**REUBEN C. OYEDO**

**V.**

**DAISY N. OYEDO**

HIGH COURT EAST CENTRAL STATE

MARCH L, 1972

SUIT HU/1D/71

**LEX (1972) - HU/1D/71**

OTHER CITATIONS

3PLR/1972/133 (HC)

**BEFORE THEIR LORDSHIPS:**

ANIAGOLU J

**REPRESENTATION**

EGBUZIEM for the applicant.

OBONNA for the respondent.

**ISSUES FROM THE CAUSE(S) OF ACTION**

FAMILY LAW:– Matrimonial causes - Custody of children – Paramount consideration in granting custody – Parties that can be granted custody

FAMILY LAW:- Application for interim custody of children – Proper way to institute the application – Whether a proper application can be heard first before hearing the substantive petition

FAMILY LAW: Matrimonial causes – Custody of children - Inalienable right of parents to look after their children – Whether means their custody must be preferred, when they are able to look after the children to that of a foster parent, however good the foster parent may be

HEALTHCARE AND LAW:- Custody of children in divorce proceedings - Condition of health of children - Medical evidence as to same – Whether relevant factors

EDUCATION AND LAW:- Matrimonial proceedings and custody applications – Arrangement for the education of children of marriage – Weight of in satisfying the requirement that welfare of children be considered paramount

CHILDREN AND WOMEN LAW: Women and Divorce/Justice Administration – Interim custody of children of marriage pending final determination of divorce proceedings – Relevant considerations

**PRACTICE AND PROCEDURE ISSUES**

ACTION:- Mere application for an interim order for the custody of the children pending the final determination of the divorce proceedings - Conclusions on the facts adduced in evidence that should be reached by court

WORD AND PHRASES:- “Institute” – Meaning thereof

**MAIN JUDGMENT**

**ANIAGOLU J.:**

This is a bitterly contested application for the custody of the children of the marriage between the petitioner and the respondent, namely, Ngozi Oyedu, Ndubuisi Oyedu and Ifeanyichukwu Oyedu. Oral evidence was heard in extenso and parties pursued the matter with such details that their attention was called to the fact that the stage at which the proceedings had reached was merely an application for an interim order for the custody of the children pending the final determination of the divorce proceedings. It is necessary at this stage that only such conclusions on the facts adduced in evidence should be reached as are absolutely relevant to the determination of the issue of interim custody. This has to be so as any definite findings on the facts which would be placed before the court for the determination of the main case would be prejudicial to the fair trial of issues in it.

Before going into the facts, however, it is necessary to discuss a legal point raised by counsel for the petitioner. Objection was taken to the form of the application which was by summons supported by affidavit. Counsel for the petitioner argued that the combined effect of section 54 (3) (a) and 114 (1) (c) of the Matrimonial Causes Decree 1970, No. 18 of 1970, in the absence of any rules made pursuant to the decree, is that an applicant for custody of infant children of the marriage must obtain leave of court to file the application. The English rules which allowed an applicant to go by way of summons did not apply.

Not having got leave, the applicant was out of court by reason of the failure to satisfy a condition precedent to the application, the provisions of section 16 of the High Court Law notwithstanding. In reply counsel for the applicant contended that in the absence of any rules made pursuant to the decree, the practice and procedure in England was to apply.

Section 54 (3) of the decree reads:

“ (3) Proceedings of a kind referred to in paragraph (c) of the definition of ‘matrimonial cause’ in section 114 (1) of this decree that are in relation to proceedings under this decree for a decree or declaration of a kind referred to in paragraph (a) or (b) of that definition

(a) may be instituted by the same petition as that by which the proceedings for that decree or declaration are instituted; and

(b) except as permitted by the rules or by leave of the court, shall not be instituted in any other manner.”

Under section 114 (1) of the decree referred to in section 54 (3) “matrimonial cause” is defined under (c), which is a part of many segments of the definition, as meaning:

“(c) proceedings with respect to the maintenance of a party to the proceedings, settlements, damages in respect of adultery, the custody or guardianship of infant children of the marriage or the maintenance, welfare, advancement or education of children of the marriage, being proceedings in relation to concurrent, pending or completed proceedings of a kind referred to in paragraph (a) or (b) above, including proceedings of such a kind pending at, or completed before, the commencement of this decree.”

By subsection 2 of section 54 of the decree “ a respondent may, in answer to the petition, seek any decree or declaration that the respondent could have sought in a petition.”

The applicant, who is the respondent to the main petition, did ask, in her paragraph 21 of the answer, for custody and maintenance of the children. Subsection 4 of section 54 of the decree has provided that “ the court shall, so far as practicable, hear and determine at the same time all proceedings instituted by the one petition.” The petitioner in his paragraph 11 of the petition also prayed the court to grant him custody of the children.

What subsection 3 (b) of section 54 of the decree forbids is the institution of proceedings for custody or maintenance of children “ in any other manner “than by the petition. The respondent/applicant did not “ institute “ proceedings for the custody of the children with this application dated November 17, 1971, but by her answer aforementioned dated August 11, 1971. By section 114 (1) (e) of the decree, a “ respondent “ is defined to include “ a petitioner against whom there is a cross-petition.” What the applicant has, in effect, done by the application she filed dated November 17, 1971, is to ask that the proceedings for custody which she “ instituted “ in her reply and which the petitioner also “ instituted “ in his petition be heard. Indeed, the proceedings for custody having been “ instituted “ both in the petition and the answer there appears to be nothing to prevent either party from applying orally in court for their prayers for custody contained in their petition and answer to be dealt with in an interim order, by the court. That the respondent has gone out of her way to formally file a paper of request that the court do deal with the custody matter first before hearing the petition, has not transformed the application as being the document “ instituting “ the proceedings for custody.

The word “ institute “ has been the subject of judicial interpretation. In R. v. Aiyeola (1948) 12 W.A.C.A. 324 the issue was elaborately gone into by the West African Court of Appeal which held that the proceedings against an accused person who was tried by the Supreme Court (now the High Court) on information after committal by an inquiry magistrate on a preliminary inquiry were deemed to have been commenced or been instituted when he was arraigned before the magistrate on the charge or charges upon which the preliminary inquiry proceeds. That case was, of course, a criminal case but the reasoning offers a most useful guide. In my view, the institution of proceedings for custody of the children in the instant case was not brought about by the application dated November 17, 1971, but by the answer dated August 11, 1971, and I so hold. It follows that the respondent having sought or instituted her plea for custody in her answer, she comes within the ambit of the provisions of section 54 (2) and (3) (a) of the decree and does not have to receive any leave of court under subsection (3) (b) of the decree.

Turning now to the merits of the application, it has to be constantly home in mind that a final order for the custody of the children is not being made at this stage. All that is required now is an interim order directing where the children should stay until all the facts of the case are heard, and a determination arrived at, as to which of the parties is guilty of the break-up of the marriage or alternatively as to an apportionment of culpability in the said break-up.

One thing is clear, and it is agreed upon on all sides, namely, that from March 1971 till December 1971 the children had been in the constructive custody of their father, the petitioner, in the care of one Mrs. Okeke at Enugu. From December 1971 they returned to the actual custody of the petitioner, living with him at his Okpara Avenue residence, Umuahia. They have started schooling in Umuahia. Had the children been left in the custody of the said Mrs. Okeke at Enugu and had the petitioner not resumed actual custody, the conclusions would have been quite different. However benevolent the said Mrs. Okeke might have been, it is an inalienable right of parents to look after their children and their custody must be preferred, when they are able to look after the children to that of a foster parent, however good the foster parent may be. The applicant cannot stand by and see her children being fostered at Enugu when she is alive, healthy, has the means with which to hook after the children, and is not otherwise disqualified. Re Thain, Thain v. Taylor [1926] Ch. 676 is an authority for saying that among other considerations, the wishes of an unimpeachable parent stand first. Thus, in Milford v. Milford (1869) L.R. 1, a guilty husband’s father was not allowed to have custody of the children against the will of the wife, merely because he is able to provide for them better than she. All these are, of course, subject to the general principle that the interest of the children is paramount and in all cases the court has a wide discretion: Stark v. Stark &Or. [1910] Al1E.R. 190.

Evidence discloses, and this is agreed on all sides, that the petitioner took custody of the children on March 25, 1971. He filed this petition on July 2, 1971. Since the said March 25, 1971, till now, the children have been out of the custody of the wife. These children were brought to court. Whatever may have been the condition of their health on or before March 25, 1971—and on this there has been much conflict of evidence and disagreement—they certainly did not look unwell as they appeared in court. This is neither here nor there as medical evidence appeared to be in conflict. But this conflict was as to their condition of health before these proceedings.

In all these custody cases, there is no hard and fast rule, the matter being one of discretion by the court according to the facts of each particular case. Still, as far as one can state a general rule, one matter which in regard to the custody of children pendente lite has to be taken into consideration is what was the status quo which it is desirable to preserve, always bearing in mind that the interests of the children are the paramount. consideration. In Boyt v. Boyt [1948] 2 All E.R. 436 the Court of Appeal in England allowing an appeal against the order of Barnard J. reiterated this point. There, the matrimonial home belonged to the wife who was living with the children in the house, the husband finding accommodation elsewhere but later threatened to return to the matrimonial home against the wishes of the wife. The wife had lived reasonably quietly in the home till March 29, 1948. On March 30, 1948, the husband telephoned he was returning to the matrimonial home whereupon the wife took the children and left the home. The court held that the status quo to be preserved was the state of affairs which existed the day previous to the day the husband telephoned he was returning, namely, March 29, 1948.

The state of affairs in the instant case, which it is desirable to preserve until the trial, is the state of affairs which existed shortly prior to the institution of proceedings. The petitioner swore that when he went on March 25, 1971, to 7 Crowther Street, Umuahia, to collect the children, the respondent willingly handed the children to him.

The wife said that although she did not like the children being taken away, she did not object as she did not want to create a scene in the place. Her own brother, Temple Emenogu, supported the husband that the removal of the children by the husband was peaceful. In exhibit 3 dated March 28, 1971-written three days after the children were removed -the wife dealt mainly with the settlement of their dispute. Indeed, she was replying to the husband’s letter dated March 4, 1971. It was towards the tail end of the letter that she talked about the children, and even then, she left room for the possibility of the husband refusing to return the children to her. She wrote:

“ I would like you to return the children back to me. I still love them and would like to stay with them till they are grown up to the age when they can cater for themselves. I didn’t struggle or resist when you took the children by force and they were weeping bitterly when you and friends dragged them into the car in the rain, because I didn’t want the innocent children to feel that something serious was wrong, and besides people were watching. I hate disgrace.”

The letter was copied to T. A. Emenogu, Chief J. A. Otutubuike, A. E. Ukattah, M. N. Kanu and J. I. Onyia. The petitioner swore that some of these men were present when he removed the children. The only one among them who testified (T. A. Emenogu), as I said, supported the petitioner’s contention. I shall say no more on this point other than to reiterate that the children were in fact removed by the petitioner; that they have been firstly in his constructive custody and latterly in his actual custody, and that they appear quite fit as they appeared in court.

Although we are not here concerned with any determination of the legal rights, inter se, of the dependants of deceased Emenogu in relation to the premises at 7 Crowther Street, Umuahia, yet it is worth mentioning that T. A. Emenogu is claiming the house to be his after the death of his father. It is not for me here to say whether his claim is well founded in law, but it is the fact that he is claiming it. No doubt the other members of the family may resist the claim, but it is to this house that the respondent/applicant is seeking to consign these children whose custody is here being considered.

It is not disputed that the house does not belong to the applicant. Admittedly, the applicant’s position in Queen Elizabeth Hospital may entitle her to quarters within the hospital premises. The fact, however, is that she is not living there and no evidence has been led of any future intention, on her part, to go there to live. As against this is the fact that the husband is living in government quarters which his post, in the Government, entitles him to.

After carefully weighing the whole of the evidence, bearing in mind that the welfare of the children is paramount; taking into consideration the fact that the children are in school and no doubt may have established a pattern and routine for school attendance, I have come to the conclusion that the best course is to leave the children, for the meantime, where they are with the petitioner, until the determination of the divorce suit. It must be clearly understood that they must remain in the actual custody of the petitioner and that they must not be sent to some third party whether they be grandmother, grandfather, nephews or nieces or the like. Should this happen this order would immediately be revoked.

This court had earlier suggested to the parties and their counsel that a genuine attempt should be made at settling this dispute. In her letter to the petitioner, exhibit 3, the respondent had written, inter alia, as follows: “ Nevertheless it is also my ardent prayer that God may guide our thoughts aright and to the logical conclusion in resolving our differences.” The sentiment expressed by her in that passage of her letter is praiseworthy, and should assist the parties in coming to a settlement. In venturing this suggestion about a settlement, I am mindful of the provisions of section 30 of the High Court Law under which the court is enjoined to promote reconciliation among the parties in a civil suit and to encourage and facilitate amicable settlements of dispute in those suits.

The petitioner would have to pay his wife’s costs on this application.