



**JHM & another v AHJ (Civil Appeal E054 of 2023)
[2024] KEHC 7998 (KLR) (Family) (7 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7998 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E054 OF 2023
PM NYAUNDI, J
JUNE 7, 2024**

BETWEEN

JHM 1ST APPELLANT

HJ 2ND APPELLANT

AND

AHJ RESPONDENT

JUDGMENT

1. By Memorandum of Appeal dated 22nd June 2023, the Appellants challenge the decision of the trial court in Milimani CMC Children’s case No. E1183 of 2022 and seeks that the judgment and decree of the lower court dated 26th May 2023 granting the Respondent access to the minor be set aside.
2. The 1st appellant is the biological father of the minor. The 2nd Appellant is the paternal grandmother of the minor, while the respondent is the maternal grandmother of the minor.
3. The Court directed that the Appeal be dispensed off via written submissions. At the time of writing this judgment, the Respondent had not filed her submissions, notwithstanding that her Counsel undertook to do so by 14th March 2024.
4. The essence of the Appellant’s submissions is that the Court erred in granting access rights whose effect is to diminish the custody rights of the sole biological parent.
5. It is submitted that the orders of the Court are in contradiction of the prevailing law and not defensible in the circumstances of the case. The Appellant relies on the decision in *OGM v FG & anor* [2020] eKLR on the primacy of parental rights. It is submitted in conclusion, that the orders of the Court are unjust, unfair, unlawful and clearly against Art. 53 of the *Constitution* of Kenya.



Analysis And Determination

6. In determining this Appeal I am well guided by the decision in *Selle & another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and *Peters v Sunday Post Limited* [1958] on the duty of the Appellate Court to re-evaluate the evidence before the trial Court as well as the judgment and arrive at its independent conclusion bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.
7. In the case of *Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa)* (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment) Hon. Mativo J (as he then was) further enunciated on the role of the Appellate Court as follows

A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.

8. I am further guided by the decision in *Mbogo & another v Shab*, [1968] EA, on general principles upon which an appellate court may interfere with a discretionary power of a trial, which were set out as follows: -

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

9. In *Patel v E.A. Cargo Handling Services Limited* (1974) E.A. 75, the Court held as follows:

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules: the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”

10. At the trial the Respondent herein was the Plaintiff and she testified as a sole witness. It was her evidence that she resided with the minor and his mother (who was her daughter). After the death of her daughter the 2nd Appellant took the minor on the understanding that she would return the child upon



closing of the schools. She was compelled to come to court when the Appellants denied her access to the child.

11. The 1st Appellant and her daughter were divorced, at the time of her death her daughter was in a subsequent marriage. At the time of filing suit, the Appellants had custody of the minor for two years. She would visit the minor at the residence of the Appellants. It was her contention that as the maternal grandmother she had a right to access the minor.
12. The 1st Appellant (1st Defendant in trial Court) testified as the sole witness of the Defence. He asserted that he is the biological father of the minor. He was provoked to block access on account of the insults of the Respondent. He is unwilling to grant access over the holidays as the child is attending remedial lessons. He is open to the Respondent accessing the minor at his home. He confirmed that he had remarried and his wife is the caregiver of the minor.
13. The trial court called for and received a report from the sub county children officer, Kibra sub county dated 31st January 2023. Having interviewed the minor, the 1st and 2nd Appellant and undertaken a home assessment, the official made the following observations;
 1. The minor appeared well groomed and jovial during the interview
 2. The minor has medical cover paid by a private medical insurer, the premiums are paid by the 1st Defendant
 3. The minor is currently in school and the school fees and other expenses are catered for by the first defendant
 4. The first defendant manages a family business that entails selling automobile spare parts and seems to have a stable income
 5. The minor and the two defendants stay in a family house in Adams Arcade
 6. The two defendants do not object to the maternal family's desire to access the minor
14. The report made the following recommendations
 1. The first defendant be awarded the actual custody of the minor since he is the only surviving parent
 2. The plaintiff be given access to the minor, based on how this honourable court deems fit
 3. That notwithstanding these recommendations, any orders deemed by the Honorable Court to be in accordance with the minor's best interest be issued.
15. In judgment dated 26th May 2023, the learned trial magistrate made the following orders
 1. That the Legal and Actual Custody, Care and Control of the minor H. M. shall vest in the 1st Defendant.
 2. That the plaintiff is granted access as follows;
 - i. During school mid-terms at ratio of 50:50 with her going first; or as parties may agree;
 - ii. During school holidays of two (2) weeks with her going first or as parties may agree;
 - iii. During Christmas and New Year on alternating basis
 3. That each party to bear own costs.



16. Based on the foregoing analysis, the pleadings filed herein, submissions filed, authorities cited and the relevant law I discern the issue for determination being
1. Whether the Respondent has a right of access in relation to the minor enforceable against the 1st Appellant?
17. The guiding principles when considering matters concerning children’s welfare are found in the Constitution that requires that the best interests of the child be of paramount importance. Article 53(2) provides:
- “A child’s best interests are of paramount importance in any matter concerning the child.”
18. The same principles are echoed in Section 4(2) and 3(b) of the *Children’s Act* that provides 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.
19. Section 76 of the *Children’s Act* provides the general principles applicable in regard to proceedings in Children’s courts. Section 76 (3) of the *Children’s Act* is critical in that it requires as follows:
- “(3) Where the court is considering whether or not to make an order with regard to a child, it shall have particular regard to the following matters-
- a. the ascertainable feelings and wishes of the child concerned with reference to the child’s age and understanding. (Emphasis Supplied)
 - b. the child’s physical, emotional and educational needs and in particular, where the child has a disability, the ability of any person or institution to provide any special care or medical attention that may be required for the child.
 - c. the likely effect on the child of any change in circumstances.
 - d. the child’s age, sex, religion personality and cultural background.
 - e. any harm the child may have suffered or is at risk of suffering.
 - f. 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.



- g.
- h.
- i. the range of powers available to the court under this Act.”

20. The appellants challenge to the decision of the trial court is to that in effect the Court has actually awarded joint custody of the minors to the respondent, whereas he is the biological father and sole surviving parent.

21. It is not in dispute that Article 53 (e) of the Constitution recognises a child’s right to parental care and protection. Section 11 of the Children Act provides:-

- (1) Every child has the right to parental care and protection.
- (2) Except as is otherwise provided under this Act, every child has the right to live with his or her parents.

22. The primacy of parental rights is well settled by judicial precedent including in the case of LAC & another v MJC (Civil Appeal E119 of 2021) [2022] KECA 68 (KLR) (4 February 2022) (Judgment), where the Court of Appeal asserted that parental rights are unassailable except in instances where it is demonstrated that the parent is unfit.

23. It is for good reason that the law only recognises parents as having enforceable rights and accommodates members of the extended family only in instances where the biological parents consent to it or are adjudged to be unfit.

24. The respondent herein in her plaint dated 13th December 2022, specifically sought that

- 1. She be granted actual custody, care and control of the minor, HM and
- 2. Costs

The Court correctly found that the plaintiff had not established a legal basis to be granted the actual custody of the minor and proceeded to find that ‘the rights of the plaintiff over the minor are the usual ones accorded to relatives of a child. She is entitled to reasonable access. This will enable her maintain contact with the minor as a member of the extended family.’ (Emphasis supplied)

25. I am unable to find legislative backing or judicial precedent for the Courts pronouncement that a member of the extended family is entitled to reasonable access.

26. Access is defined by the Black’s Law Dictionary (11th Edition) to mean the ‘legal right to see and spend time with one’s children’. The term is used interchangeably with visitation rights and is to be distinguished from custody which means-

The care, control and maintenance of a child awarded by a court to a responsible adult. Custody involves legal custody (decision- making authority) and physical custody (caregiving authority, and an award of custody usually grants both rights..’

27. The decision of the lower court can be faulted on 2 fronts. The first is that it failed to consider the expressed wishes of the child as reported by the Children officer. The Children officer made the following report-

The minor is 8 years of age and is in grade 1 at Kilimani Primary School. He reported he likes his new school and new teacher and has made some friends. The minor indicated that



he likes his father, and would want to stay with him. The minor further indicated that he enjoys visiting the National Park and going shopping with his father during the weekends. The minor, however indicated that he does not like his stepfather since he used to beat him. The minor remembers that he had been staying with the maternal family and his maternal mother (sic). He however does not want to go back to Nakuru but would wish to see his auntie (Fatuma) and grandmother someday.

28. Courts are obligated in making decisions affecting children to consider the child's wishes. In this instance the Child was clear that he would be happy to 'see' his grandmother but preferred to 'stay' with his father. The Court made a cursory reference to the report in the judgment and then proceeded to make orders whose effect does not match the wishes of the child. For that reason, that decision cannot be said to be in the best interests of the child.
29. The decision is also faulted as it purported to override a parent's legal custody rights with a non-existent right of a grandparent. It is the parent who has legal custody who will make decisions including the nature of access to the child by members of the extended family. In this case the father had stated the child needs remedial classes over holidays and attends madrassa over the weekends as two examples of factors to be considered when determining how much access the Respondent will have to the child. The Appellant states the Respondent is welcome to visit the child at his home.
30. It is evident that the Respondent, as with many grandparents is very attached to the minor, however she must understand that unless the appellant is shown to be an unfit parent she must yield to the parental authority of the appellant. She does not enjoy any enforceable right. Her relationship with the minor is at the pleasure of the appellant. She must yield. And that is the implication of parental rights.
31. In the circumstances I will allow the appeal, vacate the orders of the Court issued on 26th May 2023 on access by the respondent to the minor and substitute it with the following order-
 1. The Respondent shall have access to the minor on terms to be agreed with the Appellant or if unable to agree to have access on such terms as the appellant shall determine having regard to the minor's academic, religious and social calendar.
 2. Given the nature of the relationship between the parties, each party will bear their own costs.

It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF JUNE 2024.

P M NYAUNDI

JUDGE

In the presence of:

Lungwe Advocates for the Appellant

Ms Kimoriot Advocates for the Respondent

Sylvia Court Assistant

