

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
H.C. CIVIL APPEAL NO.21 OF 2009

M A..... APPELLANT

VERSUS

R O O..... RESPONDENT

R U L I N G

This case involves a protracted and bitter child custody dispute between the Appellant and the Respondent. The child that is the subject of the custody dispute is a boy aged seven (7) years. He is now a standard 2 pupil. The actual custody of the child is with the Appellant. The Appellant and the Respondent are no longer living together. In fact, the Appellant and the Respondent have moved on with their respective lives. The Appellant is now remarried. The Appellant resides in Siaya District while the Respondent told the court that he now works for gain in Mombasa. The Respondent moved this court pursuant to the provisions of **Sections 24(1), 83(1), 88(1), 90(a) and 114** of the **Children Act** seeking to be granted custody of the child, pending the hearing and determination of the appeal. The Respondent further prayed for the court to order the District Children’s Officer to furnish the court with a comprehensive status report on the health and general welfare of the child. The grounds in support of the application as stated at the face of the application. The application is supported with the annexed affidavit of the Respondent. He swore a further affidavit in support of the application. The application is opposed. The Appellant swore a replying affidavit in opposition to the application.

Prior to the hearing of the application, the parties herein did agree by consent that the District Children’s Officer pays a visit to the home of the Appellant and the school where the child learns to establish how well the child is being taken care of. The District Children’s Officer did pay the visits as ordered by the court. In the report filed in court, the District Children’s Officer made the following observations:

“...this is child who is likely to be in need of care and protection due to tussle between parents. The two parties have equal parental responsibilities over the child and have been supporting the child at their different capacities. But their differences are the ones that hamper any discussion regarding the welfare of the child. There is a need for proper communication”

and consultation between the school and the parents, and the parents themselves in regard to the child's medication to avoid the risk of overdosing the child during treatment, given that the school gave diverse reports on child's medication by either parent”.

The court took note of the concern of the Children's Officer. It ordered the parties to proceed with the hearing of the application.

Mrs. Osodo for the Respondent submitted that the Respondent was praying to be granted full custody of the child pending the hearing and determination of the appeal. She stated that the Respondent was the biological father of the child. He had been granted custody of the child by the Children's Court but had been denied meaningful access by the Appellant. She submitted that the child was in dire need of care and protection. She emphasized that the Respondent was genuinely concerned about the welfare of the child and had reached the conclusion that the best interest of the child could not be catered for by the Appellant. She stated that although the Children's Court had granted the Respondent limited access for a few hours in a month, such access was no longer tenable because the Respondent now works for gain in Mombasa. She submitted that the Respondent was concerned that he was unable to bond with the child since the Appellant had got married and was living in a place where he could not easily access the child. She urged the court to take into consideration the fact that as the father of the child, the Respondent was entitled to the custody of the child. She told the court that the Respondent wants to be involved in the life of the child including paying his school fee and to exercise his human right as the father of the child.

In response, the Appellant stated that the Respondent had thrown her out of their matrimonial home when she was three (3) months pregnant. She submitted that the issue of the custody of the child had been protracted and much correspondence had been exchanged between the Appellant, the Respondent and the Children's Department. She denied the allegation made by the Respondent that she had denied him access to the child. It was her case that it was the Respondent who was proving to be difficult in having the issue of the custody resolved. She submitted that although she acknowledges the fact that the Respondent is the father of the child, she was on 18th August 2012 married to another man under Luo Customary Law. She told the court her husband recognized and loved the child as his own. Her husband had no problem with her children. The Appellant asks the court to take this into account in determining who should be granted custody of the child. She reiterated that she was not interested in being paid maintenance or child support by the Respondent. She told the court that her husband was willing to adopt the child. She was opposed to the court granting joint custody of the child. She wants to retain actual custody of the child but was not averse to the Respondent being granted limited access to the child as ordered by the Children's Court.

The issue for determination in this application is who, as between the Appellant and the Respondent, should have custody of the child pending the hearing and determination of this appeal. **Article 53(2)** of the **Constitution** requires this court to treat the best interest of the child as of paramount importance in every matter concerning the child. **Section 4(3)** of the **Children Act** requires all judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any power conferred by this act to treat the interest of the child as of first and paramount consideration to the extent that this is

consistent with adopting a course of action calculated to safeguard and promote the rights and welfare of the child, conserve and promote the welfare of the child, and secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest. The dispute between the Appellant and the Respondent essentially revolve around the question who has the right to have actual custody of the child. It is not disputed that the Appellant has had custody of the child since the child was born. However, from the proceedings before the Children’s Court, it was clear that the Respondent has sought the court’s intervention with a view to being allowed to participate in the life of the child. It was also apparent from the proceedings that there is no love lost between the Appellant and the Respondent. In fact, during the hearing of the application, the court observed that the animosity between the two was palpable. In this situation, the custody battle assumed a different dimension. The court got the impression that the dispute between the Appellant and the Respondent was not the custody of the child *per se* but some sort of supremacy fight.

In determining who shall have the actual custody of the child, this court shall be guided by the principle that it is the best interest of the child that shall be of paramount importance. What is the best interest of the child has not been defined by the law. This is as it should be because the best interest of each particular child will depend on the circumstances of each particular case at any one particular time. What is not in dispute, however, is that there are certain minimum requirements that have universally been accepted to constitute the best interest of the child. This includes the right of a child to be provided with shelter, food, clothing and education. The child is entitled to medical care. The child’s welfare should be taken care of under the best possible circumstances. The child is also entitled to parental guidance. This guidance shall where possible, be provided by both parents. The child is further entitled to be given a suitable, conducive and loving environment in which to grow up in. In Kenya, it has been accepted by the courts that the custody of a child of young and tender years (defined in **Section 2** of the **Children Act** to mean a child of the age of ten (10) years and below) ought to be with the mother unless there are compelling reasons for the said custody to be removed from the mother and be given to the father. However, this will be subject to the best interest of the child.

The Supreme Court of England in **ZH(Tanzania)(FC) –Vs- Secretary of State for the Home Department [2011]UKSC 4** grappled with the question of what the court should consider as constituting the best interest of the child where it is claimed it is a primary consideration. In paragraph 25 of her judgment, Lady Hale, reading in effect what was a majority decision, stated as follows:

“Further, it is clear from the recent jurisprudence that the Strasbourg Court will expect national authorities to apply article 3(1) of UNCRC and treat the best interest of a child as “a primary consideration”. Of course, despite the looseness with which these terms are sometimes used, “a primary consideration” is not the same as “the primary consideration”, still less as “the paramount consideration”. Miss Joanna Dodson QC, to whom we are grateful for representing the separate interests of the children in this case, boldly argued that immigration and removal decisions might be covered by section 1(1) of the Children Act 1989:

“When a court determines any question with respect to-

- a. *the upbringing of a child; or*
- b. *the administration of a child’s property or the application of any income arising from it, the child’s welfare shall be the courts’ paramount consideration.”*

However, questions with respect to the upbringing of a child must be distinguished from other decisions which may affect them. The UNHCR, in its Guidelines on Determining the Best Interest of the Child (May 2008), explains the matter neatly at para 1.1:

“The term ‘best interests’ broadly describes the well-being of a child. The CRC neither offers a precise definition, nor explicitly outlines common factors of the best interest of the child, but stipulates that:

- *the best interest must be the determining factor for specific actions, notably adoption (Article 21) and separation of a child from parents against their will (Article 9);*
 - *the best interests must be a primary (but not the sole) consideration for all other actions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3).”*

In paragraph 46 of the judgment, Lord Kerr held as follows:

“It is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interest. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child’s best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result”.

In the present application, it is clear that some of the issues that the parties have advanced in their arguments will be canvassed during the hearing of the appeal. This court will not therefore make final findings in regard to the custody of the child. To do so will embarrass the court that will eventually hear the appeal. This court will confine itself to the issue of the temporary custody of the child pending the hearing and determination of the present appeal. As earlier stated, in determining who shall have the temporary custody of the child pending the hearing and determination of the appeal, this court shall be guided by the best interest of

the child. In the circumstances of this application, this court has determined that the best interest of the child shall constitute in the child not being destabilized from the environment that he currently living in. This environment includes where the child is sheltered and is being educated.

From the report of the Children’s Officer, it is apparent that the child likes the environment where he is currently living. Although he has health problems, the said health challenges are not such that they cannot be taken care of by the mother of the child. A factor which cropped in and which was highlighted by the both the Appellant and the Respondent is the changed marital status of the Appellant. This court is of the view that unless it is established that the changed circumstances has impacted negatively on the child, then it may not constitute a factor in the determination of the best interest of the child. The Respondent has not placed any evidence before this court that would lead this court to remove a child of young and tender years from the environment that he is currently living in. The Respondent has forcefully argued that this court should take into consideration his human right as the biological father of the child. In this regard, the Respondent has support in **Article 53(1)(e) of the Constitution** which states that a father and mother shall have equal responsibility to provide care and protection to a child whether they are married to each other or not. This court agrees with the Respondent that his right as the biological father of the child should not in the circumstances be ignored. However, such right shall be subject to what constitutes the best interest of the child. As an adult, the right of the Respondent as the father of the child cannot be considered to be of paramount importance to that of the best interest of the child.

In the premises therefore, this court holds that the Appellant shall have custody of the child pending the hearing and determination of the appeal. In light of the distances between where the Appellant and the Respondent reside, the Respondent shall be entitled to have custody of the child during the school holidays. This custody shall be restricted to a period of two (2) weeks. The Appellant and the Respondent shall agree on a timetable which shall be presented to the court within thirty (30) days of the delivery of this ruling. There shall be no orders as to costs. It is so ordered.

L. KIMARU

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 27TH DAY OF JUNE 2013.

F. TUIYOT

JUDGE



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