



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS NO. 1 OF 2018

MOT.....APPELLANT

VERSUS

EAO.....RESPONDENT

JUDGMENT

(An Appeal from the Judgment of Honourable Z.W. Gichana, Senior Resident Magistrate,

delivered on 16th June 2017 in Nairobi Children's Case No. 802 of 2016)

The Appeal

MOT, hereinafter the Appellant, and EAO, hereinafter the Respondent, were in a relationship that resulted in a child, a daughter named TRN, hereinafter, the minor. Their relationship soured and MOT sued EAO in the Nairobi Children's Court. He sought access to the minor and involvement in decision making in respect to the minor. The trial court, Hon. Z. W. Gichana, determined the case and made the following orders, that:

1. Legal custody of the child be shared between the parties.
2. Status quo on actual custody, care and control of the child to obtain, i.e Defendant to retain actual custody, care and control of the child.
3. The Plaintiff to have alternate Saturday access of the child from 10.00am to 6.00pm and for at least a third of the school holidays, the access shall not include overnight stays unless parties otherwise agree. The access may be incremental as the child advances in age. The Plaintiff shall be at liberty to access the child through reasonable phone access and vice versa for the Defendant whenever she is in the Plaintiff's custody.
4. The first holiday access to commence during the August 2017 school holidays.
5. The Plaintiff to continue providing for the child as he has been i.e provide school fees related expenses and Kshs 20,000 per month.
6. Any changes to the child's school shall be by mutual consultations.
7. Each party shall bear own costs.
8. Each party be at liberty to apply.

The Appellant is aggrieved by the orders of the trial court and has preferred this appeal. He raises the following grounds in his Memorandum of Appeal dated 2nd July 2019:

1. The learned trial magistrate erred in law and fact in failing to grant the Appellant reasonable access to the child.

2. That the learned trial magistrate erred in fact and in law by making orders and giving directions which would in essence make it very hard for the Appellant to have effective access to the child.
3. The learned trial magistrate erred in law and in fact by failing to consider that it was in the best interest of the child for the Appellant to have reasonable access to and build a relationship with her.
4. The learned trial magistrate erred in fact and in law in wholly relying on the evidence adduced by the Respondent in making a determination on access of the minor by the Appellant and disregarding the Appellant's evidence contained in his statements, affidavits and oral evidence.
5. The learned trial magistrate erred in fact and in law in failing to analyse the issues before it (*sic*) properly and considered irrelevant and extraneous matters while leaving out the relevant one in making her final judgment.
6. The learned trial magistrate erred in law and in fact by failing to consider, appreciate and give weight to the Appellant's pleadings and evidence as presented vide his plaint, affidavits, oral evidence and submissions.
7. The learned trial magistrate's decision was arrived at in a cursory and perfunctory manner without due consideration of the issues for determination and her entire judgment failed to address the issues presented before her by the Appellant hence her decision thereof is devoid of any justification but a serious miscarriage of justice against the Appellant.

The Appellant seeks the following orders from this court:

- (i) That the judgment of the trial court delivered on 16th June 2017 be set aside.
- (ii) That the Appellant shall have alternate weekend access of the minor one TRN from 10.00am on Saturday up to 6.00pm on Sunday and also on alternate school holidays and during the Appellant's family functions with due notice.
- (iii) That the Respondent shall involve the Appellant in all decisions affecting the social, religious, cultural and academic development of the minor.
- (iv) That costs of this Appeal be provided for.
- (v) That this Honourable Court be pleased to make such further or other orders as it may deem fit in the circumstances of the case.

Submissions

This court directed that this Appeal shall be disposed of by way of written submissions. Both the Appellant and the Respondent have filed their respective written submissions. In his submissions, the Appellant asserts that the orders of the trial court are such that it will be very difficult for him to have effective access to the child. He states that the orders that access to the child will not include overnight stay while allowing him access to the child one third of the holidays means that he would have to pick the child every morning and drop her in the evening for that period of time which is very complicated for him. He claims that he is a responsible father and that he has shown interest in the life of the child and that it is in the best interest of the child to spend quality time with her father. He asks that this court sitting on appeal should overturn the orders of the trial court and allow the Appellant to have the child one third of the school holiday continuously without having to drop her back in the evenings. He states that this way, the father and daughter would have time to bond. He asks that instead of picking the child every alternate Saturday at 10.00am and dropping her in the evenings at 6.00pm he should be allowed to have the child every alternate weekend, Saturday to Sunday. He asserts that denying the child quality time with her father is not in her best interests.

In her submissions, the Respondent states that there is no prejudice occasioned on the Appellant because he has enjoyed structured access to the child on alternate Saturdays from 10.00am; that the Appellant brings the child home late at night and sometimes past her bedtime, sometimes putting the child at risk; that the Appellant does not attend church and allowing his time with the child over a weekend means that the child will not attend church when she is with the Appellant and that the Appellant is always out drinking and partying with his friends and this may expose the child and leave her alone at night. The Respondent further submits that the structured access put in place by the trial court should not be disturbed and that there be supervised visits by one of the child's siblings who will ensure that her interests will be met.

The Respondent submits that the Appellant has revived this case after two years to waste court's time and defeat the cause of justice; that the Appellant's current relationship is not in the best interest of the child and that she will not feel safe to have the child spend nights at the Appellant's home because the Appellant will not be able to balance between the needs of the child and those of his girlfriend.

The Respondent further submits that she tries to communicate to the Appellant regarding the child's social, cultural and academic development but the Appellant ignores her text messages and that he avoids direct communication between them and that the Appellant has refused to resolve this matter through mediation. The Respondent asks the court to uphold the judgment of the trial court delivered on 16th July 2017 and dismiss this appeal as it lacks merit.

Determination

I have had time to carefully read and understand the submissions by each party. I have summarized the submissions as shown above. This matter comes to me as an appeal and not as a trial court. Some of the issues raised by the Respondent in her submissions were better addressed at the trial stage. I have considered the issues raised on this appeal, the gist of which is access to the minor or what the Appellant

calls reasonable access. The law is very clear that the best interest of the child is of paramount consideration in all matters and in all decisions affecting the child. Article 53 of the Constitution is worded as follows:

53. (1) Every child has the right—

(a) to a name and nationality from birth;

(b) to free and compulsory basic education;

(c) to basic nutrition, shelter and health care;

(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;

(e) 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 other or not (emphasis added); and

(f) not to be detained, except as a measure of last resort, and when detained, to be held— (i) for the shortest appropriate period of time; and (ii) separate from adults and in conditions that take account of the child's sex and age.

(2) A child's best interests are of paramount importance in every matter concerning the child. (emphasis added)

Section 4 (2) and (3) of the Children Act states that:

(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

All these provisions echo Article 3(1) of the Convention on the Rights of the Child.

All the authorities touching on the disputes involving children lay emphasis on the best interest of the child. There are those duties in regard to the best interest of the child that are the responsibility of the State and its organs and there are those responsibilities that lie squarely on the parents of the child in question, whether they are married or not. But in most cases and in the heat of the moment and in a bid to get at each other, most parents lose sight of this important legal requirement: that it is not about themselves but it is about the child and what is the best interest for that child. Some actions or omissions are done by the parents in the mistaken belief that it is for the best interest of the child when in actual fact it is not. Lost in that personal and selfish fight between warring parents the child becomes like the proverbial grass that suffers when two elephants fight.

I have read with care the proceedings of the trial court and the judgment. I want to disagree with the Appellant that the trial court wholly relied on the Respondent's evidence and disregarded that of the Appellant or failed to analyse issues before it properly and considered irrelevant and extraneous matters or failed to give weight to the Appellants pleadings or the decision of the trial court was arrived at in a cursory and perfunctory manner without due consideration of the issues. The judgment of the trial court is clear that the court gave due consideration to all the pleadings, evidence, the law and the precedents to arrive at the decision conveyed in the judgment of that court. However there are a few issues in that decision that lack clarity and that may bring misunderstandings between the parties in this case. This is where this court should intervene.

My reading and understanding of the decision of the trial court reveals that there are grey areas that needs to be clarified for the best interest of the child to be best appreciated. My concern is with regard to order number 3 of the judgment dated 16th June 2017. I will reproduce it here for ease of reference:

3. The Plaintiff to have alternate Saturday access of the child from 10.00am to 6.00pm and for at least a third of the school holidays, the access shall not include overnight stays unless parties otherwise agree. The access may be incremental as the child advances in age. The Plaintiff shall be at liberty to access the child through reasonable phone access and vice versa for the Defendant whenever she is in the Plaintiff's custody.

My concern is what I see as lack of clarity in the phrase **“and at least a third of the school holidays, the access shall not include overnight stays unless parties otherwise agree”** underlined above. Both parents are already in disagreement in regard to this access which

the Appellant calls unreasonable and which the Respondent sees as not prejudicial to the Appellant. Upon careful consideration of the order I agree with the Appellant that it would mean picking up the minor and dropping her in the evening and doing the same the following day until the third of the holidays expires. This is the case because the trial court was categorical that the access shall not include overnight stays unless parties otherwise agree. In my view, there is likelihood that they will not agree on this issue. It is going to be very inconveniencing for the Appellant and the minor to pick her in the morning, drop her back at the close of day one, repeat the same the following day during school holidays until time expires.

The Respondent seems to think that because the Appellant has a girlfriend she will interfere with the minor's presence with the Appellant. I tend to think that these fears may be unfounded. The Appellant has a legal duty to ensure that the minor is taken care of. If he fails in personally taking care of the minor and delegating this legal duty to a third party who may act contrary to the best interest of the child, I am sure he knows the consequences of such actions. The law, from the International Instruments on the Rights of the Child to the Constitution of Kenya and the Children Act, as well as precedents, lay emphasis on the paramount consideration when making decisions on the issue touching on the children. "**The best interest of the child**" becomes a mantra in making decisions touching on the child.

The right of a child to parental care and protection under Article 53 (1) (e) of the Constitution of Kenya includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not. The law envisages a situation that every parent of a child, whether they are married or not, must give parental care and protection to that child and exercise equal responsibility towards that child. This means that when custody is awarded to any parent, or access to the child is granted to any parent, that parent must take full responsibility for the care and protection of that child in accordance with the law. This responsibility should not, under any circumstances, be delegated to a third party.

Having said that, it is my considered view that not all of the judgment of the trial court needs to be interfered with. The trial court gave both parties a hearing, considered all the issues before it and made a decision. In my understanding and from what I can see in the judgment the trial court took into account the issues raised by each party. I will therefore not interfere with orders 1, 2, 4, 5, 6, 7, and 8 of the judgement delivered on 16th June 2017. However, it is my view that order number 3 requires to be reworded to create clarity and avoid misunderstandings between the parties. I hereby set aside order number 3 of the judgment delivered on 16th June 2017. For clarity of the orders of this court and those by the trial court which this court has not interfered with, I wish to rephrase and renumber all the orders here below as follows:

1. Legal custody of the child be shared between the parties.
2. Status quo on actual custody, care and control of the child to obtain, that is, the Respondent to retain actual custody, care and control of the child.
3. (a) That the Appellant shall have access to the minor on alternate weekends from 10.00am on Saturday to 5.30pm on Sunday. That in order not to disrupt the minor's religious upbringing, the Appellant shall ensure that he takes the minor to church to attend Sunday School in the church and denomination in which she has been attending.

(b) That the Appellant shall have access to the minor for one (1) week on every school holiday lasting three (3) weeks or two (2) weeks on school holidays lasting longer than three (3) weeks from 10.00am on the day of picking to 5.30pm on the day of return. For clarity purposes the period of access includes overnight stays with the Appellant provided that the Appellant shall not delegate his responsibility of taking care of the minor to a third party during her stay with him. During such stay, the Appellant shall ensure that the minor attends church and Sunday School as provided in (i) above
4. The first holiday access to commence during the August 2017 school holidays.
5. The Appellant to continue providing for the child as he has been, that is, provide school fees related expenses and Kshs 20,000 per month.
6. Any changes to the child's school shall be by mutual consultations.
7. Each party shall bear own costs.
8. Each party be at liberty to apply.

Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF JANUARY 2021.

S. N. MUTUKU

JUDGE