



REPUBLIC OF KENYA



KENYA LAW
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**ZM v JAM (Family Appeal E017 of 2023)
[2023] KEHC 27264 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27264 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E017 OF 2023
G MUTAI, J
DECEMBER 20, 2023**

BETWEEN

ZM APPELLANT

AND

JAM RESPONDENT

*(This is an appeal against the judgment of the Hon. Viola Yator, PM,
delivered on 10th May 2023 in Tononoka Magistrate's Court MCCHCC
No.E082 of 2023; Joseph Akong'o Myak versus Zipporah Mukolwe)*

JUDGMENT

1. This is an appeal against the judgment of the Hon. Viola Yator, PM, delivered on 10th May 2023 in Tononoka Magistrate's Court MCCHCC No.E082 of 2023; JAM versus ZM. Vide the said judgment the learned magistrate issued the following declarations/orders:-
 1. A declaration is hereby made that both the plaintiff and the defendant have equal parental responsibility over the children herein;
 2. Both parties to have joint legal custody, the plaintiff to have actual physical custody, the defendant to have unlimited access and to have the children for half the period of all school holidays;
 3. The children's department, and the police in whose jurisdiction the children are currently held, do assist in retrieving the children and handing over the same to the plaintiff in case of resistance in execution of order (b) above;
 4. No orders as to costs and either party is at liberty to apply.



2. The appellant was aggrieved by the said decision and filed the instant. Vide a Memorandum of Appeal dated 25th August 2023 the appellant raised the following grounds of appeal:-
 - a. That the honourable court erred in law and fact by hearing and determining the matter exparte;
 - b. The honourable court erred in law and fact by denying the appellant an opportunity to be heard;
 - c. The court erred in law and fact by accepting the service which was erroneously conducted and not done in person to the appellant;
 - d. The court erred in law and fact by failing to acknowledge that the best interest of the children lies in their current status where the custody lies with the mother of the children; and
 - e. The trial court erred in law and fact by failing to seek for the report on the conditions under which the children are expected to live.
3. The appeal was canvassed by way of written submissions. Subsequently the appellant through her advocates, Kituo Cha Sheria, filed her written submissions dated 10th October 2023. Counsel submitted on two issues namely; whether the appellant was denied the right to be heard; and whether the best interest of the child was considered.
4. On the first issue counsel submitted that the appellant was not served in person pursuant to Order 5 rules 1 and 8 of the Civil Procedure Rules. It was stated that the respondent did not inform the court of the frustration he suffered in effecting service that would justify effecting substituted service under Order 5 rule 17 of the said Rules. She urged that although the respondent indicated to the court that the appellant was out of the country, the court did not apply Order 5 rule 21 of the Rules on service out of the country. Further the trial court contravened section 102 of the *Children Act, 2022* on principles to be applied when making a custody- order.
5. On the second issue counsel submitted that the court did not call for a report under Section 97 of the *Children Act, 2022* prior to making its decision. Neither did the court address the issue of access pursuant to Section 33(5)(a) and 103(3) of the *Children Act, 2022*. She therefore urged the court to allow the appeal.
6. The respondent on the other hand through his advocates Muthee Kihiko & Associates LLP filed his written submissions dated 6th November 2023.
7. Counsel submitted that the appellant had legal representation in the lower court. At no point was the issue of service raised by the counsel on record. He argued that the appellant had not demonstrated how the judgement offended Section 102 of the Children's Act and that Section 97 is not in mandatory terms thus the court cannot be faulted for not calling for report. Further the best interest of the child under Section 103 (1)(j) of the said Act was adhered to. The respondent was granted actual custody of the child due to the fact that the appellant is away in Saudi Arabia. In conclusion counsel urged the court to dismiss the appeal with costs.
8. This being a first appeal, this court must re-evaluate and assess the evidence adduced before the court below and make its own conclusions. It must, however, keep at the back of its mind that the trial court, unlike the appellate court, had the advantage of observing the demeanour of witnesses and hearing their evidence first-hand.



9. This was aptly stated in the cases of *Selle versus Associated Motor Boat Company Ltd*[1968] EA 123, where the Court of Appeal rendered itself as follows: -

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

10. I will, therefore, re-evaluate the evidence and come up with my own conclusions but also bear in mind that I should not interfere with the findings of the trial court unless the same was based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. This is in tandem with decision of the court in *Peters versus Sunday Post Limited* (1958) EA 424, where it was held as follows:-

“It is a strong thing that for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion.”

11. I have considered the appeal and the rival submissions by both counsels and the issues that emerge for determination are;

- a. Whether service on the appellant was proper;
- b. Whether the appellant was given the right to be heard; and
- c. Whether the best interest of the children was considered.

12. I will discuss the 1st and 2nd issue together. The applicant submitted that from the judgement dated 10th May 2023 the Hon. Viola Yator, PM, the court only considered evidence of the plaintiff and his pleadings in making the decision. The court indicated that the defendant was served, however, the court failed to deliberate on the way the service was conducted or whether the same actually reached her. Further the fact that the service failed to reach her, denied her an opportunity to participate in the trial. She could neither controvert the contents of the pleadings or evidence laid against her. The appellant could not provide information in her position to convince the court to consider her point of view.

13. The appellant submitted that the court agreed with the service done by one Bernard Omondi without scrutinizing whether she was actually served or not. The court failed to consider that the service was done using electronic service without seeking consent for substitution the procedure of service. Also, the phone number used was not the correct number of the defendant.

14. On the other hand, the respondent submitted that the appellant had legal representation at the lower court and that at no point was the issue of service raised by the counsel on record.

15. My understanding of the appellant’s case is that there was no personal service pursuant to Order 5 rule 1 and 8 of the Civil Procedure Rules neither was leave sought before effecting substituted service under Order 5 rule 17 of the said Rules. Further that the rules of service under Order 5 rule 21 applicable



where a party is out of Kenya were not followed. The applicant argued that the court contravened section 102 of the *Children Act*, 2022 to the extent that it didn't adhere to the principles to be applied when making an order of custody.

16. Order 5 rule 8 of the Civil Procedure Rules provides as follows:-

1. Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.
2. A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.

17. Order 5 rule 17 provides;

1. Where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.
2. Substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally.
3. Where the court makes an order for substituted service it shall fix such time for the appearance of the defendant as the case may require.
4. Unless otherwise directed, where substituted service of a summons is ordered under this rule to be by advertisement, the advertisement shall be in Form No. 5 of Appendix A with such variations as the circumstances require.

18. Order 5 rule 21 provides;

Service out of Kenya of a summons or notice of a summons may be allowed by the court whenever—

- a. the whole subject-matter of the suit is immovable property situate in Kenya (with or without rents and profits);
- b. any act, deed, will, contract, obligation or liability affecting immovable property situate in Kenya is sought to be construed, rectified, set aside, or enforced in the suit;
- c. any relief is sought against any person domiciled or ordinarily resident in Kenya;
- d. the suit is for the administration of the personal estate of a deceased person who at the time of his death was domiciled in Kenya, or for the execution (as to property situate in Kenya) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of Kenya;
- e. the suit is one brought to enforce, rectify, rescind, dissolve, annul, or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract—
 - i. made in Kenya; or
 - ii. made by or through an agent trading or residing in Kenya on behalf of a principal trading or residing out of Kenya; or



- iii. by its terms or by its legislation to be governed by the Laws of Kenya; or
 - iv. which contains a provision to the effect that any Kenya court has jurisdiction to hear and determine that suit in respect of that contract, or is brought in respect of a breach committed in Kenya, of a contract, wherever made, even though such a breach was preceded or accompanied by a breach out of Kenya which rendered impossible the performance of the part of the contract which ought to have been performed in Kenya; or
 - f. the suit is founded on a tort committed in Kenya;
 - g. any injunction is sought as to anything to be done in Kenya, or any nuisance in Kenya is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or
 - h. any person out of Kenya is a necessary or proper party to a suit properly brought against some other person duly served in Kenya.
19. In its proceedings of 1st March 2023 the court stated:-
- “The defendant herein having been duly served and having failed to enter appearance, file defence, and on the application by the plaintiff’s advocates, I enter judgement as prayed.”
20. Further the court in its judgement of 10th May,2023 the court stated,
- “The defendant failed to enter appearance and the matter proceeded by way of formal proof.”
21. In the affidavit of service sworn on 1st March,2023 by one Bernard Omondi a process server, he indicates that he effected service through WhatsApp to appellant via WhatsApp number 070666760. The appellant has denied owning the said phone number and the fact that she received the documents as alleged.
22. The service referred to in this matter falls under electronic mail service pursuant to order 5 rule 22B which provides:-
- 1. Summons sent by Electronic Mail Service shall be sent to the defendant’s last confirmed and used E-mail address.
 - 2. Service shall be deemed to have been effected when the Sender receives a delivery receipt.
 - 3. Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
 - 4. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.
23. From the judgement of the court and court proceedings it’s evident that the appellant had left the country for Saudi Arabia leaving the children with their grandmother. Save for the bare denial, the appellant did not tender any evidence to show that the said phone number 0706667XX did not belong to her. The respondent was also represented by one Mr. Adika, in the lower court. The said counsel never raised the issue of service neither did he apply for setting aside of the exparte judgement. Accordingly, it’s my finding that the appellant was properly served through her last known mobile



number. In the circumstances the allegation that there was no proper service must fail. I am guided by the case of *Murtaza Hassan & Another v Ahmed Slad Kulmiye* [2020] eKLR where the court stated:-

“The appellant though inadvertently served through his last known postal address he acknowledged receipt of the suit papers touching on the claim. He however chose not to get personally involved by approaching the court registry for further advisory or seek legal representation for that matter. In procedure is the flaw on service, I mentioned, but the appellant own admission on this issue is as important to seal the compliance on service.

This case with its uniqueness would fall within the class a defendant has been made aware of a pending case before a Court of Law. Therefore, the impugned ex-parte Judgment cannot be wholly taken to be the one adjudicated without service.”

24. On whether the court considered the best interest of the children, the appellant submitted that that the court did not call for a report under Section 97 of the *Children Act, 2022* in making its decision neither did the court address the issue of access pursuant to Section 33(5)(a) and 103(3) of the *Children Act, 2022*.
25. On the other hand, the respondent submitted that the appellant has not demonstrated how the judgement offended Section 102 of the Children’s Act and that Section 97 is not in mandatory terms thus the court cannot be faulted for not calling for a report under the said section. Further the best interest of the child under Section 103 (1)(j) was adhered to. The respondent was granted actual custody of the child due to the fact that the appellant is away in Saudi Arabia.
26. Section 97 of the Children’s Act 2022 provides that:-
 1. When considering any question with respect to a child under this Act, the Court may summon and direct any person to prepare and present to it a report or statement containing such information in respect of a child as the Court may direct.
 2. Without prejudice to the provisions in this Act or any other written law, the Court may take into account—
 - a. any statement contained in the report referred to in subsection (1); or
 - b. any evidence given in respect of the matters referred to in the report and in so far as the statement or evidence is, in the opinion of the Court, relevant to any matter in issue before the Court.
 3. Where the Court orders or summons an expert pursuant to subsection (1), a party to the proceedings shall be given an opportunity to submit their views before the court makes an order.
27. This provision is not in mandatory terms. My understanding of the word “may” is that it gives courts discretion whether or not to call for such a report. Being an exercise in discretion by the trial court, and there being no evidence that the discretion was exercised injudiciously or capriciously, I am unable to interfere with her determination.
28. Section 102 of the Children’s Act 2022:-
 1. A Court may, on the application of one or more persons qualified under subsection (3), make an order vesting the legal custody of a child in the applicant or applicants.



2. An order under subsection (1) may be referred to as a custody order, and the person to whom legal custody of the child is awarded is referred to as the custodian of the child.
3. Any of the following persons may be granted custody of a child—
 - a. a parent;
 - b. a guardian;
 - c. any person who applies with the consent of a parent or guardian of a child and has had actual custody of the child for a period of three years preceding the making of the application, unless the Court is satisfied on evidence that a shorter period is sufficient to justify an order made in determination of the application; or
 - d. any person who, while not falling within paragraphs (a), (b) or (c), can show cause, having regard to section 101, why an order should be made awarding the person custody of the child.
4. Nothing in this section may be construed as limiting the power of the Court to make an order, on the application of the Secretary, directing the removal of a child from an abusive home or institution and placement on temporary alternative care on such terms as the Court may think fit.
29. In this case the respondent being the father to the subject minors applied for their custody and court granted him the same on the basis of being a parent. It is therefore my view that the court did not contravene the said provision.
30. Section 103 (1), (2) and (3) provides that: -
 1. In determining whether or not a custody order should be made in favour of an applicant, the Court shall have regard to—
 - a. the conduct and wishes of the parent or guardian of the child;
 - b. the ascertainable wishes of the relatives of the child;
 - c. the ascertainable wishes of the child taking into account the child's evolving capacity;
 - d. whether the child has suffered any harm or is likely to suffer any harm if the order is not made;
 - e. the customs of the community to which the child belongs;
 - f. the religious persuasion of the child;
 - g. whether a care order, supervision order, personal protection order or an exclusion order has been made in relation to the child concerned, and whether those orders remain in force;
 - h. the circumstances of any sibling of the child concerned, and of any other children of the home, if any;
 - i. any of the matters specified in section 95(2) where the court considers such matters to be relevant in the making of an order under this section; and
 - j. the best interest of the child.



1. Where a custody order is made giving custody of a child to one parent, or in the case of joint guardians, to one guardian, the Court may order that the person not awarded custody shall nevertheless have all or any rights and duties in relation to a child, other than the right to actual possession, jointly with the person who is given custody of the child.
 2. The rights specified in subsection (2) include the right of access to the child on such terms as the Court may direct.”
31. The appellant argued that the court did not consider certain facts in respect of the above provision to ensure that the children were being placed in safe custody.
32. The court in its judgement of 10th May, 2023 gave the following orders;
 - a. A declaration is hereby made that both the plaintiff and the defendant have equal parental responsibility over the children herein.
 - b. Both parties to have joint legal custody, the plaintiff to have actual physical custody, the defendant to unlimited access and to have the children for half the period of all school holiday.
33. The best interest principle is the paramount principle for consideration in all children matters as provided for in article 53 (2) of *the constitution* and section 8(1) of the *Children Act*, 2022. The court in the case of MAA v ABS [2018] eKLR stated:-

“What is stated in Section 4 (3)(b) of the Act is the paramountcy principle which is vital in all matters concerning children and must be given prominence. While considering this matter, this Court was alert to the welfare of the child herein who is of tender years. The matter is not about the Appellant and the Respondent and their interests are secondary to those of the child. The foregoing provisions require this Court to treat the interests of the child as the first and paramount consideration and must do everything to inter alia safeguard, conserve and promote the rights and welfare of the child herein. Acting in the best interest of the child, I am of the view that his welfare will best be served if he remains with his mother the Respondent.”
34. Although the children the subject of the appeal are of tender age and ought ordinarily to be in the actual custody of the mother this Court takes note of the fact that the appellant works in the Middle East and had left the minors in the custody of the grandmother. In my view, given those circumstances, the court was right to grant custody to the father. The Court of Appeal in J.O. v S.A.O. [2016] eKLR stated:

“There is a plethora of decisions by this Court as well as the High Court that in determining matters of custody of children, and especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother, because mothers are best suited to exercise care and control of the children. Exceptional circumstances include: the mother being unsettled; where the mother has taken a new husband; where she is living in quarters that are in deplorable state; or where her conduct is disgraceful and/or immoral.”
35. The fact that the appellant is not resident in Kenya and that she left the minors in the hands of her mother would amount, in my view, to her being unsettled justifying departure from the general rule.



36. Although allegations were made impugning the capacity of the respondent to take care of the children no cogent evidence was provided in the court below in support of the same. In the circumstances I am unable to agree with the appellant that the father did not deserve to be given custody. Denying the children the love and affection of the father, when the mother is absent, requires extraordinary justification, which in this case was not given.
37. Accordingly, it's my view that the orders issued by the trial court were in the best interest of the child and that the the trial court took into consideration all relevant factors before issuing the same.
38. The upshot of the foregoing is that it is the finding of this Court that the appeal lacks merit. The same is dismissed.
39. This being a children matter each party shall bear own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20TH DAY OF DECEMBER 2023 VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr. Gathu holding brief for Mr. Okongo for the Respondent;

No appearance for the Appellant; and

ARTHUR – COURT ASSISTANT.

