



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**CIVIL APPEAL NO.26 OF 2015**

**P.M.O.....APPELLANT**

**VERSUS**

**S.A.W.....RESPONDENT**

**JUDGMENT**

**(Being an appeal from the Ruling of Hon. F.K Munyi (Ag.PM) delivered on 17th March 2015 in Nairobi Children's Cause No.1555 of 2014)**

The Appellant herein filed suit in the children's court against the respondent seeking custody of the minor D.H.O born on 7th April 2003 as well as leave of court to travel with the said minor to the USA. It was his case that he had a relationship with the respondent in the year 2003 and the minor in issue herein was a product of the said relationship. He stated that he had been in care and custody of the minor herein until the year 2007 when he left for the United States of America leaving the minor in custody of his brother. The respondent later took custody of the minor from the appellant's brother, and later left the minor in the custody of her sister when she (respondent) left for the United States of America in 2010. The appellant stated that it would be in the best interests of the minor if he is placed under his care and custody with the respondent being granted reasonable access to the minor as both biological parents are residents of the USA.

The respondent opposed the application stating that the appellant herein had abdicated his duty as the minor's biological father and that it was she the respondent who took care of all his needs. She further stated that she left the minor in able and caring hands of her sister and her mother as she sought greener pastures in the USA with the intention of bringing the minor to live with her in the USA once she settled. She stated that she was not opposed to the appellant having visitation rights and staying with the minor over his school holidays once the minor moves to the USA as well.

The appellant together with the plaintiff filed Notice of Motion dated 1st December 2014 seeking for custody of the minor and permission to travel with him to the USA.

In the ruling issued pending the hearing and determination of the suit, the trial court held, *inter alia*, that; both parties shall have joint legal custody of the minor D.H.O; the defendant/respondent shall have the physical custody, care and control of the minor; the plaintiff shall pay the minor's school fees and related expenses; both parties to share the minor's medical expenses when need arises.

It is this ruling that aggrieved the appellant giving rise to this appeal. In his memorandum of appeal filed on 18/03/2015, he stated that the appeal was based on grounds, *inter alia*, that the learned magistrate erred in law and fact by; displaying open bias in preferring the evidence of the responding and ignoring appellant's evidence; ignoring expert recommendations of the children's officer; granting the respondent orders not sought for; failing to find that the minor had been abandoned by the respondent and misdirecting herself by taking into account extraneous matters; failing to consider that the minor herein is a boy child approaching his teenage years and thus in need of the guidance of the father who is ready and willing for all his needs. he prayed that the ruling by the trial court be set aside and in its place an order be entered granting him custody, care and control of the minor with the respondent being granted reasonable access to the minor.

The appeal was disposed by way of written submissions. It was submitted for the appellant that there was no basis for granting the custody of the minor to the respondent who had not prayed for the same. Further, that despite being granted custody the respondent has failed to take actual custody of the minor who still lives with his maternal aunt. The appellant reiterated that there was no basis for the court denying him custody as at no time was it suggested that he was ill suited as a parent. Lastly, it was submitted that since both parties reside in the USA, if he were granted custody of the minor, the respondent would not suffer any prejudice as can easily access the minor if she so wishes.

This being a first appeal, this court is cognisant of its mandate to reconsider the evidence, re-evaluate the same and arrive at its own conclusion while keeping in mind the fact that it neither saw nor heard the witnesses who testified before the trial magistrate's court (**SELLE -V- ASSOCIATED MOTOR BOAT CO.LTD (1986) EA 123**). I have perused the trial court's file and in particular the evidence adduced therein. Under Article 53(2) of the Constitution of Kenya 2010, every court dealing with every matter concerning a child is mandated to consider a child's best interests as being of paramount importance (**N-v-K [2008] 1 KLR (G&F) 518**).

As correctly pointed out by the trial magistrate, none of the parties herein had been living with the child. The child previously lived with a paternal uncle and since 2010 with the maternal aunt. I further note that the minor was interviewed by the trial court wherein he stated his unwillingness to accompany the appellant herein to the USA. **Under Section 83 1(d) of Children Act 2001** the wishes of the child shall be taken into account in determining the best interests of the child. I am of the view that taking into account the totality of the evidence adduced in court, the trial court correctly guided itself in arriving at its decision. It is the best decision the court could arrive at taking into account the welfare and wishes of the minor and the fact that neither of the parents currently stay with the minor as both had relocated to the USA in search of greener pastures.

It should also be noted that this was a ruling on an application and the main suit is still pending determination in the Children's court. In the case of **K-v-W (2008) 1 KLR (G&F) 525**, the court held that;

***" Ordinarily, where there is a dispute over the custody of a child, just like a dispute over ownership or parenthood of a child and also where an adopting order is yet to be made, no party should be allowed to take the infant or child affected outside the jurisdiction of the court."***

In view of the foregoing the appeal is dismissed with costs.

**DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2016**

**M.W. MUIGAI**

**JUDGE**

***In the presence of:***

***Ms. Velo holding brief Mr. Kadima for the Defendant***