



**PNK & another v AWW (Civil Appeal E227 & E229 of 2021 (Consolidated)) [2024] KEHC 8928 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8928 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E227 & E229 OF 2021 (CONSOLIDATED)**

**RC RUTTO, J  
JULY 19, 2024**

**BETWEEN**

**PNK ..... 1<sup>ST</sup> APPELLANT**

**RWW ..... 2<sup>ND</sup> APPELLANT**

**AND**

**AWW ..... RESPONDENT**

*(Being an appeal from the Ruling and Orders of the Hon. D.N Musyoka S.P.M delivered on 16th November, 2021 in Kikuyu Children Case No. 15 of 2012)*

**JUDGMENT**

**Background**

1. These consolidated appeals arise from Kikuyu Children’s Case No. 15 of 2012 RWW versus PNK and AWW as the Interested Party.
2. By way of a plaint dated 12<sup>th</sup> July 2012, the 2<sup>nd</sup> appellant moved court seeking a declaration that the 1<sup>st</sup> appellant is duty bound to take, exercise and or discharge his parental responsibility of the minor; an order for maintenance of the minor by the 1<sup>st</sup> appellant, costs and interest.
3. This matter was heard and on 16<sup>th</sup> April 2013, the trial court delivered judgment in the following terms; that the 2<sup>nd</sup> appellant to take care of the child clothing and food; the 1<sup>st</sup> appellant to take care of the child schooling needs, medical needs and to contribute ksh 7000/- per month to assist the child’s upkeep.
4. Later on, in December 2019, seven years later, vide a Chamber Summon application dated 18<sup>th</sup> December 2019, the respondent herein moved court seeking the following orders;
  - a. to be enjoined as interested party in the primary suit;



- b. to be granted legal custody, care and control of the minor RWW pending hearing and determination of the suit with the 1<sup>st</sup> appellant getting restricted and supervised access;
  - c. an order to immigration office to block any travel of the minor outside Kenya;
  - d. an order directing the 1<sup>st</sup> appellant to pay a sum of ksh 560,000/- being arrears for 80 months accruing since April 2013;
  - e. an order directing the 2<sup>nd</sup> appellant to pay kshs. 40,000/- per month towards the minor's needs in terms of food clothing and shelter;
  - f. Children Officer to prepare a report on the welfare of the minor
5. Subsequently, on 4<sup>th</sup> February, 2020 the plaintiff through its advocate Ndege & Co Advocate filed a Notice of Withdrawal of case under Order 25 Rule 1 of the Civil Procedure Rules dated 4<sup>th</sup> February 2020 seeking that the suit be withdrawn with no orders as to costs. On the 25<sup>th</sup> February 2020 during the hearing of the Chamber Summon application dated 18<sup>th</sup> December 2019 counsel for the defendant informed court that a notice of withdrawal had been filed and served as a result of which the matter be marked as withdrawn. This was opposed by counsel for the then interested party (now respondent). This notice prompted the court to order that Mr. Ngege who filed a Notice of Appointment together with the purported Notice of withdrawal to be summoned to appear before court on 7<sup>th</sup> April 2020 and that the father and mother be summoned through the firm of Ngege & Co Advocates to appear before court.
  6. From the record of proceedings, the 1<sup>st</sup> and 2<sup>nd</sup> appellants never appeared before court despite service and on 24<sup>th</sup> June 2020 the court proceeded to allow the interested party Chamber Summon application dated 18<sup>th</sup> December 2019 as was prayed since it was unopposed.
  7. The grant of the above orders prompted the 1<sup>st</sup> appellant through its advocate S. Ngege and Company Advocates, to file a Notice of Motion application dated 13<sup>th</sup> July 2020 seeking to set aside the orders issued on 24<sup>th</sup> June 2020 and all consequential orders and proceedings; and that the court be pleased to issue such other orders as it deemed fit.
  8. Later on 28<sup>th</sup> July 2020 the court, upon submission by counsel for the interested party/ the respondent herein that the notice of withdrawal as well as the Notice of Motion Application filed by S. Ndege and Co. Advocates were defective, null and void as they were filed by an advocate who had not obtained a practicing certificate, proceeded to give a ruling striking out with costs the Notice of Motion application dated dated 13<sup>th</sup> July 2020. Seemingly, the court did not make any order with respect to the notice of withdrawal.
  9. This occurrence led the 1<sup>st</sup> appellant to change counsel who then filed a Chamber Summon Application dated 17<sup>th</sup> September 2020 seeking; to stay the execution and set aside the orders granted on 24<sup>th</sup> June 2020; that he be allowed to respond to the application dated 18<sup>th</sup> September 2019; that the custody care of the minor herein be given to him since he was the biological father of the child. This application was based on the ground that the plaintiff who had initially instituted suit is agreeable that custody care and control of the minor be given to the father; the orders were obtained by means of misrepresentation of facts and material non-disclosures; that the interested party/ the respondent herein was receiving support from both the plaintiff and defendant and did not disclose this to the court.
  10. On 15<sup>th</sup> December 2020, the court upon hearing the parties, set aside the orders given of 24<sup>th</sup> June 2020 and set out the matter for inter parties hearing.



11. Come January 2021, the 1<sup>st</sup> appellant filed another Chamber Summon Application dated 6<sup>th</sup> January 2021 seeking that the legal custody care and control of the minor herein be granted to him, that the interested party to produce the minor whom should be handed over to him and the interested party to be permitted limited access to the minor; the 2<sup>nd</sup> appellant be permitted access of the minor when she is in the country. This application was scheduled for hearing on 9<sup>th</sup> February, 2021.
12. On 9<sup>th</sup> February, 2021 the court directed the Children Officer Kikuyu to visit the minor and file a comprehensive report. The court also ordered the parties to appear in person and to each pay kshs. 2000/= every month to the interested party for the maintenance of the child till the case is heard and determined. Subsequently, the court also directed that the Children Officer's report be given to all parties and the minor be brought to court.
13. On the 21<sup>st</sup> of July 2021, the minor was presented and examined by the court. Thereafter the two applications (dated 18<sup>th</sup> December 2019 and 6<sup>th</sup> January 2021) were heard and on 16th November, 2021 the trial court delivered its ruling allowing the Chamber Summon application dated 18<sup>th</sup> December 2019 in the following terms;-
  - a. That the Defendant to pay Kshs 560, 000/=into account opened by the Interested Party in trust for the minor.
  - b. That the Plaintiff should also pay the same amount of Kshs 560, 000/= towards the same account for the child.
  - c. Each parent (plaintiff and the defendant) to pay a monthly upkeep of the child of Kshs 20, 000/= each on or before the 10th day of each subsequent month.
  - d. That if the Plaintiff does not comply with this order the same to be served through the foreign embassy while the defendant's non-compliance be met by attaching his salary with his employer.
  - e. That the legal custody of the child be and is hereby given to the maternal grandmother till the child is 18 years of age with restricted access given to the mother and father under the guidance of the children officer Ruiru.
  - f. That the two parents shall also bear the costs of this Application.
14. It is the above Orders that aggrieved both the plaintiff and the defendant and led to the filing of two (2) appeals No. 227 of 2021 and No. 229 of 2021.

### **The Appeal**

15. In Civil Appeal No. 227 of 2021 filed on 22nd March, 2021, the appellant, PNK appealed against the entire ruling of the court on the following grounds;
  - a. The Learned Trial Magistrate erred in law and in fact when he revived a suit that had been fully and finally determined by a court of concurrent jurisdiction and hence arrived at a wrong decision.
  - b. The Learned Magistrate erred in law and in fact when he failed to appreciate and apply the doctrine of functus officio in relation to the matter before him hence arrived at a wrong decision.



- c. The Learned Magistrate erred in law and in fact when he decided that a Children’s matter can be revived at any time despite the clear and unequivocal principles of res judicata and functus officio.
  - d. The Learned Magistrate erred in law and in fact when he revived a suit at the instance and behest of the respondent an Interested Party and a stranger to the proceedings.
  - e. The Learned Magistrate misdirected himself in law by overturning the decision of a court of concurrent jurisdiction.
  - f. The Learned Trial Magistrate erred in law and in fact in granting the Respondent orders which could not be granted to her as she was never a party to the proceedings and in any event as an Interested Party who would not be legally entitled to any relief in the suit or framed.
  - g. The Learned Trial Magistrate erred in law and in fact when he failed to consider the rights of the child to parental care and guidance and instead granting custody to the grandmother of the child a distant relative and hence arrived at a wrong decision.
  - h. The Learned Magistrate erred in law and in fact by denying the child his natural, constitutional and legal right to live with and be taken care of by his natural father.
  - i. The Learned Trial Magistrate erred completely in ignoring a duly executed parental agreement between the natural parents of the child as to the custody, care and control of the child.
  - j. The Learned Trial Magistrate erred in depriving the Applicant natural father of the child, his right to take care of and bring up his own child.
  - k. The Learned Trial Magistrate erred in law and in fact when he awarded the respondent a sum of Kshs 560, 000 as against the appellant without taking into account the fact that the appellant had been remitting monthly payments towards the support of the child and without taking into account the evidence of such payments placed before him.
  - l. The Learned Trial Magistrate erred in law and in fact taking the sum of Kshs 560, 000 as arrears without proof of the same and despite evidence to the contrary.
  - m. The Learned Trial Magistrate erred in law and in fact in awarding the respondent the sum of Kshs 560, 000 as against the appellant despite the fact that the sum so decreed was to be paid to the plaintiff and not the respondent.
  - n. The Learned Trial Magistrate erred in failing to consider the responses and submissions by the appellant and the plaintiff and following the narrative by the respondent and hence arrived at a wrong decision.
  - o. The Learned Trial Magistrate erred in law and in fact in ordering that the sum of Kshs 20, 000/= to be paid to the plaintiff for the maintenance of the minor ordering that the mother of the minor pays a similar amount which would be for in excess of the needs of the child.
  - p. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the respondent was using the child as a cash cow so as to unjustly enrich herself at the expense of the appellant and to the detriment of the child.
16. Based on the above grounds of appeal, the appellant asked that the Ruling of the trial court be set aside with costs, that the legal and physical custody of the minor be given to him, that an appropriate order on maintenance of the child and access to the child be made.



17. Similarly, in Civil Appeal No. 229 of 2021 filed by the 2<sup>nd</sup> appellant RWW appealed against the entire Ruling on the following grounds:-
- a. The Learned trial Magistrate erred in ordering the appellant to pay a lump sum of Kshs 560, 000/= without any basis for such amounts.
  - b. The Learned Magistrate erred in considering the needs of the interested party other than those of the minor.
  - c. The Learned trial Magistrate failed to consider that it is the appellant was always providing money to the interested party for the use of the minor.
  - d. The Learned Magistrate erred in considering the evidence of a biased children's officer and relying on her evidence to make the ruling.
  - e. The Learned trial Magistrate erred in failing to appreciate the minor's negative development in the hands of the interested party.
  - f. The Learned trial Magistrate failed to consider that the appellant had lived with the minor and the interested party before leaving for Germany.
  - g. The Learned trial Magistrate erred in treating the minor as a child in need of care and protection and therefore condemned and penalized the appellant as his parent.
  - h. The court's ruling is against the minor's best interest, the provisions of the Children's Act.
  - i. The award of Kshs 20, 000/= monthly from each parent is manifestly excessive and calculated to provide for the interested party not the minor.
  - j. The Learned Magistrate erred in alluding to matters not in evidence when making his ruling.
  - k. The Learned Trial erred in failing to take affidavit of means from the Interested Party before giving her custody over the natural parents.
  - l. The Learned trial Magistrate erred in law by proceeding and issuing orders in a matter that had been withdrawn by the Plaintiff vide a notice of withdrawal dated 4.02.2020.
  - m. The Learned trial Magistrate erred in law by issuing orders in favour of a person who had not been joined as an Interested Party.
  - n. The Learned Trial Magistrate erred in law by issuing orders against the Plaintiff yet the application sought orders against the Defendant.
  - o. The Learned Magistrate erred in law and in fact by issuing order that back dated payments yet there was evidence that payments had been made by the defendant to the decree holder the Plaintiff.
  - p. The Learned Trial Magistrate erred in law and in fact by issuing orders against a decree holder making her a judgment debtor of the same decree.
18. Based on the above grounds, the appellant sought that the Ruling delivered on 16th November 2021 be set aside with costs and be substituted with an order giving custody of the minor to his parent(s).
19. Before the matter could be heard, the two appeals were consolidated vide a consent order dated 25th April, 2023 and PN became the 1st Appellant, RWW became the 2nd Appellant and AWW became the Respondent.



20. The Appeal was canvassed by way of written submissions where parties confirmed that the same were comprehensive enough and did not need to highlight.

## **PARTIES SUBMISSIONS**

21. To begin with, it is important that I note that the 1<sup>st</sup> Appellant did not file any submissions and the only submissions I refer to in this judgement are those filed on the Case Tracking System by the 2<sup>nd</sup> appellant, RWW dated 3<sup>rd</sup> June, 2024 and those of the respondent, AWW dated 28<sup>th</sup> May, 2024.

### **Appellant's submissions**

22. Despite stating 16 grounds of appeal in her Memorandum of Appeal, the 2<sup>nd</sup> Appellant in her submissions narrowed down the issues to five namely;
- a. Whether the trial court was functus officio at the time of delivering its Ruling dated 16<sup>th</sup> November 2021?
  - b. Was AWW's Application dated 18<sup>th</sup> December, 2019 to be enjoined as an interested party after judgment merited?
  - c. What was the import of the Notice of Withdrawal of the suit dated 4<sup>th</sup> February 2020 and filed by the appellant?
  - d. Who between the grandmother and the biological parents should have the legal and actual custody of the minor?
  - e. Did the trial Court err in law and in fact in ordering the appellant to pay kshs. 560,000/- and a further kshs. 20,000/- to the interested party?
23. The appellant submitted that the trial court erred in entertaining the interested party application to be enjoined as a party and have custody of the minor because, the suit proceeded for full hearing on 26<sup>th</sup> march 2013 and upon taking oral evidence the court delivered its judgment on 16<sup>th</sup> April 2013, hence it became functus officio and had no jurisdiction to grant further orders and entertain fresh applications.
24. Reliance was placed on the following authorities; Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR, Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR, John Gilbert Ouma v Kenya Ferry Services Limited (2021) eKLR, Smt. Rais Sultana Begam v Abdul Qadir & Others SC Appl. No. 16 of 2014 and Charles Kiptarbei Birech v Paul Waweru Mbugua & Another (2021) eKLR.
25. It was submitted that in relying on these authorities and Section 99 of the *Civil Procedure Act*, children's cases are not an exception to the doctrine of functus officio since cases have to be finalized.
26. They urged this court to find that the application by the respondent to be enjoined as an interested party after judgment was delivered was not merited since the matter was effectively closed. To buttress this point reference was made to the principles set out in the case of Absolom Opini Mekenye v James Obegi (2018)eKLR.
27. Further, it was their submission that the 2<sup>nd</sup> appellant filed a Notice of Withdrawal under Order 25 Rule 1 of the Civil Procedure Rules dated 4<sup>th</sup> February, 2020 before the trial court issued its judgment on 16<sup>th</sup> November 2021. They submitted that upon withdrawal the suit ceased to exist and no order could be made on that which does not exist.



28. The appellants submitted that the parents of the minor have parental rights over the child which override that of the minor's grandmother and therefore the trial court was wrong in granting custody to the grandmother. The appellant relied on the case of *SNM v Sub-county Children's Officer & Another (Family Appeal 015 of 2020)* [2022].
29. Further, that the amounts that were ordered to be paid to the grandmother had no basis. That the trial court was wrong in issuing orders that had not been sought for by the respondent and in that regard, this court has been invited to dismiss all orders issued by the trial court by allowing the appeal as prayed for.

### **Respondent's submissions**

30. The Respondent submitted that the filing of this appeal amounts to forum shopping since a Ruling which was delivered by the trial court on 21st January, 2022 addressed similar orders. That by March, 2024, the arrears of Kshs 560, 000/= had been repaid by the 1st appellant whose salary was being deducted and continues to be deducted for the amount of Kshs 20, 000/=. Additionally, that the 2nd Appellant has not been in compliance with the court's orders save for paying Kshs 7, 000/= for the minor's maintenance.
31. The respondent submitted that the appellants are unfit to have custody of the minor as they are irresponsible and have never had any concern for him.
32. Further, they submit that, the 2<sup>nd</sup> appellant is not deserving any audience before this court since she has not complied with the orders of the court given on 16<sup>th</sup> November 2021. The respondent relied on the case of *Econet Wireless Kenya Limited v Minister for Information & Communication of Kenya & Another (2005) eKLR* and *RON v EWW (2021) eKLR*.
33. On the Notice of withdrawal, it was her submission that the suit proceeded and even the 2nd appellant changed representation notwithstanding that the Notice.
34. On the trial Court being functus it was the respondent's submission that in children's matters, any party is at liberty to apply to court for orders at any time due to change of circumstances and for the minor's best interest.
35. The Respondent's counsel urged the court not to stay and or vary the orders granted by the trial court and reliance was placed on the case of *AKK v SMM (2020) eKLR*, *FGC v PGN (2021) eKLR* and *BRO v WJNWM (2022) eKLR*.

### **Issues for Determination**

36. I have painstakingly read the record before me as well as the parties' submissions and discern the following issues for determination: -
  - a. Whether the trial court had jurisdiction to render the Ruling dated 16th November, 2021.
  - b. Whether the court erred in granting legal and actual custody of the minor to the Respondent?
  - c. Whether it was proper for the court to order the appellants to pay Kshs 560, 000/= and a further Kshs 20, 000/= per month.
37. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand.



38. The duty of the first appellate Court was settled long ago in the locus Classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, where the court, held by as follows;-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

**Whether the trial court had jurisdiction to render the Ruling dated 16th November, 2021.**

39. I will address this issue in two limbs first on whether the trial court became functus officio after rendering its judgment on 16th April, 2013 and whether the matter was withdrawn pursuant to the Notice of Withdrawal dated 4th February, 2020.

40. The appellants submitted that since the trial court rendered its judgment on 16th April, 2013, it became functus officio and had no jurisdiction to grant further orders or entertain fresh applications. Further, that the suit having been withdrawn vide the Notice of Withdrawal dated 4th February, 2020 filed by the 2<sup>nd</sup> respondent advocates, there was no suit upon which pleadings and proceedings were to be filed.

41. The respondent on the other hand submitted that the allegation that the suit was non-existent is false noting that the appellants continued to participate in proceedings after the alleged withdrawal of the suit.

42. To contextualize this issue, there is need to reiterate the occurrence of events in the matter and their outcomes details of which have been captured under the background. The lower court matter was filed by the 2<sup>nd</sup> appellant against the 1st appellant, summarily seeking orders that the 2nd appellant take responsibility of the minor. This was determined by the court in a judgment delivered on 16th April 2013. It is after this determination that the respondent in December 2019, seven years later, vide a Chamber Summon application dated 18<sup>th</sup> December 2019, moved the court seeking among other orders to be joined as an interested party in the primary suit and be granted legal custody, care and control of the minor.

43. While I appreciate the principle of functus officio as stated in the Court of Appeal case of *Telkom Kenya Limited v John Ochanda (Suing on His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR that explained the doctrine of functus officio as;

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon”

44. I take cognizant that this matter wholly concerns the maintenance and parental responsibility of a child matters which are not static as they keep evolving which each new day. I draw reference to the decision in *EKK & another (Minors Suing through their Mother ANK - Next Friend) v HKK* [2020] eKLR where the High court had this to say;

“So both parents have parental responsibilities and in matters in respect of maintenance and provision of the children, the court does not become functus officio. When the need arises the trial magistrate will have discretion to vary the order depending on the circumstances of the case....”



45. Further, Muchelule J, as he then was, held in EAW versus WAN [2021] eKLR at paragraph 4 as follows:

“The Children Court has the jurisdiction to periodically review and adjust the maintenance and education orders which it has issued where the circumstances of the child and the parents change (JKW versus AWM [2018] eKLR). In order to review upwards or downwards, as the circumstances may demand, the court has to fully hear the parties and examine whatever evidence of means that will be availed. It is only then that the court can reach a decision as to the appropriate maintenance and education amount. Such decision is reviewable, or appealable as the case may be”.

46. Therefore, guided by the above holding of the courts, I find that this being a matter involving the maintenance and provision of the child to ensure his well-being the doctrine of *functus officio* was inapplicable in the circumstance and hence the trial court was right in determining the application dated 18<sup>th</sup> December 2019 and rendering the ruling dated 16<sup>th</sup> November 2021.

47. This brings me to the second limb on the notice of withdrawal purportedly filed by the 2<sup>nd</sup> Appellant in the trial court. The 2<sup>nd</sup> Appellant has submitted that the filing of the Notice of Withdrawal rendered the suit non-existent. I have carefully reviewed the trial court’s proceedings and the documents in the Record of Appeal. The Notice of Withdrawal is dated 4<sup>th</sup> February 2020, and was filed on 13<sup>th</sup> February, 2020.

48. When the matter came before the trial court on 25<sup>th</sup> February 2020, the court ordered that M/s Ngege, who was then counsel for the 2<sup>nd</sup> Appellant, to appear before court along with the parties in the suit. Notably, the parties did not appear before court as directed.

49. Further from the proceedings, at no point was the Notice of Withdrawal endorsed by the trial court. Be it as it may, the proceedings also show that the trial court struck out a notice of motion application filed by the firm S. Ngege and Company Advocates on the basis that counsel who drew and filed the application did not hold a practicing certificate. While the application was struck out the court did not pronounce itself on the notice for withdrawal.

50. For good order it then follows that the Notice of Intention to Withdraw the suit ought to have also been struck out for being drawn and filed by counsel who did not hold a practicing certificate. Therefore, the argument by the 2<sup>nd</sup> appellant that the suit was non-existent cannot stand.

#### **Whether the court erred in granting legal and actual custody of the minor to the Respondent?**

51. This court is being asked to review the trial court decision granting legal custody of the minor to his maternal grandmother until the minor is 18 years.

52. In granting custody to the respondent the court noted that “since 2013 the defendant the biological father wakes up from slumber after the interested party moved to court for the attachment of the defendant’s salary. That cannot be allowed. The plaintiff moved to Germany married and forgot she had a child left behind. If the parties were serious about pursuing the issue of legal custody they should have done so immediately after 2013 and not in 2021 7 years later.”

53. In arriving at its decision, the court opined that ‘a child cannot be given to irresponsible parents’. The court proceeded to consider the recommendation of the Children’s Officer that custody be granted to the maternal grandmother and counselling be done on the minor as to why the biological parents left him. I also take note that the trial court examined the child and noted that the child seemed very



oblivious of either his mother or father and all the child wanted was to stay with the grandmother whom he referred to as mum.

54. I have also considered the appellant's submissions that they, as the natural parents of the child, executed a parental agreement as to the custody, care and control of the child. Notably, from the record it appears that the court did not consider this agreement.

55. Sec 103 of the Children's Act provides for considerations to be had in making a custody order; it states

“In determining whether or not a custody order should be made in favour of an 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) the ascertainable wishes of the child taking into account the child's evolving capacity;
- (d) whether the child has suffered any harm or is likely to suffer any harm if the order is not made
- (e) the customs of the community to which the child belongs;
- (f) the religious persuasion of the child;
- (g) whether a care order, supervision order, personal protection order or an exclusion order has been made in relation to the child concerned, and whether those orders remain in force;
- (h) the circumstances of any sibling of the child concerned, and of any other children of the home, if any
- (i) any of the matters specified in section 95(2) where the court considers such matters to be relevant in the making of an order under this section; and
- (j) the best interest of the child.”

56. This court therefore in considering whether the trial court erred needs to consider whether the trial court was guided by the above provision of law in considering what was best in the circumstances of that time. I also take note that a child's growth mental and emotional capacity is continuous and their views are bound to evolve as well based on their circumstances.

57. The trial court in making its orders did seek and considered the views of the child as well as the Children Officer's Report. However, with the passage of time the perspective of the parties and circumstances may have changed.

58. I appreciate that 1<sup>st</sup> appellant now seeks to have the custody of the child and have entered into a consent with the 2<sup>nd</sup> Appellant, the minor's mother, that he be given the legal custody of the child.

59. Indeed, the law leans mostly towards a child being raised by a parent. This can only be denied if it is proved with cogent evidence and valid grounds that the parents are not suitable or are incapable of taking care of the child. The best interest of the child are determined depending on the circumstances of the case.



60. Therefore, considering the above and noting that Children's court's orders are never final, it will only be proper for the court, bearing in mind the best interests of the minor, to interrogate and re-examine the prevailing circumstances and situation of the parties to determine the suitability of the parents to take up the legal custody of the minor.
61. In the circumstance I find it prudent that there be a fresh determination by the trial court on the issue of custody. All the parties should be involved in the process and the Court should take into account the passage of time, that is since 2021 when the orders were made, the current developments as well as the requirements of section 130 of the *Children Act*.

**Whether it was proper for the court to order the appellant's to pay Kshs 560, 000/= and a further Kshs 20, 000/= per month**

62. While considering the order for financial provision for the maintenance of a child, the trial Court was obligated to take into account the earning capacity and financial resources of the parties, bearing in mind the Child's financial needs and circumstances. Instead, the trial court's basis for granting the maintenance orders was that parents should not be left unpunished.
63. The court held that; 'a child cannot be given to irresponsible parents that is an exceptional circumstance but parent who are able to provide for their child but fail to do so should not be left unpunished by the law. They should be ordered to provide for the child'
64. I have analyzed the record before the trial Court and note that the basis of Ksh. 560,000 arrears were the order of 16th April 2013, which directed the 1st appellant to contribute ksh 7000/- per month to assist the child's upkeep. At the time when the order was granted the respondent herein was not a party to the proceedings/suit thus was not the decree holder. It's curious then how a party who was a stranger to the suit and proceedings could execute a decree on behalf of the parties.
65. A perusal of the record before the trial Court further shows that the 1st appellant placed evidence before the Court on remittances he had made towards the maintenance of the child. It appears to me that the trial Magistrate did not consider this evidence, while awarding the impugned arrears against the 1st appellant. The evidence of the 1<sup>st</sup> appellant needed to be considered. However, no proper inquiry was made to determine if the sums had been paid to the 2<sup>nd</sup> Appellant as ordered on 16/4/2013.
66. Therefore, it is my considered view that the trial Magistrate erred in awarding arrears of Ksh. 560,000 to the Respondent against the 1<sup>st</sup> Appellant and the same ought to be set aside. The trial Court also did not provide any justification to order for payment of Ksh. 560,000 by the 2<sup>nd</sup> appellant. Notably even the prayers sought with regard to the arrears were in respect to the 1<sup>st</sup> Appellant. Specifically, the order read as follows; an order directing the respondent to pay a sum of ksh 560,000/- being arrears for 80 months accruing since April 2013; This did not include the 2<sup>nd</sup> Appellant and the same should also be set aside.
67. With regard to the terms of monthly maintenance, the Magistrate's Court failed to conduct a proper assessment into the level of the incomes of the parties and their respective financial responsibilities vis –a –vis the Minor's needs and circumstances. It therefore follows that a proper basis for the financial provision and the maintenance of the minor need to be undertaken and established. This should also extend to establishing exactly how much was due to be paid by the 1<sup>st</sup> appellant and how much had been paid as the blanket order awarding the arrears of kshs 560,000/- was erroneous. Thus, the need for re- assessment of financial provision and maintenance.



## CONCLUSION

68. In the circumstances of this matter, I do find as follows;

- a. That the trial court had jurisdiction to hear and determine the respondent chamber summon application dated 18<sup>th</sup> December 2019 and to deliver the ruling dated 16<sup>th</sup> November 2021.
- b. In the best interest of the minor, I do send back this matter for rehearing on a priority basis before another magistrate for determination on the issue of custody of the minor and assessment of financial capacity of the parties for equitable apportionment of responsibility on his maintenance.
- c. The order directing the 2<sup>nd</sup> appellant to pay Kshs. 560,000/- is set aside.
- d. In the meantime, the present status quo shall remain, that is the legal custody of the minor will remain with the respondent, the 1<sup>st</sup> and 2<sup>nd</sup> appellant continue to each remit Kshs 20,000/- per month pending determination by the magistrate court on the issue of legal custody of the minor and assessment of financial capacity of the parties.
- e. The lower court file and a copy of this Judgment be placed before the head of station Kikuyu Law Courts on 6<sup>th</sup> August, 2024 for purposes of reallocating the same to another magistrate for hearing.
- f. This being a children's matter I order that each party to bear its own cost.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 19 TH DAY OF JULY, 2024**

**Rhoda Rutto**

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**Judge**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

For 1<sup>st</sup> Appellants: Mr. Njuguna

For 2<sup>nd</sup> Appellant: Mrs. Kihika

For Respondent: Mr. Wambugu

Court Assistant: Peter Wabwire

