



REPUBLIC OF KENYA



**KENYA LAW**  
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**HMI v KBH (Family Appeal E010 of 2022)**  
**[2022] KEHC 14547 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14547 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MOMBASA**  
**FAMILY APPEAL E010 OF 2022**  
**JN ONYIEGO, J**  
**OCTOBER 21, 2022**

**BETWEEN**

**HMI ..... APPELLANT**

**AND**

**KBH ..... RESPONDENT**

*(An appeal from the Judgment of Hon. Lucy Sindani at the Tononoka children's court, Mombasa, delivered on 21st February, 2022)*

**JUDGMENT**

1. Through a plaint dated December 30, 2019, HMI (hereinafter the appellant) moved to Tononoka children's court vide children case No 435/2019 seeking orders as hereunder;
  - a. A declaration that both the plaintiff and the defendant have equal parental responsibility for the issue herein namely JRH .
  - b. A maintenance order requiring the defendant to make periodic financial payments of Kshs 180,000 to the plaintiff in respect of the subsistence, maintenance and utility needs of the child herein.
  - c. The defendant do pay school fees in respect of his child.
  - d. The defendant do take a medical cover for the child.
  - e. An execution order do issue against the defendant
  - f. The defendant do meet the additional educational and medical needs of the child herein as and when the same may arise.
  - g. Actual/physical custody of the child to vest in the plaintiff.



- h. Costs of the suit and interest therein at court rates.
  - i. Any other relief that this honourable court may deem fit.
2. The plaintiff's /applicant's case was based on the claim that sometime the year 2015, she and the defendant /respondent started cohabiting as husband and wife. That they together brought up baby JRH the subject of these proceedings.
3. She claimed that the defendant /respondent who is a non-Kenyan being a British national was likely to leave the country thus abandoning his parental responsibility over the baby. She therefore prayed for an order compelling the defendant /respondent to pay Kshs 180,000 to cater for the child's maintenance and utility besides medical and educational expenses.
4. In response, the respondent /defendant filed a statement of defence and counter claim dated November 23, 2020 in which he stated that he was engaged in a relationship with the appellant out of which the subject herein was born.
5. He stated that he was a British national but regularly visited Kenya on average three to four times a year and would stay with the appellant/plaintiff for holidays for a week or one month.
6. He claimed that despite his efforts to visit Kenya to see his child, the plaintiff had frustrated him by denying him access to the baby. According to him, he has been providing for his child besides sending huge sums of money to fund the plaintiff's /appellant's business to provide long time security for the child.
7. That despite every attempt through mediation to settle the dispute, the appellant had frustrated the effort employed. He lamented that he has been providing funds for the upkeep of the child but the same was not put to proper use.
8. In his counter claim, he stated that when he met with the appellant, she did not disclose that she was married to a Germany "mzungu" and that to date their marriage has never been dissolved. That the appellant is also in love relationship with another Swiss "mzungu" who also maintains her with her daughter S.
9. He further stated that during the subsistence of their marriage, the plaintiff/respondent did subject him and their son to cruelty and abuse. He averred that he loves his child so much that he will do anything to make his son happy.
10. That as part of his support to the plaintiff/appellant, he bought and developed properties for her besides stocking her dress shop. That among the properties bought for the appellant to hold in trust for the minor was Mtwapa LR Kilifi/Mtwapa/2895 worth 10 million.
11. He expressed his fear that the appellant had threatened to sell the property so as to relocate to Italy with the sole purpose of denying him access to the baby. To him, the appellant is a careless and non-loving mother, temperamental and displays psychopathic behaviours, immoral and a woman who sleeps with various men in her house while drinking beer in the presence of the children.
12. He therefore sought actual /physical custody of the child and authority to leave the country for the UK with the baby whom he promised will be visiting Kenya regularly and be in touch with the mother on whatsapp.
13. In conclusion he prayed for;
  - a. A joint legal custody between the parties



- b. Actual /physical custody do vest in the defendant
  - c. Plaintiff to have supervised access to the child and have regular whatsapp video calls.
  - d. Permanent injunction to issue against the plaintiff not to sell L/R Kilifi /Mtwapa 2895
  - e. The court to put the said property in trust for the child with the defendant as the trustee
  - f. The court to garnishee the five accounts operated by the defendant in KCB, Family and Equity banks and the funds therein be transferred to an account to be opened with the defendant as the signatory
  - g. The plaintiff to account for the money she has ever received from the defendant.
  - h. The plaintiff to visit medical mental psychiatrist for her own benefit and that of the child.
  - i. The plaintiff be permanently restrained from entertaining other men in the family house to protect the moral wellbeing of the child herein and the other children.
  - j. The plaintiff be restrained from harassing or abusing the defendant through sms.
  - k. The defendant be restrained from removing the child from the jurisdiction of Kenya without the defendant's consent.
  - l. Costs of the suit
  - m. Any other relief the court may deem fit.
14. During the hearing, PW1 HMI (appellant) told the court that she was a business lady dealing with sale of hand bags. Besides, she claimed that she owns landed property in Bungoma and Malaba which generates rental income. She told the court that the subject child is below 4 years hence entitled to his custody. She further stated that the defendant /respondent was not the father of the child. That when they met with the defendant, she was expectant and when the defendant demanded that she aborts, she refused hence the reason for their differences.
15. She claimed that the defendant only supported the child for one year and thereafter stopped. She further told the court that since she started sharing custody of the child, she does not know where the defendant is staying. According to her evidence, the defendant was a tourist (visitor) in Kenya hence cannot be given actual custody. In her view, it will not be proper for the child to relocate to UK. She lamented that the defendant/respondent has denied her access to the child and only allows her to talk to the baby through video call.
16. She alleged that when she left the baby while in the defendant's / respondent's custody, the child had razor cuts in the shoulders and burns related injuries on the buttocks.
17. She claimed that she is fit and has the capacity to look after her child and even meet his educational expenses. According to her, the defendant was at liberty to directly pay school fees to the school and that she did not want any cash from him. She left it upon the defendant/respondent to decide on what to provide for the child.
18. She told the court that if she got custody of the baby, she will allow the defendant/respondent pick the child during weekends on Saturday at 8.00 am and return him in the evening. She opposed any attempt to let the child sleep over with the respondent for his own safety.
19. On cross examination, she accused the respondent of starting these court proceedings at Tononoka children's court. When further pressed, she admitted filing the suit. She denied demanding for



maintenance of Kshs 180,000 to provide for the child's upkeep and categorically stated that she did not want any money from the defendant nor payment of school fees. She admitted that she was living in the child's house but claimed that she and the respondent jointly bought it for the child in the year 2018 at 10 million.

20. However, in the middle of cross examination, the plaintiff/appellant refused to answer questions on grounds that the child was not in court. The court having warned her against her conduct whenever the child was in court closed her case prematurely. The plaintiff/appellant chose not to participate in the defence case after she made it difficult for the court to proceed by using derogatory remarks against the trial magistrate calling her a woman just like her.
21. On his part, the defendant /respondent told the court that he was a British national attached to Scotland yard having worked for the organization for 40 years as an international detective.
22. He adopted the content contained in his witness statement together with documentary exhibits which is a replica of his counter claim. He pleaded for actual custody on grounds that the plaintiff did not respond to his counter claim. He however claimed that the plaintiff/appellant had no property generating rental income nor is she doing any business as she had closed shop long time ago.
23. Touching on the defendant's psychotic behaviour, the defendant stated that the plaintiff/appellant had threatened to eat her with her own teeth. That she does things without fear of the law or order nor does she have feelings for any other person.
24. He stated that in October 2020, Dr Abuto diagnosed the child as suffering from gastro internal infection. That in another instance, the plaintiff /appellant forced the child to take hot porridge a behaviour manifesting or reflecting on a person with psychotic behaviours. That another sign of psychotic behaviour is that the plaintiff/appellant is obsessive and extremely promiscuous as she frequently scouts for tourists at night for sex hence unfit to take care of the child.
25. The witness told the court that he wanted to save the child from abuse and immoral behaviour of the mother. That he will take care of the child with his aunt and that he has no intention of taking the child out of the country.
26. Upon considering the evidence tendered before court and the defendant's submissions, the court delivered its judgment on February 2, 2022 thus directing that;
  - a. This court is not bound by the doctrine of *res judicata* thus not barred to determine the issues on custody on merit.
  - b. Legal custody of the child to be joint between the plaintiff and the defendant
  - c. The defendant to have physical/actual custody of the child while the plaintiff to have physical supervised access to the child on alternate weekends at Mtwapa police station the gender desk from 11.00am to 3.00pm. During this period the plaintiff is warned against causing any kind of drama and commotion in the presence of the child. The plaintiff to access the child peacefully as a mother without abusing and talking to the defendant in any manner.
  - d. The plaintiff is also allowed to continue with virtual access to the child on the days that she doesn't have physical access but is restrained from using abusive language to the defendant in the presence of the child while having the said access. The plaintiff to access the child in a peaceful manner and in the event that there is any damaging information being passed by the plaintiff to the child then the call to be disconnected.



- e. The above access to go on for a period of one year from the date of this judgment and in the event that the plaintiff has been maintaining peace, order and decorum during these moments of access then either party can apply for review of access.
  - f. This court allows the defendant to provide for the child fully and the plaintiff be a liberty to chip in at any time
  - g. This court lacks jurisdiction to deal with the prayer by the defendant in respect of property named Mtwapa title number Kilifi/Mtwapa/2895. The defendant to approach a court with proper jurisdiction to handle.
  - h. Prayers f,g,h and I of the defendant's counter claim are dismissed.
  - i. Neither the plaintiff nor the defendant is allowed to leave the jurisdiction of Kenya with the child without the consent of the other or order of the court until the child is 12 years old and able to understand better what is going on. Any party who wishes to leave the county with the child when he attains the age of twelve should also do so with the consent of the other party or by court's order
  - j. The defendant's passport deposited in court to be released to him.
  - k. This being a case brought on behalf of the child then costs to be borne by each party.
27. Dissatisfied with the said judgment and orders, the appellant lodged a memorandum of appeal dated March 21, 2022 but amended and filed on July 19, 2022 citing 8 grounds of appeal
- a. That the learned magistrate erred in law and in fact in holding that the respondent was better placed to take care of the child disregarding the evidence that the respondent is an unsettled foreigner in the country, temporarily visiting as a tourist and in the circumstances not suitable to have permanent orders of actual custody of the minor.
  - b. That the learned trial magistrate erred in law and fact in proceeding on wrong principles and facts thereby awarding custody of the child to the respondent
  - c. That the learned magistrate erred in law and in fact in holding that the custody order that she made should stay until the child gets to twelve (12) years
  - d. That the learned trial magistrate erred both in law and fact in failing to uphold the doctrine of precedent with regards to children of tender years when she gave custody of the four -year old JRH to the father without sufficient evidence on record to dispel the assumption that the mother is the most suited to have custody of a minor of tender years.
  - e. That the learned trial magistrate erred in law in holding that the judgment would be subject to review by the trial court after one year and thereby failed to consider that having issued the judgment, the trial court had become functus officio and therefore cannot review and or extend its own judgment
  - f. That the learned magistrate erred in law by proceeding to make a judgement in the case without having the appellant cross examine the respondent and children officer, thereby offending the tenets of natural justice and fair hearing.
  - g. That the learned trial magistrate erred in both law and fact in considering issues not pleaded and proven by the respondents thereby arriving at a wrong decision



- h. That the learned magistrate erred in law and in fact in giving weight to irrelevant issues telling the acrimonious relationship between the parties and thereby ended up making biased determination to secure the interests of the respondent before those of the minor contrary to the Children Act No 8 of 2001.
28. Simultaneously filed with the memorandum of appeal was a notice of motion seeking stay of execution. The application was later compromised in favour of hearing the main appeal. Parties agreed to file their respective submissions to dispose the appeal.

### **Appellant's submissions**

29. Through the firm of Sospeter Okwaro and company advocates, the appellant filed her Submissions on August 8, 2022. She submitted on the following issues.
- a. Whether the trial magistrate erred in awarding custody of the child to the respondent in total disregard of the prima facie general rule on custody of a child of tender age;
  - b. whether the trial court erred by rendering its orders without regard to the principles thereof and;
  - c. Whether the trial court erred in making a determination without according the appellant a chance to cross examine the defendant.
30. It was contended that the court erred by according a foreigner on a tourist visa custody of a child of tender age. That unless there are exceptional grounds to warrant denial of actual custody of a child of tender age to the mother, as a general rule, the mother should be granted such custody. To buttress that position, the court was referred to the case of JO v SAO [2016] eKLR and Githuburi v Githuburi [1979] eKLR where both courts awarded custody to the mother on account of tender age.
31. The appellant opined that the respondent having admitted that he was engaged and committed all over the world, he has no place of permanent residence to settle with the baby hence unsuitable.
32. According to the appellant, there was no exceptional circumstances to warrant custody of the child of tender age to the respondent. That the trial court based its findings on extraneous observation of the appellant's character which in any event was not pleaded.
33. The appellant took offence of order No 5 where the court stated that the actual custody order was available to review after one-year subject to the appellant maintaining peace, order and decorum during the access moments. Counsel submitted that the trial court was *functus officio* after delivery of its judgment hence cannot purport to reopen the suit for purposes of review of its orders yet section 80 of the Civil Procedure Act and order 45 of the Civil Procedure Rules cannot apply in the circumstances.
34. On the question whether the defendant was denied an opportunity to cross examine, counsel contended that it pokes holes on the validity and integrity of the whole process. In this regard, reliance was placed in the case of SM v HGE [2019] eKLR. The court was further referred to the case of Pinnacle Projects v Presbyterian Church of East Africa Ngong Parish & another [2018] eKLR to express the position that the right to fair hearing is enshrined under article 50 of the Constitution which espouses the right to adduce and challenge evidence.

### **Respondent's submissions**

35. Mr L Obonyo from Obonyo legal advocates appearing for the respondent filed his submissions on August 17, 2022. Counsel submitted on the four issues submitted on by the appellant. Regarding



- the award of actual custody to the respondent, Mr Obonyo contended that the respondent being a parent to the minor has an equal right to the custody of the minor just like the mother his nationality notwithstanding.
36. Counsel underscored the respondent's sentiments in his evidence that he was willing to relocate to Kenya to be with his son. That since he was awarded custody of the child, the baby has been comfortable and has had his health improve.
  37. Mr Obonyo submitted that there was sufficient evidence before court demonstrating that the defendant has generally endangered the health of the child thus attracting warrant of arrest and her committal to civil jail. That it is in the best interest of the child that actual custody orders be maintained.
  38. Concerning non- applicability of the *prima facie* rule that a child of tender age should be granted to the mother unless special circumstances dictates not to, Mr Obonyo contended that in this case there were special circumstances which dictated the award of the minor to the father. To support his position, counsel made reference to the case of *FM v HG* [2012] eKLR and *ZMN v GSG* Court of Mombasa CA No 1234 of 1993.
  39. Learned counsel opined that the best interest of a child is superior to the right and wishes of parents. To advance this position the court was referred to the case of *KKPM v SWW* [2019] eKLR.
  40. To further support the determination and reasoning of the trial court, counsel urged the court not to interfere with the trial court's decision unless found that the court applied wrong principles. To that extent, reliance was placed in the case of *Makube v Nyamiro* [1983] eKLR.
  41. According to Mr Obonyo, the court considered the unruly, unreasonable, disregard of court orders and unpredictable behaviour of the appellant as a reason for denying her actual custody. That such behaviour was openly played out in the presence of the court and that the actual custody awarded was in the best interest of the child.
  42. Further, that the respondent often disappeared with her baby whenever custody was awarded to her and that her unpredictable behaviour cast a lot of doubt as to her mental status. That it was upon the appellant to discharge the burden that she was fit to take care of the child. This position was buttressed by the holding in *JF v AHK* [2009] eKLR where the court granted custody of the father on account that the mother was not fit and caring.
  43. As to the aspect of providing review after one year, counsel relied on section 117 which allows a trial court to review its orders from time to time. To support this position reliance was placed in the case of *MKN v JL & Children Court at Kericho* [2019] eKLR
  44. As to whether the applicant was denied the opportunity to cross examine the respondent, counsel submitted that it was the appellant who refused to participate despite several pleas and persuasion from the court hence deemed to have waived her right to cross examine. To that extent counsel referred to the case of *Sita Steel Rolling Mills Ltd v Jubilee Insurance Company Ltd* [2007] eKLR where the court stated that a waiver may arise where a party has pursued such a conduct to waive his right.

### **Determination**

45. I have considered the record of appeal, grounds of appeal and submissions by both counsel. This is a first appeal. As the first appellate court, I am duty bound to re-consider, re-evaluate and re-assess the evidence tendered before the trial court afresh and arrive at an independent determination without losing sight of the fact that the trial court had the advantage of listening to and seeing witnesses testify



so as to be able to assess their general demeanour. See *Selle and another v Associated Motor Boat Co Ltd and others* (1968) EA 123 where the court stated that;

“...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 conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect”.

46. From the grounds of appeal cited, parties submitted on four grounds which I shall respectively adopt as follows;
- a. Whether the magistrate erred in giving physical/actual custody of the minor herein to the respondent.
  - b. Whether the learned magistrate erred in not upholding the prima facie rule in regard to custody of a child of tender age.
  - c. Whether the learned magistrate erred by providing for review without regard to the legal principles thereon.
  - d. Whether the learned magistrate made a determination on the case without according the appellant an opportunity to cross examine the respondent and the children officer.
47. Considering that issue number 1 and 2 are intertwined, I will handle them concurrently. One of the grounds raised in challenging the trial court’s finding is that the court awarded actual custody of the minor herein to a foreigner who is on a tourist visa and therefore not a permanent resident in Kenya. There is no dispute that the respondent is a British national who is enjoying his visitation in the country through a tourist visa. It is not in dispute that he has no permanent residence by virtue of his status. Further, it is also on record both in the respondent’s counter claim and testimony that he is an international detective working for Scotland Yard but deployed in Iraq and Afghanistan. That he visits the country three to four times a year.
48. There is no doubt from the record that the respondent is the father to the minor herein. In that capacity, he is entitled to claim equal parental responsibility over the baby just like the mother his race or nationality notwithstanding. This position is clearly spelt out in article 53 (1) of the [Constitution](#) which provides;
- “every child has a right to parental care and protection which includes equal responsibility of the mother and father to provide for the child, whether they are married to each or not”
49. Section 24 (2) of the now repealed [Children Act](#) provides that parents have equal parental responsibility over their children and that neither the father nor mother has a superior claim or right over the other. This position was succinctly held in the case of [KKPM v SWW](#) (*supra*) where Ongeri, J held that the best interests of a child are superior to the rights and wishes of parents. Similar sentiments were echoed by Aroni J, as she then was in the case of [PKM v ANM](#) [2020] eKLR where the learned Judge held that the parties in that case had joint responsibility towards their son and no one was superior to the other.
50. Fortunately, in this case both parties are willing to take full responsibility over the baby even in the absence of the other.
51. The crux of the matter herein is whether the respondent was suitable to be granted actual custody. Whereas parental responsibility is equal, the court has the discretion to determine on whether the best



interests of the child would be served by making an order such as actual custody to one party with limited or unlimited access to the other. article 53 (2) of the Constitution and section 4 (2) and (3) of the Children Act now repealed clearly provide that in every decision made affecting a child, the best interests of the child must be taken into consideration. See MJA v LAC & another [2020] eKLR where the court held that it was obligated under section 4 (3) of the Children Act to give primacy to the best interests of a child in consonance with article 53 (2) of the Constitution.

52. Before awarding actual custody of the minor herein to the father, the court did examine and indeed considered in length the behaviour and character of the appellant whom it described as temperamental, dramatic, uncontrollable, vengeful, aggressive and unreasonable thus displaying an attitude of a person who is not mentally sound.
53. The law governing award of custody of a minor to any party is laid out under section 83 (1) of the Children Act now repealed which provides;
- 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.
54. In the instant case, each party is claiming to have a superior right in respect of custody to the child over the other. The minor herein was born on November 12, 2017. He is about 5 years now. Section 2 of the Children Act defines a child below 10 years as a child of tender age. Who is best suited to be granted actual custody of the child herein?
55. It is trite that as a general rule, a child of tender age should be awarded to the mother unless there are exceptional or special circumstances to warrant denial of such custody. This position has severally and in a myriad of authorities been accepted as the standard application of the law. See JO v SAO (*supra*) where the court of appeal held that;

“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.”

56. Similar position was held in the case of *Gitbunguri v Gitbunguri* (*supra*) and *DNN v MAM* [2018] eKLR where exceptional circumstances were found to include the minor’s mother having taken a new husband or living in deplorable conditions.
57. In the instant case, the court took into account the unreasonable and uncouth character of the appellant, temperament, disrespect to court orders, use of abusive language and generally exhibiting a behaviour of a mentally unsound person. She also relied on various children officer’s reports and medical status of the child showing that the respondent was fit to look after the baby and whenever the baby was with the father his academic performance improved and was generally in good health.
58. There is no doubt from the record or proceedings and general history of this matter which I have had occasion to deal with in a related appeal that the appellant is generally a vexatious and difficult litigant who believes that anybody who does not dance to her tune is biased and generally against her. As the trial court correctly put it, the appellant has no respect for court orders nor court officers including magistrates and even children officers. To her, no court order is good unless it’s in her favour. From her testimony, she exhibited a high degree of dishonest. She could deny certain information only to change the story next minute.
59. From the testimony of the respondent which was not challenged, the appellant was described as an irresponsible mother who keeps several men as her lovers quite often in her house and in the presence of the minor and the other children. That she goes in the night scouting “for Wazungu tourists” looking for money in exchange for sex. She is unkind to the child and that whenever the child is with her his school performance drops and health deteriorates. This fact is supported by the children officer’s reports aforesaid and medical evidence that the child has ever suffered traumatic episodes while in the mother’s custody.
60. Besides, there was sufficient evidence demonstrated by the respondent which was confirmed on cross examination by the appellant that whenever actual custody of the child was given to her she could disappear with the baby and deny the respondent access. In one such occasion, she secretly travelled to Nigeria to hide the baby from the respondent but the law caught up with her as an illegal immigrant thus calling for the respondent to rescue her by paying some money to secure her freedom.
61. I do agree with the trial court that the appellant has not been responsible to the child and her frequent movement out of jurisdiction in her effort to deny the respondent access to the child, the child has lost a lot in school due to unnecessary interruptions hence the poor performance in school whenever the baby is with her. Her immoral behaviour in taking different men to the house is not building the moral character of the minor positively. In my view then, these are exceptional circumstances warranting denial of actual custody of the baby to the appellant.
62. On the other hand, the respondent has behaved with distinction as a responsible person, caring and loving to the child. He has bought a house for the child worth 10 million but had it registered in the name of the appellant. He has been providing for the child and paying school fees. Under normal circumstances, he is actually the best suited parent to be given custody of the minor.
63. However, the respondent has one limitation or incapacitation which revolves around his residence status. As stated earlier, the respondent is on a tourist visa renewable after every three months. The respondent works in Iraq and Afghanistan. He travels a lot in and out of the county. He stated that he normally visits Kenya thrice or four times a year.



64. Considering his tight schedule, nature of employment and residence status, he has no sufficient time for the baby implying that the child will be left in the hands of 3<sup>rd</sup> parties who are not answerable to the court. The trial court did not address this fact or issue. The judgment is silent as to what will happen when the respondent is not in the country. In my view, proper control, and overseeing of the baby's day to day activities will be lacking thus making the respondent unsuitable also as a custodian.
65. From the above analysis, it would appear like none of the two is suitable to be awarded custody of the minor. In fact, this is a suitable case where a close relative to the minor would have served as a better alternative. However, since none of appellant's close relatives nor children officer have expressed such opinion or desire, I am for the time being left with the discretion to determine who among the two parents will be a better option in law and for the best interest of the child.
66. Given the tender age of the baby, the appellant(mother) would be a better option after taking into account the short comings of each party. It is possible for the respondent to take care of his child when in the custody of the mother while enjoying unlimited access to the baby whenever he is in the country. He can also stay with the baby on alternate weekends between 4.00 pm on Friday of the alternate weekend and return him at 4.30 pm every Sunday of that weekend. This arrangement will ensure that the child enjoys sufficient bonding and love from both parents.
67. I have with a heavy heart given actual custody of the minor herein to the appellant on condition that she does not frustrate the respondent's right to access the baby as directed. The appellant is further warned from disregarding court orders which she has made her daily bread in the past. Should she disobey the aforesaid orders, the court will not hesitate to revoke the custody order and make appropriate orders.
68. In view of the above holding, the trial court's order awarding actual custody to the respondent is hereby substituted with an order that; Actual custody of the minor herein is awarded to the appellant with unlimited access rights to the respondent during alternate weekends starting 4.00pm on Friday to 4.00pm pm on Sunday of the same weekend.
69. Regarding the issue of the court providing for review of the access rights after one year, the appellant argued that the court had become functus officio hence no review orders could issue in advance. It is trite that unlike ordinary civil suits, children courts are special and therefore sui generis. Under section 117 of the now repealed *Children Act*, a children court is empowered from time to time to review, vary, suspend or discharge any order made. It is therefore proper and lawful for a children court to make provision for review.
70. Concerning the allegation that the court made a determination without according the appellant an opportunity to cross examine the defendant, the court record is clear. In fact, from the proceedings, it was the appellant who disrespectively walked out on the court describing the learned magistrate of being a woman like her. She chose not to participate in the proceedings. She was plainly arrogant, unruly and abusive to the court. She simply made it impossible for the court to conduct orderly proceedings thus ridiculing the court. She basically held the court at ransom without blinking an eye. I commend the trial court for exercising calmness, patience and professionalism.
71. A party who is fully aware of her or his rights under article 50 (1) of the *Constitution* but opts to forfeit that right cannot be heard to complain over denial to access justice. See *Sita Steel Rolling Mills Ltd v Jubilee Insurance Company Ltd* (*supra*). In my view, the court had no choice but to exclude her from participating in the proceedings. She cannot claim that she was denied the opportunity to participate. Accordingly, that ground is not sustainable.
72. Having held as above, it is my finding that the appeal has merit and the same is allowed with orders that;



- a. The order of the trial court awarding actual custody of the minor herein to the respondent be and is hereby substituted with the order that; actual custody of the minor herein be and is hereby awarded to the appellant with unlimited access to the respondent.
- b. That the respondent shall have the child during alternate weekends starting from 4.00pm on Friday and return the child on Sunday at 4.30 pm same weekend
- c. That the respondent shall pick and drop the child at a place to be agreed upon by parties as shall be convenient to them.
- d. The rest of the orders made by the lower court shall remain in force
- e. The respondent shall deliver the minor to the appellant on October 30, 2022 at 4.00pm at a place to be agreed by parties and thereafter to pick the baby the second Friday from that day.
- f. Regarding costs each to bear his or her costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 21<sup>ST</sup> DAY OF OCTOBER, 2022.**

.....

**JN ONYIEGO**

**JUDGE**

