REPUBLIC OF KENYA

IN THE HIGH COURT OFKENYA

AT KAKAMEGA

CIVIL APPEAL NO. 38 OF 2019

JAM.....APPELLANT

VERSUS

FOK.....RESPONDENT

JUDGMENT

1. The appeal herein arises from an order by the Resident Magistrate's Court in Kakamega CMC Children Case No. 18 of 2015, made on the 25th February 2019, in which the trial court reinstated an *ex-parte* judgment entered on the 1st August 2017, granting the respondent custody of two minors, namely KK and PO.

2. The appellant aggrieved by the trial court's decision, lodged an appeal, vide a memorandum of appeal dated 19th March 2019. In her memorandum of appeal, she raised nine (9) grounds of appeal which are as follows:

(a) That the learned magistrate erred in law and in fact in reinstating the *ex parte* judgment without giving the appellant a fair hearing and hence condemning the appellant unheard;

(b) That the learned magistrate erred in law and in fact in reinstating the *ex parte* judgment that gives custody of the minors to the respondent and yet the said minors are of tender age;

(c) That the learned magistrate exhibited bias from the onset of the case before him being eager to grant custody of the minors herein to the respondent without any justifiable cause or reason;

(d) That the learned magistrate erred in law and fact in disallowing the appellant's application dated 1st March 2019 that sought review of the said *ex perte* order that reinstated the judgment herein without any justifiable cause and or reason;

(e) That the learned magistrate erred in law and fact by disallowing the interlocutory applications dated 3rd March 2017 filed by the appellant seeking interim maintenance on part of the appellant against the respondent without any justifiable cause and or reason;

(f) That the learned magistrate erred in law and fact in declining to deliberate on an interlocutory application that sought interim maintenance in favour of the minors in total disregard of Article 53(e)of the Constitution and Section 76 of the Children's Act and insisted to proceed with the main suit and as such causing prejudice to the minors;

(g) That the learned magistrate exhibited bias by failing to record proper and adequate proceedings as submitted by advocate for the appellant had selectively recorded proceedings in favour of the respondent's advocate; and

(h) That the learned trial magistrate exhibited bias in maintaining and keeping scanty court record.

3. She prayed that the judgement delivered on the 25th February 2019 and orders made on the 2nd August 2017 be set aside and the matter be heard afresh.

4. The primary suit herein was instituted by the respondent on the 8th May 2017. In his pleadings, the respondent sought legal custody of the minors stating that the appellant had in 2015 left her matrimonial home and had since denied the respondent access to the minors. The respondent filed the suit simultaneously with an application dated 8th May 2017 seeking for interim orders of custody, pending hearing of the suit. The appellant through her advocate filed a memorandum of appearance on the 20th May 2017. She, however, did not file a defence. The matter was then fixed for hearing on the 30th May 2017, when the advocate for the appellant was absent, and sought for an adjournment. The

same was granted, and the matter was fixed for hearing of the main suit on the 4th July 2017, when it proceeded to close of both case in the absence of the defence advocate.

5. On the 1st August 2018, judgment in the suit was delivered prompting, the appellant to file the application dated 3rd August 2017, in which she sought to have the judgment set aside and that she be granted leave to file the statement of defence. When the matter came up for hearing on the 5th September 2017, the court, on its own volition, stated:

> "This matter is taking the wrong direction, yet it involves children and it will not be in the best interest of the children. I direct that the matter proceeds for hearing of the main suit the defendant is granted leave to file defence and all requisite documents and serve the same on the plaintiff within the next two weeks mention on 19/07/2017 to confirm the compliance and fix the date."

6. The matter came up for hearing on the 19th July 2017, and the appellant's advocate made an application for interim maintenance of the minor pending hearing and determination of the case. The same was declined by the trial court on the basis that it dispensed with the interlocutory applications to allow the main issue of custody be determined expeditiously.

7. On the 21st November 2017, when the matter came up for hearing, Ms. Akinyi holding brief for the appellant's advocate, submitted to court that the advocate had abandoned the issue of interim maintenance and prayed for a hearing date of the main suit. On the 19th December 2017, the respondent appointed an advocate and for that reason the matter did not proceed despite the presence of the defence advocate. The matter then came up for hearing on the 22nd May 2018 when the appellant's advocate submitted that the parties were negotiating and thus prayed for another date for hearing. On the 28th August 2018 the matter was adjourned on the application of the appellant's advocate on the grounds that he was engaged in another matter. The same was also adjourned for the same reason on the 15th January 2019 when the matter was adjourned to 5th February 2019. On the 5th February 2019 an adjournment was granted on the instance of the appellants advocate on the ground that the parties had not complied. The same was slated for hearing on the 25th February 2019 when at 2.20 pm, the matter was called out, in the presence of the respondent's advocate and in the absence of the appellant's advocate, and the judgment entered on the 1st August 2017 was reinstated at the instance of the respondent's advocate.

8. The appellant aggrieved with the orders filed an application dated 1st March 2019 seeking for orders to set aside the orders made on the 25th February 2019 and for interim maintenance. The same was via a ruling delivered on the 12th March 2019 and it is on its basis that the appeal is made.

9. The duty of the first appellate court was explained in the case of *Kiruga vs. Kiruga & Another* [1988] KLR 348**,** where the Court of Appeal observed that;

> "An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution."

10. The same duty was emphasized in *Abok James Odera t/a AJ Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR as follows: -

> "On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

11. This is a first appeal to the High Court. It is, therefore, an appeal on both facts and the law. The court has a duty to consider the evidence adduced before the trial court in its entirety; the grounds of appeal; the judgment of the learned trial magistrate and the written submissions filed by both parties together with all the authorities cited.

12. The issues that I have flagged out for determination are:

> a. Whether the Trial magistrate was biased in handling of the primary suit; and
>
> b. Whether the appellant has provided sufficient grounds for setting aside orders made on the 25th August 2017 and 25th February 2019.

13. It should be noted that I have belaboured to give an account of the proceedings of the primary suit based on the claims of bias on the part of the trial magistrate. It is the appellant's contention that the learned magistrate exhibited bias by failing to record proper and adequate proceedings as submitted by advocate for the appellant and selectively recorded proceedings in favour of the respondent's advocate and that he exhibited bias in maintaining and keeping scanty court record.

14. The issue of bias was discussed by the Court of Appeal in *Lubna Ali Sheikh Abdalla Bajaber & Another vs. Chief Magistrate's Court, Mombasa 2 Others* [2018] eKLR, where court held that:

> "On the issue of bias, the learned Judge found that if indeed there was bias, that was an issue to be raised with the concerned

Magistrate in the first instance. The appellant had not done so. What is bias? An apt definition of 'bias' can be deciphered from the following passage from the judgment of the Court of Appeal in England in Medicament and related Classes of Goods (2001) 1WLR 700 where the court expressed:

> "Bias is an attitude of mind which prevents the Judge from making an objective determination of the issues that he has to resolve. A Judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of the prejudice in favour of or against a particular witness, which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him."

Nearer home in Attorney-General v. Anyang' Nyong'o & Others [2007] 1 EA 12, the court set the test for bias as follows:

> "The objective test of 'reasonable apprehension of bias is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the public that a Judge did not (will not) apply his mind to the case impartially ["] Needless to say, a litigant who seeks [the] disqualification of a Judge comes to Court because of his own perception that there is appearance of bias on the part of the Judge. The Court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case..."

The Magistrate against whom allegations of bias were being made was not the one who had heard the case in which the impugned judgement was made. Nor was it demonstrated that she made other orders against the appellants which would have manifested bias on her part. The accusation of bias was based on the fact that the Magistrate declined to exercise her discretion in favour of the appellants by not allowing them an adjournment. Granting or denying an adjournment is purely an act of discretion by the presiding Magistrate or Judge and unless it is demonstrated that such discretion was not exercised judicially or in a judicious manner, within the parameters already defined in law and practice, then the learned Judge could not interfere with the same. We are not persuaded that the allegations of bias were well founded."

15. In the instant suit, the appellant has not in any way stated the instances where the said bias allegedly occurred. It should be noted that the trial court, from the perusal of the file of the primary suit, has kept an impeccable account of the proceedings of the court. It must be noted that the times when advocate for the appellant attended court are well recorded and so are his submissions. It should also be noted that the issue of bias was not at any time raised by the appellant. The appellant herein faults the trial magistrate for failing to hear and determine an application for interim maintenance yet, it is the same advocate who, through a colleague, submitted that he had abandoned the said application and wished to proceed to the hearing of the main suit. The other occasion was where the court did not adjourn the matter which as stated above was purely discretionary. It is thus my humble opinion that the allegations of bias are not well founded and as such the court ought to dismiss the said grounds of appeal.

16. It is the appellant's submission that the orders issued on the 2nd August 2017 and 25th February 2019 have condemned the appellant unheard. She stated in her submissions that the absence of heradvocate ought not to be visited on her, an innocent litigant and that the court lacked jurisdiction to reinstate the judgment. It should be noted from the proceedings that, it is clear that the matter was came up for hearing severally when the advocate for the appellant was either unable to proceed, for one reason or another, or was absent.

17. Section 3A of the Civil Procedure Act provides that:

> "Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

While Order 12 Rule 7 of the Civil Procedure Rules 2010 provides that:

> "Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just."

18. In *Richard Ncharpi Leiyagu vs. Independent Electoral Boundaries Commmission & 2 Others* [2013] eKLR the Court of Appeal held that:

> "We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice … The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality"

19. In *Esther Wamaitha Njihia & 2 Others vs. Safaricom Limited* [2014] eKLR the court held that:

> "The court has the discretion to set aside ex parte judgment .The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can

reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali. It also goes without saying that the reason for failure to attend should be considered."

20. The same was adopted in *Gideon Mose Onchwati vs. Kenya Oil Company Limited and Another* (2017) eKLR where Aburili J cited various case law and stated as follows: -

> "Setting aside an ex parte judgment is a matter of the discretion of the court, as was held in the case of Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd where the court citing relevant cases on the issue held inter alia: -
>
> "The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo) ...
>
> In Shah vs Mbogo and Ongoma vs Owota the Court held that for such Orders to issue inter alia the court must be satisfied about one of the two things namely: -
>
> a. either that the defendant was not properly served with summons; or
>
> b. that the defendant failed to appear in court at the hearing due to sufficient cause."

21. So was there sufficient cause to set aside the orders issued herein? Mativo. J in *Auto Selection (K) Ltd & 2 Others vs. John Namasaka Famba* [2016] KLR, stated that:

> "Sufficient cause is an expression which has been used in large number of statutes. The meaning of the word, "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which then the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of the case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the Court exercises discretion, it has to be exercised judiciously."

22. The court emphasized that sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. Thus, that an applicant must demonstrate that he was prevented from taking the steps in question by a sufficient cause. The same was reiterated in the case of *Wachira Karani vs. Bildad Wachira* [2016] eKLR, where the Court stated as follows;

> "The fact that setting aside is a discretion of the court is not disputed. What is contested is whether the applicant has demonstrated "sufficient cause" to warrant the exercise of the courts discretion in its favour. I again repeat the question what does the phrase "Sufficient cause" mean. The Supreme Court of India in the case of Parimal vs Veena observed that: -
>
> > "sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."

23. The appellant's advocate in his application to set aside the orders stated that his absence was due to late service upon him by the respondent's advocate. He stated that on the said date he was engaged in Eldoret High Court where he was proceeding on a matter that had been scheduled on that date. It should, however, be noted that from the record it is clear that the date for hearing on the 25th of February 2019 was fixed by consent on the 5th February 2019 in the presence of the respondent's advocate and one Ms. Rauto who was holding brief for the appellant's advocate. The appellant's advocate cannot, therefore, say that he was served with the hearing notice late yet he was represented in court when the hearing date was fixed. It is obvious from the record that the conduct of the appellant's advocate has been greatly prejudicial to the appellant. It is obvious that he seemed to have been too busy handling other matters at the detriment of the appellant owing to the numerous times he adjourned the matter for being engaged in other courts. The appellant's advocate's conduct has also occasioned a delay in prosecuting the matter at the detriment of the parties involved. It is, therefore, my opinion that the applicant did not furnish sufficient cause to warrant setting aside of the impugned orders.

24. However, it should be noted that the suit herein involves minors, now aged 9 and 12 years. Section 4 (2), (3) and (4) of the Children Act stipulates 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.

(4) In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity."

25. The Constitution of Kenya 2010 requires that in all matters concerning children, the best interest of the child shall be of paramount importance. Article 53(2) provides:

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

26. In *MAA vs. ABS* [2018] eKLR the court observed that:

"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."

27. It should be noted that at the time of filing this suit the minors were children of tender years. It is a trite and commonsensical principle that the physical custody of a child of tender years should be with the mother unless the mother is shown to be an unfit person. In *B vs. M* [2008] I KLR 531, the court held:

"Section 83(1) of the Children Act provides matters which the court shall have regard to in determining whether or not a custody order should be made in favour of the applicant. I have considered the same and I have called for and received a report from the District Children's officer Mombasa which ends by stating as follows: -

"Your Lordship, the children do not seem to lack any basic needs other than the love of both parents as they both live with one parent each."

"The officer has visited and talked to each child. AM is living with the father. He is 7 years old while DW is living with the mother at their maternal grandparent's home. Each of them is comfortable according to the report. I do not feel in such a situation where all things seem to be equal, the age of the children is the deciding factor. The children are still within the ages that dictate that they live with their mother unless the mother is found to be hopelessly unable to take care of them and to give them the moral upbringing required".

28. In *DK vs. JKN* [2011] eKLR the court held:

"The general rule is that, where the custody of a child of tender years as defined by section 2 of the Children Act is in issue, the mother of the child should have the custody unless special circumstances are established to disqualify the mother from having the custody of such a child. The child that is the subject of these proceedings is a child of young and tender age. She is a girl of nine (9) years of age. In Midwa vs. Midwa [2002] 2EA 453 at page 455 the Court of Appeal had this to say:

"*It i*s trite law that, prima facie, other things being equal, children of tender age should be with their mother, and where a court gives the custody of a child of tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule, see Re S (an infant) [1958] 1 ALL ER 783 at 786 and 787 and Karanu vs. Karanu [1975] EA 18. The learned judge, in our view, did not correctly direct herself on the principle that in cases of custody of the children the paramount consideration is their welfare. Moreover, as the record shows, there were no exceptional circumstances shown to justify depriving the mother of her natural right to have her children with her."

In the present application, it was evident from the facts of the case that the subordinate court failed to take into consideration the applicable law in regard to custody of children before he reached the determination granting custody of the child to the respondent. The respondent did not place before the trial court any special circumstances that would deny the appellant the prima facie right to have custody of a girl child of young and tender age.

In the premises therefore, this court is of the considered opinion that the appellant established that she would suffer substantial loss if the order of the subordinate court granting custody of the child to the father (the respondent) is not stayed. The subordinate court did not take into consideration the best interest of the child when it reached the decision denying custody of a girl child of young and tender years to the mother. That decision of the subordinate court is stayed pending the hearing and determination of the appeal."

29. In *JKW vs. MAA* [2015] eKLR the court held:

> "In addition, the general principle that has been approved by our courts is that where custody of a child of tender years is in issue, is that the mother should have the custody unless special circumstances are established to disqualify the mother from having the custody of such child.... Under section 2 of the Act, "child of tender years" means a child under the age of 10 years. The children subject to these proceedings are children of tender years.
>
> The testimony before the subordinate court largely focused on the events that led to the separation between the appellant and the respondent. The consequence of the separation was that the respondent left the matrimonial home with the parents. The appellant has not shown or demonstrated that there are exceptional circumstances that would entitle the appellant as the father of the children, to have custody of the children."

30. In *PWM vs. CMM* [2015] eKLR, the court held: -

> "In Sospeter Ojaamong vs. Lynnette Amondi Otieno Court of Appeal Civil Appeal No. 175 of 2006 the court held:
>
> > "The principles that guide the court in custody of children are that except where exceptional circumstances exist, the custody of such children should be awarded to the mother, because mothers are generally best suited to exercise care and control of the children.
> >
> > The exceptional circumstances would include if the mother is unsettled, has taken a new husband or her living quarters are in a deplorable state"

31. The Court of Appeal in *JO vs. SAO* [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."

32. In the instant suit, the court granted custody of the minors, who were by then children of tender years, to the respondent, their father. It should be noted that no reason was advanced by the respondent as to why the appellant should not be granted custody of the children save for the allegation that he was their father and that he had been denied access to them. From the proceedings, it is impossible to tell how the minors herein are staying and who is taking care of them in the absence of their mother, while in the custody of their working father. These issues will only be addressed if the matter was to full hearing and the appellant is allowed to ventilate her case. It is, therefore, my opinion that it is in the best interest of the minors herein that the matter be heard and determined on merits.

33. In an upshot. I hereby allow the appeal herein, and set aside the orders made on the 2nd August 2017 and 25th February. The matter shall be reverted to the Children's Court for retrial by a magistrate other than Hon. Malesi, with directions that the main suit for custody and maintenance be determined within 90 days from delivery of this judgment. Further, it is in the best interest of the minors that the current *status quo* be maintained pending hearing and determination of the suit. This appeal was occasioned by the dilatoriness of the appellant or her advocate; I shall, therefore, award costs thereof to the respondent.

34. Should any party be aggrieved by the orders that I have made here above, there is liberty to appeal to the Court of Appeal within twenty-eight days.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 15TH DAY OF AUGUST, 2019.

W MUSYOKA

JUDGE