



Case Number:	Civil Appeal 2 of 2012
Date Delivered:	05 Dec 2012
Case Class:	Civil
Court:	High Court at Garissa
Case Action:	-
Judge:	
Citation:	E.K.K V K.M[2012]eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

High Court at Garissa

Civil Appeal 2 of 2012

E.K.K.....APPELLANT

VERSUS

K.M.....RESPONDENT

JUDGEMENT

Introduction

1. This suit was filed before the Senior Resident Magistrate at Mwingi by M.K a minor suing through the appellant her mother and friend. It is not clear why the suit was filed in a representative capacity when the relief sought is clearly custody of the suing minor and not a suit by a minor as envisaged under Order 32 Rule 1 (1) of the Civil Procedure Rules. The minor is the subject of the suit and therefore the correct procedure would have been the mother bringing the suit in her own right. The reliefs sought in the pleadings presented before the lower court are also not properly framed. The prayer sought is custody of the minor with several statements which appear like particulars of negligence. In determining the issues raised in this appeal, I want to be guided by the substantive justice without paying undue regard to procedural technicalities **(Article 159 (2) (d) of the Constitution 2010)**.

Pleadings and evidence

2. By a plaint dated 16th April 2010 and filed on the same day and her testimony in court, the appellant states that she and the respondent married under the Kamba customary law on 19th January 2001 and they begot the **M.K**, the minor subject of these proceedings. They lived together as husband and wife until May 2007 when the marriage broke down. She alleges that the respondent chased her from the matrimonial home. She left with the child but after two days the respondent went for the child. The child has been under the custody and care of the respondent since 2007. The appellant has since remarried to one [particulars withheld]. There was an attempt to return the dowry under the Kamba customary law but this did not bear fruits when the respondent failed to return the child.

3. The appellant alleged before the lower court that the respondent had neglected the child in regard to providing for her upkeep, care, education, health and also mistreated her. She told the court she is capable of taking care of the child and has means to do so. She told the court that her current husband has capacity to take care of the child and does not object to the custody of the child being given

to the appellant.

4. The respondent did not testify in the lower court. In his amended defence and counterclaim, he denied that he chased the appellant from the matrimonial home. He stated that the appellant left the matrimonial home on her own volition and left the child with the respondent and that she remarried. He further stated that the appellant has no interest in the child since she left her with the defendant in 2007. In his counterclaim he alleges that the appellant is abusive and a woman of loose morals and that she is incapable of living with the child. He asked the lower court to give him custody of the child stating that he is capable of taking care of her and has been doing so since the appellant left. The lower court gave custody to the respondent and this decision has aggrieved the appellant hence this appeal.

Grounds of appeal

5. The appellant has listed eight (8) grounds of appeal that the trial magistrate erred in law and misdirected himself on facts by:

- a) Granting the custody of the minor the respondent.
- b) Basing his decision on extraneous matters that were not in issue.
- c) Failing to take into account that the respondent failed to offer his evidence during trial.
- d) Granting the appellant access to the minor subject to prior arrangement with the respondent instead of granting full custody to the appellant.
- e) Ordering the appellant's suit dismissed without costs.
- f) Failing to take into consideration the minor's tender age and gender.
- g) By delivering judgement not in the best interest of the minor.
- h) Failing to find that proper care of the minor can only be given by the appellant.

Submissions

6. The parties opted to go by way of written submissions. In her submissions through her counsel, the appellant states that the trial magistrate misdirected himself in awarding the custody of the minor to the respondent; that the trial court relied on extraneous matter and awarded prayers not sought by the respondent since the respondent did not file a counterclaim for custody of the minor (I have confirmed that the respondent actually filed a counterclaim asking for custody of the child); that the respondent did not present evidence in support of his claim; that the respondent did not offer evidence on who takes care of the minor child and that the respondent did not demonstrate that he has safeguarded the rights and welfare of the child; that the respondent did not establish that the minor has access to and is enjoying the rights guaranteed under the law and that the court misdirected itself in granting the appellant access to the child subject to prior arrangement instead of granting full custody to her.

7. Further submissions by the appellant are that she remarried to one [particulars withheld] who is able and has means to take care of the minor; that the court misdirected itself in dismissing the

appellants case without costs and in not considering that at the child's tender age and gender, custody ought to have been given to the mother and that the interest of the child was not taken into account. The appellant asks this court to allow the appeal, reverse and/or set aside the judgement of the lower court and uphold the appellant's suit. I understand the appellant to be saying that the court orders that she be given custody of the child and any other relief the court may deem fit to grant.

8. On his part the respondent submits that he has been living with the child after the appellant left the matrimonial home and remarried; that the appellant's current husband has no right to take care or get custody of the child since he is not her biological father; that the appellant's current husband is not a man of means and cannot take care of the child; that the children's officer visited the child and found that she is properly taken care of; that he had been educating the child and that the child's grandmother takes care of her. He is asking the court to dismiss the appeal and uphold the judgment of the lower court.

Evaluation and Determination

9. This case is peculiar in that the respondent filed his pleadings but did not testify in support of his case. The record of the lower court shows that the respondent was at one time represented by counsel. They seem to have differed necessitating the counsel to ask the court to discharge him from representing the respondent to which the respondent had no objection. He however did not engage another counsel and although he had filed an amended defence which included a counter claim for custody of the child, he did not adduce evidence in court. He however filed written submissions in which he stated that he has been taking care of the child for 10 years without any complaint (my calculations show that the respondent had been living with the child for about 3 - 4 years as at the time the case in the lower court was going on).

10. The trial court in granting custody and care of the child to the respondent considered the parties' pleadings, the appellant's evidence and submissions and a report from the children's department. The report from the children's department presented at the lower court indicates that the child, her parents (appellant and responder) and other relatives had not been interviewed to know their wishes. The trial magistrate's view was that the appellant had not socially bonded with the child for three years and that if the child is separated (I guess he meant separated from the respondent) she was likely to suffer and this would not amount to the best interest of the child.

11. Cases touching on the rights of the children are civil cases whose determination is anchored on the best interest of the child. The decisions arrived at by the courts, after considering the evidence and all circumstances surrounding the case, revolve around the paramount question whether the best interest of the child has been considered. I say this because it has been raised as an issue here that the respondent who was awarded custody and care of the child did not testify in court in support of his case and therefore it was not proper to grant him custody.

12. Guided by the provisions of Article 53 (1) (a) to (e) all inclusive and (2) of the Constitution 2010, Section 83 (1) of the Children's Act and Section 3A of the Civil Procedure Act this court called for a report from the children's officer to inform its decision. The parties were informed of the intention of the court to call for that report and they had no objection. Specifically the court was interested to know the wishes of the mother and father (appellant and respondent), wishes of the appellant's current husband, wishes of the grandparents where the child currently resides, wishes of the child herself, the report from the school where the child attends as well as her religious persuasions. The report was filed in court on 24th October 2012.

13. The approach I want to adopt is to evaluate the pleadings, the submissions from both appellant and respondent and the report from the children's department which is informed by the interview of both parents, the child, other close relatives currently living with the child, appellant's current husband and a report from the school where the child attends. I will also consider the relevant law as well as decided cases and arrive at my decision. In using this approach I want to lay more emphasis on substantive justice (**see Article 159 (2) (d) of the Constitution 2010**) as opposed to procedural technicalities, all the time not losing sight of the paramount consideration in custody of children cases.

14. The grounds of appeal seem to be raising these issues: Was the trial magistrate wrong in granting custody to the respondent when he had not adduced evidence in support of his case" Was the trial magistrate guided by extraneous matters not in issue" Is the mother (appellant) the one better placed to take care of the child" Was the judgement of the trial court in the best interest of the child"

15. My reading of the record of the lower court discloses that the trial magistrate considered the respondent's submissions. It seems to me that the trial magistrate did not indicate if he considered the pleadings (respondent's counterclaim). However, my reading of the judgement shows that the trial magistrate emphasized on the best interest of the child as being of paramount consideration. Whether the respondent testified or not, his pleadings and submissions were in the file. In addition to this, there was a report that gave the background of the matter and the circumstances under which the child was living. I therefore do not agree that the trial magistrate considered extraneous matters.

16. On whether the appellant was better placed to take care of the child, I have looked at the report filed in court. The appellant has since remarried to one Kitonga and both have a male child together. Since she separated from the respondent (the year is not clear whether it was 2007, 2008 or 2009) she has not had contact with the child save the time she says she had gone to see the child. The respondent has been taking care of the child with the help of his mother (the child's grandmother). The report shows that the respondent too has remarried but the current wife was not interviewed. At the time of asking for this report, this court was not privy to that information or it would have insisted on the current wife being interviewed as well.

17. The wishes of the respondent, the child's grandmother and the child are that she remains with the respondent and the relatives whom she had lived with since the time her mother (the appellant) left. The wishes of the appellant is that she be given custody as she is the one better placed to take care of the child being a female child. The appellant's current husband also says he is capable of taking care of the child. The report from the child's school is positive that the child is doing well in school and has no problems with learning. I have noted from the children's officer's report that the appellant and her current husband are said to be peasant farmers. The respondent on the other hand is indicated to be in gainful employment as a driver.

18. Parental responsibility over a child is shared between both parents where they were married at the time of the child's birth (**see section 24 (1) of the Children's Act**). This is the situation in this case although the parents have since separated. The law is settled that in cases of custody, the paramount consideration is the welfare of the child. I am alive to the generally accepted rule that, in the absence of exceptional circumstances, the custody of young children should be given to the mother (**see K. v. K [1975] E.A 18**). This rule lends more credence in my view where the child is a girl of tender years.

19. Are there exceptional circumstances in this case as to make this court deny the appellant custody of the child" The respondent has alleged in his pleadings (see amended defence specifically the counterclaim) that the appellant is a woman of loose morals and is incapable of living with the child. There was no evidence to prove that allegation and therefore this court will not give meaning to it. However, there is

evidence, which is not denied by the appellant, that after the marriage between her and the respondent broke down, she left and got remarried. There is no evidence to show that she displayed keen interest in the well being of the child. I am aware that she claimed she was not able to access the child but for a mother to stay for three years until the time of filing this case without making any efforts to access her daughter to my mind is behaviour that points to her disinterest in the child's well being and development. There is no doubt that the child is a child of tender years, she was left when she was aged about 6-7 years and lived with the respondent and other relatives. The appellant remarried and life for her continued. I would have loved to see more effort on her part to pursue the child's upbringing, welfare and well being during the time of their separation. If she did this, it did not come out in her pleadings and evidence. From reading the report from the children's office, there is no indication that the child is not being taken care off. This court has no reason to doubt the contents of the report in the absence of any other statement to the contrary.

20. After careful analysis of all the evidence in the lower court, submissions before me, the report from the children's department which contains the wishes of the parties and the child, and after considering the behaviour of the appellant from the time of separation from the respondent to the time of filing the case in the lower court, it is my view that there are exceptional circumstances to make this court not grant custody of the child to the appellant. This is a very difficult decision to make but in my view and after taking into account section 83 of the Children's Act, the best interest o the child would be to let her continue living with the respondent and other relatives. To uproot her from the home she has known since birth to go and live in another home which is strange to her would be to disturb her social and psychological status. This may, in my view, disorganize and affect her well being and development.

21. To my mind, the trial magistrate correctly directed his mind in arriving at the conclusion that he did. I will therefore not disturb the findings and decision of the trial court. I will however modify the second order of the trial court which reads thus: '**The plaintiff is granted access to the child subject to prior arrangement with the defendant**'. In my view this order can be abused by the parties and needs clarification to remove any ambiguities. Instead, I order that the respondent shall allow the child to visit the appellant and stay periodically with her (see section 114 (a) of the Children's Act). This access shall not be withheld by the respondent and the appellant and the respondent shall make arrangements for smooth operation and execution of this order always bearing in mind that it is for the best interest of the child who should not be denied access to her mother.

22. My final orders are as follows:

- a) The appeal is hereby dismissed.
- b) The custody of the minor shall remain with the respondent.
- c) An access order is hereby granted that the respondent shall allow the child to visit the appellant and stay with her periodically especially during school holidays.
- d) The respondent shall facilitate such access and the visits shall not be denied.
- e) Each party to bear its own costs.

It is ordered accordingly.

Stella N. Mutuku, J.

Dated, signed and delivered this 5th day of December 2012.



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