REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CHILDREN APPEAL NUMBER 2 OF 2019

JWAN.....APPELLANT/APPLICANT

VERSUS

VOO .....1ST RESPONDENT

MMN..... 2ND RESPONDENT

R U L I N G

1. The application before me is the Notice of Motion dated 28th January 2019 brought under **Article 53 of the Constitution, Section 2, 4(2), 6, 81, 82, 83, 87 and 114 of the Children Act and all enabling provisions of the law.** It is also supported by the affidavit of the appellant sworn on 28th January 2019, and the submissions filed on 29th November, 2019.

2. The application is opposed vide the 1st respondent's Replying Affidavit sworn on 1st May 2019 and the submissions filed on 11th January 2020, and those of the 2nd respondent filed on same date.

3. At the centre of this appeal is a living breathing human being by the name JNKO who was born on 24th September, 2015 to JWN and VOO, currently both of them hold dual citizenship with the United States America.

4. Jason's father was already a USA citizen when he was born and his mother won the green card in May 2015 when she was five (5) months pregnant. For this reason her child could not feature in her green card. According to the mother, the 2nd respondent, she moved in with her, with the minor as she processed her papers to move to the USA. The two parents agreed, and the child was left with his maternal grandmother as she left for the USA in March 2016.

5. In December 2016, the 1st respondent flew to Kenya and visited the minor. In April 2018 be came back to pursue the VISA issues for the child. On 24th April 2018, he went for the child but apparently he had not informed the applicant so, she refused to have the minor released to him. The applicant came into the country on 30th April 20186. Since the two (2) were no longer living together in the US, she felt that she needed to be involved. The1st respondent was acting alone, so the child did not attend the VISA interview scheduled for 2nd May 2018 because the 1st respondent refused to involve her. That is when he moved to court in **Children Case Number 81 of 2018** where he sued the applicant's mother for custody. On 9th May 2018 the following consent order was entered into.

> *1. THAT custody of the minor be and is hereby vested upon VOO and JWN.*
>
> *2. Both the Plaintiff as the father and JWN as mother do liase and make arrangements to appear jointly before the American Embassy in Nairobi for the registration process of the minor.*
>
> *3. The minor shall be left with the Plaintiff's family members.*
>
> *4. The Defendant MMN shall have reasonable access to the minor.*
>
> *5. In case JWN the mother of the child may want to communicate with the Plaintiff's relatives concerning the minor the following members are available.*
>
> *a. C (Uncle Nairobi) 0722xxxxxx*

b. M (Cousin Nairobi) 0724xxxxxx

c. J (Cousin Nairobi/Kisii) 0729xxxxxx

d. C (Aunt Nairobi) 0723xxxxxx

e. A (Cousin Nakuru) 0724xxxxxx

f. E (Cousin Nairobi) 0715xxxxxx

g. R (Cousin Nairobi) 0712 xxxxxx

h. J (Aunt Nairobi) 0750 xxxxxx

i. J (Friend/Driver) 0724xxxxxx

6. The only Birth Certificate to be used henceforth shall be the one bearing names of both parents of the minor.

7. Whenever the minor's mother JWN is travelling out of the Country, she shall hand over the minor to the plaintiff's family members that she has access to in the presence of the advocates for the parties.

8. The passport already issued to the minor shall be surrendered and another passport bearing the names of both parents and the surname of O.

9. THAT this matter be and is hereby marked as settled. Each party to bear own costs.

10. Either party be at liberty to apply.

6. Note that these orders issued with regard to the applicant were made yet she was NOT a party to the suit.

7. The child left the custody of his grandmother and was taken to live with the 1st respondent's uncle.

8. Following other developments and family meetings, was on 1st December 2018 was agreed that the child would continue to live with his grandmother 2nd respondent, but on 3rd December 2018 the 1st respondent demanded that child be taken to his aunt in Kariobangi.

9. In the meantime the applicant sought and was enjoined in the Children's Case as an interested party on 23rd November 2018.

10. On 4th December 2018 she filed an application to review the consent order of 9th May 2018. The application was dismissed on 21st December 2018 leaving the consent of 9th May 2018 intact.

11. The child was released to 1st respondent on 15th December 2018, he left the country on 23rd December 2018 leaving the child with his uncle. The 1st respondent's family thereafter frustrated her efforts to see her child up to the time when she was to leave the country on 11th February 2019, hence this application.

12. In response the 1st respondent deponed;

"6. **THAT *the application herein is misconceived as it raises no substantive issues that ought to diligently be addressed by the honorable court but rather, merely raises unsubstantiated hearsay information; fabricated lies and un collaborated facts, thrown to the court and left for the court to make a finding that appears favourable to the appellant applicant at my expense.***

7. THAT the matter which the applicant herein resonates is merely duplicity and res judicata having been so marked as settled, thus the honorable court should decline any whatsoever invitation by the applicant appellant to entertain the same and instead, have the said application dismissed ab initio.

9. THAT however, the appellant's application is a genesis of my application dated the 24th day of April 2018 which application was duly adjudicated by a court of competent jurisdiction and an order was issued vesting custody of the minor subject matter herein to me, with the appellant's applicant's mother the second respondent herein being given reasonable access to the minor, while the appellant applicant equally being given reasonable access to the minor. (Annexed hereto and marked "VOO1" is a copy of the order issued on the 26th day of April 2018).

The order is reproduced hereunder:

"VOOI"

REPUBLIC OF KENYA

IN THE CHILDREN COURT AT NAKURU

CIVIL CASE NUMBER 81 OF 2018

IN THE MATTER OF JNKO (MINOR)

VOO.....PLAINTIFF

VERSUS

MMN..... DEFENDANT

ORDER

UPON READING *the application dated the 24th day of April, 2018 together with the supporting affidavit* ***AND UPON HEARING*** *counsel for the Plaintiff/Applicant in the absence of the defendant/respondent.*

IT IS HEREBY ORDERED;

1. THAT the Hon. Court is pleased to make an order compelling the defendant to avail the minor JNKO to the plaintiff to enable the plaintiff present the said minor to the Embassy of United States of America on 2/5/2018 for purposes of registration of the said minor.

2. THAT this Hon. Court be pleased to make an order vesting custody of the minor JNKO upon the plaintiff.

3. THAT this Hon. Court is pleased to vest parental responsibility of the minor JNK upon the plaintiff.

4. THAT JWN the mother to the minor shall hereby have some reasonable access to the minor.

5. THAT cost of this application is provided for.

6. THAT OCS, Mwariki Police Station to provide security and ensure compliance of the court orders.

GIVEN under my Hand and the Seal of this Honourable Court this 26th day of April, 2018.

HON. W. K. KITUR

RESIDENT MAGISTRATE

13. In the affidavit he also denies all the allegations made against his relatives regarding the child, stating that this appeal was only brought because he had obtained the orders issued in VOO1. That it is the applicant and respondent who had frustrated his access to the child, forcing him to go to court. That applicant and respondent appeared bent to permanently deny him access to the child. That the consent of 9th May 2018 placed the child with his uncle whom the court determined being a ***"children social worker"*** was possessed with ***"immense personnel to cater and ensure the well-being of the minor."*** That any alteration of that order would render his ***"efforts and plans towards the minor unattainable as it has been … severally [he] was completely denied access of the minor save for the court's intervention"***. He also deponed that as at the time of swearing his affidavit, 1st May 2019 he was in the country ***"having been informed that the 2nd respondent and appellant absconded with the minor from where he was staying with the 2nd respondent."*** That he and his uncle were doing the most they could to get the boy American citizenship. He went on to depone that the appellant was a person of questionable character who had been implicated in criminal activities and her address in the USA was unknown to him. He urged the court to sustain the consent of 9th May 2018.

14. In their submissions the appellant's counsel (Ntabo & Company Advocates) submitted that the child was born at the time the two (2) parties were not married, that he was now four (4) years old, and all actions and directions must be taken with his best interest in mind as envisaged by **Article 53 (2) of the Constitution of Kenya (2010).** That from the annexures by the applicant it was evident that there was no mother figure in the uncle's home, the child was mostly left with the teenage children of the uncle, and the 1st respondent now wanted the child moved from Kitengela, to Kariobangi to stay with his aunt. That the child was closer in consanguinity to 2nd respondent, the uncle had not had any interactions with the child before he was given custody and could not have been the fit person to have custody of the child. That it was in the best interests of the child, as per **Article 3 of the UNCRC Article 4 of the ACRWC, Section 4(2) and (3), Section 83 (1) (e) of the Children Act, Section 88 of the same Act.**

15. The 2nd respondent's submissions were filed by the firm of Munene Chege & Company Advocates on 11th January 2020. She, the mother to the appellant, associates herself with the appellant's submissions. In the submissions the 2nd respondent points out that the 1st respondent filed suit in **Children Case 81 of 2018** where he obtained *ex parte* interlocutory orders dated **24th April 2018**, the 2nd respondent filed Notice **of Motion dated 30th April 2018** seeking the setting aside of the orders of 24th April 2018, but in a "***twist of events"*** the consent

of 9th May 2018 issued vesting the custody of the minor in the custody of the 1st respondent's relatives, uncle. The efforts of the appellant to have the orders issued therein reviewed were frustrated when her application was dismissed. She filed this appeal.

16. It was further submitted that minor was born on 24th September 2015, the 1st respondent was in the USA, and the minor and the mother lived with 2nd respondent when she too moved to the USA the child was in the custody of the 2nd respondent from when the minor was six (6) months old to 24th April 2018 when he was removed from her custody.

17. I was referred to **Section 2 of the Children Act.** It defines a child of tender years as any child below ten (10) years. I was also referred to **Section 83 of the Act**, specifically **(1) (c).** The 2nd respondent relied on **MAA v ABS [2018] eKLR;**

> ***"…The matter is not about the Appellant and the Respondent and their interests are secondary to those of a child. The foregoing provisions require this court to treat the interests of a child as the first and paramount considerations and must do everything to inter alia safeguard, conserve and promote the rights and welfare of a child herein. Acting in the best interest of a child, I am of the view that this welfare will best be served if he remains with his mother the Respondent…"***

> ***"….It is trite that children of tender years, absence of exceptional circumstances, ought to be with their mother. In the case of Githunguri vs Githunguri (1981) KLR, Re S (an infant) [1958] 1 All ER, and Wambwa vs Okumu (1970) EA 578, various Courts upheld the general rule that custody of children of tender years should be vested in their mother unless there are sufficient reasons or exceptional circumstances to depart from this prima facie rule…"***

She also relied on **J.O. v SAO [2016] eKLR**

> ***"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."***

18. It was submitted that the trial court in removing custody from 2nd respondent had only taken into consideration the interests of the parties and not the child. That the child ought to remain in the custody of the 2nd respondent with unlimited access to the parents as they await to arrange for his moving to the USA. That there were no special circumstances that warranted the removal of the child from custody of 2nd respondent.

19. For the 1st respondent, submissions were filed on 11th January 2020 by Wamaasa, Masese, Nyamwange & Company Advocate.

20. It was argued that what the applicant sought is what was being sought in the appeal, and if the application was granted, then the appeal would have been spent. Retracing the applicant's route to this application, counsel argued that it was only meant to circumvent the prosecution of the appeal.

21. Relying **on Section 67 (2) of the Civil Procedure Act** that;

> ***"No appeal shall lie from a decree passed by the court with consent of parties"***, the 1st respondent cited the case of **J M Mwakio vs Kenya Commercial Bank Limited Civil Appeal Number 28 of 1982** and **69 of 1983** and **Purcell vs FC Trigell Limited [1970] 2 All ER 671** the words of **Wynn LJ**

> ***"It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside/rectification of this order looked at as a contract)."***

22. To emphasize on this I was referred to **Brooke Bond Liebig Limited v Mallya [1975] EA 266 & 269** where in the words of *Platt J* the court followed the case done viz;

> ***"A court cannot interfere with a consent judgment except in such circumstance as would afford good ground for varying or rescinding a contract between parties."***

23. The 1st respondent argued further that the consent was already a contract and no ground had been placed before court to set it aside. Further that the 2nd respondent was neither the mother nor in direct care of the minor and pretended to visit the minor then absconded with him against court orders. That the appellant and 2nd respondent had approached the court with unclean hands, fundamentally in contempt of court orders. That the two (2) the appellant and 2nd respondent were bent on frustrating the 2nd respondent's efforts to relocate the minor to the USA.

24. I was referred to **Section 82 and 83 of the Children Act. JO v SAO [2016] eKLR, Section 4(2)** on best interests of the child, **4(3)** on mandate of the judicial and other administrative institutions, and Australian case of **U v U (2002 – 2003) CLR 238 at page 257** on the determination of best interest of the child;

a. Any wishes expressed by the child and any factors that the court thinks are relevant to the weight it should give to the child's wishes while all the time keeping in mind the child's age, maturity and/or level of understanding.

b. The nature of relationship of the child with each of the child's parents and with other persons.

c. The likely effect of any changes in the child's circumstances including the likely effects on the child of any separation from the parents or either of them or any siblings of the child or any other person with whom the child has been and is living.

d. The practical difficulty and entailed possible expense of the child to have contact with the parent and whether that difficulty of expense will substantially affect the child's right to maintain personal relationships and direct contact with both parents on a regular basis.

e. The capacity of each parent to provide for the needs of the child including provision for emotional and intellectual needs.

f. The child's maturity, sex, and background… And any other characteristics of the child that the court considers relevant.

g. The need to protect the child from physical or psychological harm caused or to be possibly caused by being subjected or exposed to abuse, ill treatment, violence or other behaviour that is directed towards the child…

h. The attitude to the child, and to the responsibilities of parenthood, demonstrated by each parent of the child.

i. Any family violence involving the child or a member of the child's family.

j. Any family violence order that applies to the child or a member of the child's family.

k. Whether it will be preferable to have any an order that will be least likely to lead to the institution of further proceedings in relation to the child.

l. Any other factor or circumstance that the court thinks is relevant.

It was also submitted;

"Further, it is more the happiness of the child, not the material prospects which this court should be concerned with. Obviously however, a party's financial position in prospective plans of the minor which in our circumstances the first respondent is desirous of the minor having dual citizenship for subsequent relocation to the United States of America; cannot be ignored entirely. It therefore follows that if a party is so poor or likely to get married and have the minor catered for by a third party as is the case in our circumstances that the appellant and the second responded cannot provide for the child, this in itself is sufficient reason to refuse the prayers sought by appellant as was stated in Re Story (1961) 2 I.R. 328, 345-346 and in Re F, (1969) 2 Ch 238, where it was restated that "a parent who can offer a child good accommodation must, other things being equal, have the edge over one who cannot."

25. The issue for determination is whether;

"The custody of the minor ought to be vested in the 2nd respondent pending the hearing and determination of the appeal herein."

The appeal is based on the following grounds;

1. The Learned Magistrate even after he had initially and without assigning any reasons recused himself from adjudicating upon the issues affecting the parties in the case still went on to recall the file again, without giving reasons whatsoever, and proceeded to hearing and ruling on the matter.

2. The Learned Resident Magistrate erred in law and failed to appreciate very basic principle in children matters that at all times the best interests of the child have to be served.

3. The Learned Resident Magistrate erred in law and fact in dismissing the appellant's application dated the 4th December 2018 without giving a comprehensive and/or concise statement of the case, points for determination the decision thereon and the reasons for arriving at the dismissal.

4. The Learned Resident Magistrate erred in law by deciding the case in favour of respondent when there was over-whelming material facts and evidence presented by the appellant in her application.

5. The Learned Resident Magistrate failed to follow up on the children officer's report the parties had applied by observing erroneously that it is the court and not the parties to follow up on the same and to ensure impartially.

6. The Learned Resident Magistrate misconstrued the law and misapplied the facts on the entire case against the appellant.

7. The Learned Resident Magistrate erred in dismissing the appellant's application and failed to appreciate the appellant's assertions that the minor aged only three (3) years old was being mistreated by the respondent's paternal uncle where the minor was being held.

8. The Learned Resident Magistrate erred by failing to review its orders and grant the actual custody of the minor to the applicant who is the biological mother of the minor and thereby failed to recognize that in the obtaining circumstances the appellant as such as a mother has a first parental responsibility towards the minor.

9. The Learned Resident Magistrate erred by failing to award the actual custody of the minor to the 2nd respondent who is the maternal grandmother of the minor and had the initial actual custody before the appellant went to the USA.

10. The Learned Resident Magistrate erred by failing to order that the minor be returned to the appellant who is now in the country and further failed to appreciate the 1st respondent was due to and actually flew back to USA where he is resident on 27th December 2018.

11. The Learned Resident Magistrate erred in awarding the actual custody of the minor to a person not a party to the proceedings and in utter disregard of the minor's interests and those of the appellant as the biological mother of the minor.

12. The Learned Resident Magistrate failed to analyse each and all the materials and evidence presented and went on to dismiss the appellant's application.

26. I have set out the facts, submissions and authorities cited. I have carefully considered every part of this application. I have in mind the 1st respondent's fears that the orders sought, if granted would spend the appeal.

27. The only guiding principle, even in the interim, is what is best for the child. I have come to the following conclusions;

A. From the material placed before me, and as emanating from the lower court, it is clearly evident that the learned trial magistrate failed to appreciate that the minor is a child, a living human being of tender years whose immediate welfare needed to be safeguarded even as the parties herein fought between themselves as to who was better suited to have actual and legal custody of the child, and whether there was any urgency in removing the child from the his country of birth to the USA.

B. It is a fact that when the child was born the 1st respondent was out of the country where he lives with his parents and siblings who are all USA citizens. At the age of six (6) months the child was left by his mother, with the knowledge and consent of the father, in the custody of the 2nd respondent, the maternal grandmother. So, going by **Section 83** the 2nd respondent had actual custody and care of the child, and he had been in her continuous care and custody up to 24th April, 2018 when the trial magistrate made orders to remove him from that custody. Those orders (VOO1) were made in the absence of the 2nd respondent who was the child's guardian and the applicant, child's mother, removing the custody of the child from the guardian, to the 1st respondent, without hearing the 1st respondent or the mother of the child or considering the welfare of the child. The fact that the police were going to be involved was clear that there was a dispute of sorts. Further and final orders were made on 9th November 2018 removing the minor from the guardian, in the absence of the mother, without hearing the mother, to the custody of other persons and marking the matter as settled.

C. This is not a contractual matter. It cannot be, the most important persons in this child's life are the mother and father, there was no urgency in getting the child a visa and moving the child to the USA, if the two (2) parents who are not married, and who are resident in the USA could not agree here on who was to have custody, the court was required to safeguard the welfare, the wellbeing of the child as they settled their differences. The child is a person, as envisaged by our Constitution with all the rights therein and more so the rights under Article 53.

D. There was no evidence that the child was mistreated by the 2nd respondent, the issue appears to be the dispute as to who between the parents would take the child to the American Embassy for VISA application, and who between them would have custody of the child back in the USA once the child left the country. The child is a Kenya Citizen by birth, his rights are protected by the **Constitution of Kenya (2010)** and the **Children Act**. For as long as the custody dispute was not settled, the removal of the child from its guardian, and into the absent custody of the 1st respondent was in violation of the best interests of the child.

E. So until the appeal is heard and determined, the child will remain in the care and custody of the 2nd respondent.

F. The 1st respondent will have reasonable access to the child and is at liberty to choose, for the assessment and approval by court one of his relatives resident in Kenya to have access to the child on his behalf under the supervision of a Children Officer.

G. The Record of Appeal be filed and served within 60 days hereof

H. Either party is at liberty to fix a date for directions thereafter.

I. The parents must settle the custody issue before either of them can remove the child from Kenya.

J. Costs in the cause.

Delivered, Dated and Signed at Nakuru this 30th day of April, 2020.

Mumbua T. Matheka

Judge

Via Email by consent of:

Munene Chege & Company Advocates

M. G. Ntabo & Company Advocates

Wamaasa, Masese, Nyamwange & Company Advocates

Edna Court Assistant