REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Appeal 143 of 2009

H.S.A……..……..……..DEFENDANT/APPELLANT
-AND-
A.F.F…….……...…..…… PLAINTIFF/RESPONDENT
(*An Appeal from the Judgment of Senior Resident Magistrate* ***R. Ondieki*** *dated 29th July, 2009 in Tononoka Children's Court Civil Case No. 145 of 2009***)**

JUDGMENT

The appeal relates to a thirteen-year-old male child, ***F.M***, whose parents, ***H.S.A*** (appellant) and one ***M.F.H*** (who lives at Jeddah in Saudi Arabia), are divorced. The child's father is the younger brother of the plaintiff/respondent, and her interest in this matter is that of a relative to the child (who is also holding a power of attorney from M.F.H).

The issue before the Children's Court was, the management of affairs in relation to the child, while the child is in his mother's custody. The plaintiff was aggrieved and pleaded, ***inter alia,*** that –

(i) ***there is little parental control or guidance being exercised over the child;***
(ii) ***it would be in the best interests of the child if he were transferred to St. Kevin's Hill School, Voi.***

The learned Magistrate, in his judgment of 29th July, 2009 set out some of his findings as follows:

(a) ***Before divorce took place between*** *M.F.H* ***and the defendant/appellant, the plaintiff/respondent used to stay with the defendant/appellant, and she used to meet all expenses of the child, on behalf of her brother who was staying abroad; and the child at the time was enrolled at K Academy; but now the defendant/appellant has removed the child from that institution to "an undisclosed place".***

(b) ***The Plaintiff/Respondent and her brother have now arranged for the child's admission to St. K Academy in Voi, a boarding school;***

(c) ***The marriage between*** *M.F.H* ***and the defendant/appellant had taken place in*** *1990;* ***separation took place in*** *2008****; the couple had one child,*** *F.M****; the said*** *M. F.H* ***has been a driver in Saudi Arabia for the last 9 years; the defendant/appellant is a housewife;*** *M.F.H* ***used to send money for the upkeep of the child; but thereafter, the defendant/appellant removed the child to a different place;***

(d) *M.F.H* ***was praying that he be granted custody of the child, to enable him to have the child enrolled in a boarding school;***

(e) ***The defendant/appellant testified that K Academy was a costly institution, and she did not have enough money to pay in fees; so she removed the child from there and enrolled him in a different school; and she has been able to pay the fees from moneys which she earns from selling foodstuff;***

(f) ***The defendant/appellant asked that she be entrusted with the custody of the child.***

The learned Magistrate recorded that "the defendant is not in a meaningful employment to meet the needs of the child adequately".

The learned Magistrate went on to state:

"Yes, they [*M.F.H* ***and defendant/appellant] may have had their matrimonial problems, but of major consideration here is the interest of the child. The child needs better education because one of the parents is capable of providing."***

From that statement of policy, the learned Magistrate went on to make orders as follows:

"1***. Legal and actual custody of the issue herein is vested [in] the father,*** *M.F.H.*

"2. The defendant to have unlimited access to the child.

"3. The defendant to have custody of the child during the weekends and during school holidays.

"4. The child to be enrolled at St. Kevin Hill School, Voi from third term, 2009.

"5. The father of the child to be responsible for school fees, medical [expenses] and clothing.

"6. The defendant to have custody of the child for two weeks during the holidays while the plaintiff shall have the rest of the weeks during the holidays.

"7. Any aggrieved party at liberty to apply."

The foregoing orders aggrieved the defendant/appellant, and she appealed, stating her grounds in the Memorandum of Appeal (dated ***3rd August, 2009***) as follows:

(i) The learned Magistrate erred in law and in fact, in awarding the legal and actual custody of the minor child to the father when he had not prayed for such custody;

(ii) The learned Magistrate erred in law in failing to hold that the custody of a minor child should be awarded to the mother, unless there are exceptional circumstances disentitling the appellant from having custody;

(iii) The learned Magistrate misdirected himself on the evidence adduced;

(iv) The learned Magistrate erred in law and in fact, in failing to take into account the evidence given by the appellant and her witness;

(v) The learned Magistrate erred in law and in fact in issuing a Judgment in the matter, when it was the respondent's application which proceeded for hearing.

The appellant's prayers were that –

(a) the appeal be allowed with costs, by setting aside the order awarding legal and actual custody for the minor child to *M.F.H****, and making the award to the appellant;***

(b) the Court do order the respondent to provide for the needs of the minor child.

Learned counsel began from the well known trial principle, that a party is bound by that party's pleadings, and urged that the plaintiff/respondent's prayer in the pleadings was that "An order [be made] that the child be released to attend school at St. Kevin's Hill School, Voi"; the father of the child had not sought custody of the child; but it was the

appellant herein who, from the very beginning, had sought legal custody of the child. Counsel urged that there was no basis upon which the Court of first instance awarded custody to ***M.F.H***.

Counsel next contested the propriety of awarding custody to ***M.F.H*** instead of the biological mother, the appellant herein, when there was no exceptional circumstance disentitling the appellant from having custody. The significance of this point took a higher level, counsel submitted, in the light of the recorded evidence that ***M.F.H*** lived abroad, in Saudi Arabia; at the time of hearing the matter at the trial Court (***6th May, 2009 – 21st July, 2009***), the said ***M.F.H*** had last been in Kenya in ***2007***. Counsel noted that it also emerged from the evidence that from the time the child was born, he had always been residing with the appellant, until the divorce, which took place in ***November, 2008***, and thereafter the appellant herein continued raising the minor child.

Learned counsel submitted that it is a general rule guiding judicial practice, that "custody will always be given to the mother, unless she is disqualified by exceptional circumstances". Counsel urged that no such circumstances were proved.

Counsel invoked s. 83(1) of the Children Act, 2001 (Act No. 8 of 2001), which provides that:
"In determining whether or not a custody order should be made in favour of the applicant, the Court shall have regard to –

(a) the conduct and wishes of the parent or guardian of the child;

(b) the ascertainable wishes of the relatives of the child;

(c) ……

(d) the ascertainable wishes of the child;

(e) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;

(f) the customs of the community to which the child belongs.

(g) ……..."

Learned counsel contested the trial Court's orders because there is no evidence that that Court gave any consideration at all to the foregoing statutory criteria.

Counsel questioned the reference by the learned Magistrate to ***finance,*** as a factor in ascertaining the best interests of the child: finance was not the only criterion of best-interest; it was no less relevant that the appellant herein was the biological mother who had continually raised the child since birth; and moreover, counsel urged that it was not in the best interest of the child to award custody to "an absentee parent".

Learned counsel submitted that there was no basis for the order that the child should be taken to boarding school at St. Kevin's Academy, Voi: this order was arrived at by overlooking the evidence called for the appellant herein; the appellant had called the principal of the educational institution currently attended by the child, and he indicated that the child had made remarkable progress.

Counsel urged that the question of ***health*** had not weighed at all in the learned Magistrate's assessment of the best interests of the child; the appellant gave evidence that the child often fell sick – and so a boarding school would not be appropriate for him.

Counsel submitted that a case-management error had afflicted the whole trial process: for it was not made clear whether what was being heard and determined was the main suit, or the plaintiff/respondent's application by Chamber Summons of ***28th April, 2009***.

A check on the record shows that the trial Court drew no line between the main suit and the application of ***28th April, 2009***, and proceeded to deliver a Judgment, which suggests that the Court believed it was hearing the main suit.

The proceedings show that on 29th April, 2009, the learned Magistrate, ***Ms. R. Makungu*** certified the

plaintiff/respondent's Chamber Summons of ***28th April, 2009*** as urgent, and set it for hearing on ***6th May, 2009***; on 6th May, 2009 hearing was re-scheduled to ***18th May, 2009***; on ***18th May, 2009***, hearing of the Chamber Summons of ***28th April, 2009*** was re-scheduled to ***3rd June, 2009***; on ***3rd June, 2009***, learned counsel ***Mr. Mwakisha***, for the plaintiff/respondent, applied that the said application be heard by ***viva voce*** evidence – but he said nothing about the main suit, and the Court made no orders or gave any directions about the main suit. On that occasion, the appellant herein, who was acting in person, rightly understood the matter before the Court to be the plaintiff/respondent's application by Chamber Summons of ***28th April, 2009;*** and the appellant insisted that the Court be guided by the ***affidavits*** filed in relation to the Chamber Summons. Without resolving that point by giving directions, the learned Senior Resident Magistrate, ***Mr. Ondieki***, only assigned ***15th June, 2009*** as the date of hearing.

Hearing, indeed, took place on ***15th June, 2009***. But ***what*** was heard? The application or the main suit? Evidence was taken from PW1, PW2 [***M.F.H***] (on ***16th July, 2009***), DW1 [appellant herein] (on ***16th July, 2009*** and ***21st July, 2009***), DW2 (on ***21st July, 2009***), and the hearing of the main suit was closed, and Judgment delivered on ***29th July, 2009***.

By the Court proceeding as if it was going to hear the plaintiff/respondent's Chamber Summons of 28th April, 2009 but ending up hearing the suit itself, learned counsel has urged, the appellant herein was significantly prejudiced – because no reference was ever made to her affidavit evidence which was part of the package accompanying the Chamber Summons. Counsel urged that this mix-up in the trial process is a ground for setting aside the judgment and orders of the trial Court.

Counsel urged that the trial Court could only have ascertained the best interests of the child after considering all the evidence, in the context of the relevant provisions of the law.

Learned counsel concluded his submissions by citing s. 6(1) of the Children Act, which provides that:

> ***"A child shall have a right to live with and to be cared for by his parents".***

He submitted that whereas a child has the right to be loved and to be provided with education, it was not obvious that a good education could only be found in boarding schools. Counsel urged that child-custody was not any good to "an unwilling and an absentee parent who will not be in a position to monitor the day-to-day upbringing of the said child." Counsel urged that the appellant was the most suitable person to have the custody of the child, and that good education will be best provided while the child is in her custody.

Counsel relied on the Court of Appeal decision, ***S. O. v. L.A.M.*** [2009] eKLR in which it was held that:

> ***"The general principle of law is that custody of such children should be awarded to the mother unless special and peculiar circumstances exist to disqualify her from being awarded custody".***

Learned counsel ***Mr. Mwakisha***, for the respondent, shows common cause with the appellant, on the question that the respondent's prayer in the trial Court, was that –

"The child be released by the defendant to attend school at St. Kevin's Hill School, Voi"

Counsel was calling for the exercise of the Court's discretion, within the terms of s. 113 of the Children Act which provides that [s. 113(1)]-

"The Court may make any order mentioned in this Part [Part IX] in any proceedings concerning the welfare and upbringing of a child instituted under this Act or under any other written law";

and that such order may be sought [s.113(2)] by –

(a) the child;

(b) the parents, guardian or custodian of the child; or

(c) a relative of the child.

On the contention made by the appellant, that the hearing before the trial Court entailed an unexplained mix-up of different sets of proceedings, learned counsel submitted:

"With respect, that not being a matter that can be said to have occasioned any prejudice [to] either of the litigants, and is indeed, an omission on the part of the Court which omission does not go to the [root] of the ultimate verdict…., we do not think it would be worthwhile for this……Court to expend time on it. [T]he appellant….claims to have been prejudiced by the decision to proceed to the main trial and call evidence. This cannot be so, the case being that upon the order being made to proceed to full hearing, both parties were accorded ample time…., to prepare for trial."

On the custody question, learned counsel restated that –

"….the respondent's concern is not as regards custody of the child, but the welfare of the child as regards his education and maintenance".

But counsel went on to urge that "the learned Magistrate cannot be faulted with regard to the order he made for custody": because the question of custody had figured in the counterclaim, and so it ***was*** an issue before the trial Court; the defendant/appellant had sought custody. And so, in counsel's submission, the Court was satisfied that the appellant was not the right person to have custody. Counsel submitted:

> ***"In deciding to disallow the counterclaim relative to the issue of custody, the trial Magistrate was duty-bound, indeed had the jurisdiction, to make orders on custody consistent with the evidence as he perceived it, and as the justice of the case demanded."***

Counsel urged that the custody order made was in keeping with the terms of s. 76(1) of the Children Act, which thus provides:

> ***"Subject to section 4, where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any other orders unless it considers that doing so would be more beneficial to the welfare of the child than making no order at all".***

The essence of counsel's contention here, is that the learned Magistrate had even an inherent obligation to make an order such as that which he made, regarding custody.

Counsel submitted that as the Court made the custody order, it was required under s.76(3) of the Children Act to take into account certain particular matters [s. 76(3)(c)]: the child's age, sex, religious persuasion, educational background.

Mr. Mwakisha, in view of the terms of s. 76(3)(c) of the Children Act, submitted that the learned Magistrate's decision was properly arrived at; and counsel relied on the Court of Appeal decision in ***Zuleikha Mohamed Naaman v. Gharib Suleiman Gharib***, Civil Appeal No. 123 of 1997: but the relevant passage in that decision is that of ***Madan, JA***. In an earlier case, ***Mehrunissa v. Pravez*** [1982-88] 1K.A.R. 18:

> ***"The parties agreed freely that the custody of the child should remain with the wife up to the age of 7 years albeit within the jurisdiction of the Court. It is accepted that the doctrine of the mother's*** *hizanat* ***(custody) of her male child ends with the completion of his seventh year……."***

Counsel submitted that under the provisions of s. 76 of the Children Act, the personal law of the child, who in this instance is a Muslim, is to be taken into account; and that the learned Magistrate's order on custody was consistent with this principle. Counsel remarked the evidence of the appellant given during cross-examination, that:

"A child aged 7 years and above, according to Muslim law, resides with the father".

Learned counsel raised more justification for the custody order in the context of s. 76(3)(f) of the Children Act, which makes a relevant consideration in the making of such orders, "the ability of the parent, or any other person in relation to whom the Court considers the question to be relevant, to provide for and care for the child". Counsel submitted that the trial Court had taken into account all the relevant factors, at the time of making the orders in question.

On the other grounds of appeal – misdirection on evidence, overlooking the defendant/appellant's evidence – counsel submitted that "the record of proceedings, taken as a whole, does not support the ground of appeal regarding failure to consider the appellant's evidence."

Counsel urged that the trial Court's order regarding the education of the child should be left undisturbed, as the appeal carries no prayer on the question of education.

The quite contentious question of custody arose because the appellant herein pleaded it, in the counterclaim. So, just as learned counsel for the respondent submits, an obligation fell upon the trial Court, to dispose of the question, one way or the other – but, of course, as required by the terms of the Children Act, being guided by the best interests of the child.

The judgment, against which this appeal has been brought, is quite brief, and specifies no particular elements that were taken into account in determining the ***best interests of the child***. The "best interests of the child" is not to be attributed to the mere fact that the Children's Court has determined a particular question relating to a child: the judgment should specify those descrete factors which the Court took into account, so it may be clear that the welfare of the child was the main criterion in the making of the Court's orders.

From the evidence, the child is aged 13, and therefore by the normal practice among Muslims, such a child would be in the custody of the father. From the evidence, the child herein has always been with at least one of his natural parents, and that has been the appellant herein. From the evidence, a divorce took place in ***November, 2008*** between the child's father and mother, but even before this, the child was in the actual custody of the mother, for the father was working as a motor vehicle driver in Saudi Arabia, and he still works there. It is not surprising that the child's father has not ***asked*** for the custody of the child; and this Court will take judicial notice that it is impracticable for the father, while he drives along the roads of a distant land, to have proper custody of the child. This leaves only the appellant herein, as the natural parent who is available to have the custody of the child.

It means, quite plainly, that the trial Court's order which committed the child to ***M.F.H's*** custody rather than that of the appellant herein, was in error and must be set aside. It would not be in the best interests of the child to place him under his father's legal and actual custody, in those circumstances.

From the evidence, the appellant, who has not had all the necessary financial resources for the child's education, had difficulty keeping him at the school he used to attend, K Academy; and so she relocated the child to another school, from which a witness appeared in Court, and testified to the good progress which the child has made since joining the new school.

Against such a management-reality on the ground, the child's father, working with his consanguine relations, has made a different schooling arrangement, by which the child is expected to join a boarding school, St. Kevin's Hill School at Voi. Is this decision in the best interests of the child? Yes, according to the orders appealed against. But the appellant believes otherwise: for the reason that the boy of 13 years has frequently been in ill-health, and so requires her constant attention, which cannot be given if the child goes to boarding school.

Of boarding school, both the child's father, and the trial Court, are convinced that this is in the best interest of the child, firstly, because that school will give a better education, and secondly, because the father who has reasonable amounts of money, will ensure the educational programme runs uninterrupted. So in this regard, the pecuniary capability is seen as the main factor favouring committing the child to St. Kevin's Hill School, Voi. This is contested by the appellant who contends that the best interests of the child will also embody the provision of motherly care.

The Court has a broad discretion in determining questions regarding the best interests of the child. As already noted, the trial Court did not detail out the ***manner in which it arrived at its assessment of the best interests of the child***, as regards custody, schooling and other matters. In that regard, it is right to state that the trial Court misdirected itself.

The evidence shows that only very rarely has ***M.F.H*** been returning to Kenya, from his base in Saudi Arabia. In these circumstances, a choice has to be made between his judgment as to the most suitable and practical school to be attended by his minor son, and the appellant's judgment on that very question; whereas he has the luxury of planning his judgment of the matter on an abstract basis, the appellant has the reality to deal with – to ensure that the

child goes to school from day to day: and this means she has to take quick decisions, and carry them out. Logically, she ought to have the benefit of the doubt, when the merits of such different decisions are assessed. This point, taken together with the element of the best interests of the child, rules out the possibility of upholding the decision to relocate the child to St. Kevin's Hill School, at Voi. But the obligation of ***M.F.H*** to provide the means for educating his son remains.

I will determine this appeal and make orders as follows:

1. ***The appellant's appeal is allowed, and the Judgment of the Court of first instance is set aside.***

2. ***A separation is hereby made between*** *legal custody* ***and*** *actual custody****; and whereas*** *M.F.H* ***shall have legal custody over the child,*** *F.M.H****, the appellant herein shall for the time being have*** *actual custody* ***over the said child.***

3. ***On the question of custody, either party shall have the liberty to make any necessary application before the Court.***

4. ***While having actual custody of the child, the appellant's decision shall always be taken into account, regarding educational arrangements for the child.***

5. *M.F.H****, upon receiving the fee-payment structures in respect of the schooling of the child, shall provide the moneys required by the educational institution, and this shall be the case up to and including the stage of College education.***

6. ***The parties shall be at liberty to apply to the Court, in any matter relating to the payment of educational fees for the child.***

7. *M.F.H* ***shall make appropriate arrangements in respect of the costs of health-care and nutrition, for the child; and on this question, the parties shall have the liberty to make an application before the Court, if need be.***

8. *M.F.H* ***shall have unlimited access to the child while the child remains in the actual custody of the appellant herein.***
9. ***The respondent shall pay the appellant's costs for this appeal.***

Decree accordingly.

DATED and **DELIVERED** at **MOMBASA** this 9th day of July, 2010.

J. B. OJWANG
JUDGE

Coram: *Ojwang, J.*
Court Clerk*: Ibrahim*
For the Defendant/Appellant: *Ms. Kayatta*
For the plaintiff/Respondent: *Mr. Mwakisha*