of the Prophet Muhammad (may peace and blessings be upon him), the second source of Islamic law, interpretation of Muslim jurists of the highest eminence and panel of contemporary Muslim scholars who authored the Islamic charter on Family under the International Islamic Committee for Women and Child [IICWC].

15. It is reported that a lady complained to the prophet (peace and blessings be upon him) 'O Prophet, my stomach has been my son's bed, and my breast his source of nourishment and my lap his place of rest, but his father has divorced me and wants to take him from me', the prophet said: **' you are more entitled to him (his custody) as long as you are not remarried (to another husband).** ; Nail al Awtar vol. 6 pp 384

16. Abu Ayub (may blessings be upon him) said, he heard the Prophet (Peace and blessings be upon him) say: **'whoever separates a child from his / her mother, surely Allah will separates him from his loved ones in the day of Judgment'**. It is reported by Al Tirmidhi (53/80)

17. Article 106 [1] of the Islamic Charter on family provide:

The child shall have the right to have someone to take charge of his custody, to care for and raise him and to provide for his physical and psychological needs. The mother has the greatest right to custody of the child according to Islamic Shariah.

[The Islamic charter on Family is published by the International Islamic Committee for women and Child IICWC with contributions from eminent Muslim scholars: Dr. Abd El Lateef Aamir, Dr. Abdurrahman El Naqeeb, Dr. Ahmad Assal, Dr. Ahmad El Mahdi Abd el Haleem, Dr. Ali Gomaa, Dr. Fathi Lashin, Dr. Jamal Al Din Atiyyah, Dr. Makarim El Deeri, Dr. Mohammad Emarah, Dr. Muhammad Kamal El Din Imam, Dr. Salah Abd El Mutaal, Dr. Yusuf Al Qaradawi].

18. In the instant case, the children have been living with their mother all their life and their father providing necessary support in education and other welfare. No sufficient evidence has been presented to prove existence of any extenuating circumstances necessary to deny custody to their mother. The plaintiff has a prima facie case on the issue and at this stage the court is obliged to protect the children's interest to have continued stability in their life. The respondent taking the custody of the children is disruptive. Parties will have opportunities to canvass their case at full trial and give evidence to enable court make final orders on custody. The children officer to make investigation and file comprehensive report on the same to help in the determination of the matter. Accordingly pending hearing and determination of this case custody of the children is granted to the plaintiff / applicant, defendant / respondent to get unlimited access.

19. The respondent shall continue to provide for the children's accommodation, sustenance and education. Accordingly the applicant cannot be evicted from the matrimonial home. until the matter is determined.

20. The issue of division of matrimonial property can be only determined in the main suit upon hearing of *viva voce* evidence. Parties are at liberty to file necessary application on questions of law regarding this courts competence to hear and determine the

issue.

21. We take this early opportunity to encourage parties to talk towards the amicable settlement of the dispute through reconciliation with assistance of elders and Imams.

22. Application granted as prayed.

23. Costs be in the cause.

Dated and delivered at ISIOLO on 12th November 2018

HON. ABDULHALIM H. ATHMAN

PRINCIPAL KADHI

In the presence of

Mr. Mohamed Jattani Court assistant

Plaintiff / Applicant

Mr. Lekoona for Defendant / applicant



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