



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 34 OF 2016**

**CONSOLIDATED WITH CIVIL APPEAL NO. 27 OF 2015**

**E.I.K.....1<sup>ST</sup> APPELLANT**

**J.N.I.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**S.K.....RESPONDENT**

***(Being an appeal against the Ruling of the Honourable Lucy Gitari made on 4<sup>th</sup> March 2016***

***in Nairobi Children's Case No. 1470 of 2014 in the matter of N.M. (minor))***

***and***

***(Being an appeal against the Ruling of the Honourable A. Nyoike made on 5<sup>th</sup> March 2016***

***in Nairobi Children Case No. 1470 of 2014 in the matter of N.M. (minor))***

**JUDGMENT**

1. When this cause was filed before the Children Court at Nairobi on 12<sup>th</sup> November 2014, the child herein, N.M., was aged 4. Her parents were C.M.M. (the father), who died on 13<sup>th</sup> May 2014, and M.M. (the mother), who died on 17<sup>th</sup> August 2014. The cause was filed by the appellants E.I.K. and J.N.I. who are the father and mother, respectively, of the child's late mother. It was bought against the respondent S.K. who is the father of the child's late father. The child's parents were buried in Makueni in the home of the respondent. They were living in Nairobi before they died.

2. The appellants sought the custody, care and protection of the child, and a permanent injunction to restrain the respondent from taking away the child from them. Along with the cause was an application dated 12<sup>th</sup> November 2014 seeking the protection, custody, care, and control of the child, and that the respondent be restricted from interfering with the child's peace, wellbeing and custody. It was claimed that, during the burial of mother of the child, the respondent forcefully took the child and had kept her away from the appellants.

3. The respondent filed a defence and counterclaim, and opposed the cause and the application. He sought to be given custody, care and protection of the child, and the appellants be given visitation rights.

4. On 5<sup>th</sup> March 2015 the trial court, in a reserved ruling, granted custody, care and control of the child to the appellants. The respondent was aggrieved by this decision. He appealed to this court in **Appeal No. 27 of 2015**.

5. The respondent filed an application dated 16<sup>th</sup> June 2015 seeking that he and the family of the late C.M.M. be allowed access, visitation rights and the right to stay with the child over the weekends; he be allowed to collect the minor at school or any other place convenient to the appellants every Friday; and that the Children Officer be directed to report on the welfare and well-being of the minor in school and in the appellants' custody. He was claiming that, among other things, he had been living with the child before custody was granted to the appellants; that he had since not seen the child; and had not been able to know how the child was doing at school, and so on. The application

was opposed by the appellants. On 4<sup>th</sup> March 2016, a separate court gave a ruling and found that, just like the appellants, the respondent had the right to access the child for the purpose of bonding and maintaining the family relationship. The respondent was granted visitation rights on alternative Saturdays during the school term from 10.00am to 4.00pm. The child was to be picked from the Children's office at Ruiru where the appellants were to drop her. The respondent was to have the child for the first half of the school holidays and the appellants to have the child during the second half. The appellants were aggrieved by these orders and filed **Appeal No. 34 of 2016** to have them set aside. They claimed that the orders had been given without them and the child being given opportunity to give evidence; the court had erred by relying on the report of the Children Officer Mbooni East which had excluded the harsh conditions of the home of the respondent; and the court had not considered the fact that the respondent lived alone and could not take care of the child who was a minor of female gender.

6. Both appeals were consolidated. Mr. Njanja appeared for the appellants and Mr. Ndubi for the respondent. Counsel filed written submissions on the appeals. I have considered the submissions.

7. It is the duty of this court to reconsider the evidence tendered before the trial court and to determine whether the findings made were supported by the evidence (**Selle –v- Associated Motor Boat Company [1968]EA (23)**). In so doing, the court has to bear in mind that it did not see and hear the witnesses who testified before the trial court. Secondly, an appellant court should not interfere with the decision arrived at by the exercise of discretion by the lower court unless it is satisfied either that the lower court had misdirected itself in some matter and as a result arrived at the wrong decision, or that it is manifest from the case as a whole that the lower court was clearly wrong in the exercise of its discretion and that, as a result, there was injustice (**Choitram –v- Nazari [1984] KLR 327**).

8. It is regrettable that this dispute over the custody, care and control of the child herein has not been finally determined since 2014. The delay has been occasioned by the parties who chose to appeal to this court challenging the determination on interlocutory applications, instead of setting down the dispute for substantive hearing and determination on merits. Such determination would still attract an appeal to this court. I make this observation because, the respondent has not sought the custody of the child. Custody was given to the appellants. The appellants are challenging visitation and access rights. On the face, that challenge would be unreasonable. This is because the child's parents died. Her closest relatives are the grandparents on either side. It was correctly observed by the trial court in the ruling following the respondent's application that either grandparents have the right to access the child for purposes of bonding and maintaining the family relationship. I will go further to state that the grandparents on either side have the responsibility to ensure that the rights of this child under **Article 53(1)** of the Constitution are afforded.

9. Both trial courts and counsel in their written submissions acknowledged that, in dealing with this matter, the best interests of the child have to be promoted. This is what **Article 53(2)** of the Constitution and **section 4(2)** of the **Children Act (Cap. 141)** command. The parties need to be aware that under **section 76(2)** of the **Act**, where there is dispute regarding the upbringing of a child, the court shall have regard to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child, and therefore prejudicial to its best interests.

10. I have considered the facts of this case. I determine that what is in the best interests of the child is to commit, which I hereby do, the matter back to the trial court, with the directions that it moves with due speed to hear all the parties and finally determine the questions of custody, access, care and upbringing of this child. The orders already made shall remain, unless varied by the trial court, until the matter is heard and determined.

11. In the meantime, either appeal is dismissed with an order that each party bears own costs.

**DATED and DELIVERED at NAIROBI this 25<sup>TH</sup> day of JULY, 2019.**

**A.O. MUCHELULE**

**JUDGE**