TSKC v DAO (Civil Appeal E112 of 2024)
[2024] KEHC 11703 (KLR) (Family) (5 July 2024) (Judgment)

Neutral citation: [2024] KEHC 11703 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL E112 OF 2024

PM NYAUNDI, J

JULY 5, 2024

BETWEEN

TSKC ..... APPELLANT

AND

DAO ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon R.O Ombogo , Senior Resident Magistrate at Nairobi Children's Case No.E1677 of 2021 delivered on 28th September 2023.)

JUDGMENT

1. This Appeal arises from a judgment delivered in Milimani Children's Case No. E1677 of 2021. The Appellant is aggrieved by the decision of the Honourable R.O Ombogo, and has preferred this Appeal. In the suit before the Lower Court, the Appellant was the Defendant. The Respondent who was the Plaintiff in her plaint 10th December 2021 sought the following orders;

    a. The Plaintiff be granted permanent legal custody of the minor issue herein.

    b. That an order do issue that the Defendant pay a monthly reasonable amount towards the upkeep of the minor issue herein.

    c. That an order do issue compelling the Respondent to execute all travel documents and other relevant documents required by the Canadian Embassy to facilitate the minor with travel and/or stay in Canada.

    d. Costs of this suit.

    e. Any other relief this honourable court may deem fit and expedite to grant.

2. The Appellant entered appearance and filed a defence and counterclaim dated 12th April 2023. In his counterclaim, he prayed for judgment against the Respondent as follows;

    a. Full , legal and actual custody , care and control of the minor be granted to the Defendant.

    b. Plaintiff be only allowed access to the minor when in the country.

    c. A restraining order be issued to the effect that the minor shall never be moved out of Kenya without the Defendant's consent.

3. The suit was set down for hearing. Both the Appellant and the Respondent testified and the trial court delivered a judgment on 24th March 2023 in the following terms;

    1. The Plaintiff shall have permanent legal custody of the minor.

    2. The defendant shall have access during school holidays and in accordance to the Canadian educational system. He shall pay for the flight tickets for the child.

    3. The plaintiff shall provide for the child all her needs while in Canada.

    4. The defendant shall execute travelling documents for the child granted the sole legal and actual custody, care and control of the minor AC.

    5. That the Defendant's Amended Counterclaim dated 22nd August, 2022 is dismissed.

    6. That each party to bear own costs.

4. The Appellant being dissatisfied with the trial court's decision approached this Court by way of a Memorandum of Appeal dated 11th April 2023, listed seventeen grounds of appeal as follows;

    1. That the Trial Court erred in fact and law by granting the Respondent legal custody solely without due consideration that there are two biological parents.

    2. That the trial court erred in fact and in law by failing to consider the appellant's sentiments of the minor being taken care of by third parties an the same was not addressed in the judgment.

    3. That the trial court erred in fact and law by disregarding any wrong doing on the part of the Respondent but went ahead and painted the appellant in bad light. It was discovered at the hearing stage that not more than once did the respondent abandon the minor to third parties without notifying the appellant while she was in search of greener pastures. On one occasion, the Respondent travelled to South Sudan and on another occasion, she travelled to Canada and did not inform the appellant.

    4. That the trial court erred in fact and law by failing to consider that the Respondent has reduced her parental responsibility ad obligations to material provisioning for the minor while the minor is under the care of third parties.

    5. That the trial court erred in fact and law by admitting evidence that was not proven when the Respondents stated that she returned to Kenya every three months to visit the minor. There was no proof of air tickets to warrant that submission as a truth. The court went ahead and granted an absentee parent permanent custody and failed to give the appellant a response to his concerns on what will happen to the minor while in Canada and the Respondent assumes her negligence abroad where the appellant would have no recourse.

    6. That the trial court erred in fact and in law by failing to acknowledge the appellant's rights by failing to consider the clear details of the appellant's witness statement where the third parties

designated by the Respondent while she was out of the country had blocked the appellant from accessing the minor. These concerns were not addressed considering the Appellant's statement clearly states he last accessed the minor on 24th September 2022.

7. That the trial court erred in fact and in law by failing to consider that the respondent was in contempt of court orders dated 10th June 2022 where she denied the appellant access. The appellant put across this point but the court failed to consider it.

8. That the trial court erred in fact and in law by failing to consider the appellant's input in providing for the minor and was biased in considering the respondent's input only. Both the respondent and the appellant submitted evidence of the material support they extend to the minor. The appellant submitted receipts of medical bills, clothing items, shoes, hair salon payments, children theme park play fees, grocery and snack purchase that spanned over 15 pages of evidence but shockingly the trial court still chose to believe similar evidence from the respondent but completely disregard the same type of evidence from the appellant's side.

9. That the trail court erred in fact and in law by adopting mpesa messages provided as proof by the Respondent as truth and failed to consider the Appellant's transaction messages which were also proof more so these sent to the third parties designated by the respondent to take care of the minor were deemed questionable.

10. That the trial court erred in fact and in law by failing to consider that the appellant was employed by his current employer on 1st March 2021 hence he was medically covered. The court however adopted the respondent's fallacy that the appellate tool out a medical cover to hoodwink the court.

11. That the trial court erred in fact and in law by conveniently ignoring that when the respondent could not sustain the school fees at [Particulars Withheld] School, the appellant stepped in and enrolled the minor at [Particulars Withheld] School after which the Respondent's relatives went into hiding with the minor and the Respondent did not cooperate in order to facilitate the transfer of schools. The appellant later discovered that the respondent had moved houses from Lavington to Nyayo Estate. The appellant also discovered that the minor had been enrolled in [Particulars Withheld] School in Embakasi without the appellant's consultation or approval.

12. That the trial court erred in fact and in law by adopting the respondent's statement as true for example, that education in Canada is free. Further, the court discredited the education system in Kenya in order to grant the Respondent sole legal custody without considering the kind of education the appellant would have provided for the minor.

13. That the trial court erred in fact and law by adopting a biased language in the ruling against the defendant by using terms such as, 'I find the Defendant not genuine.'

14. That the trail court erred in fact and in law by failing to consider that the appellant had tried an out of court settlement to reclaim the minor's custody through the customary means going to the lengths of visiting the respondent's rural home four times to have the respondent's parents arbitrate and chose not to participate. The ruling ignored all this.

15. That the trial court erred in fact and law by blatantly picking and favoring the respondent with a preconceived outcome. The appellant's evidence has been consistently ignored and the basis for this being that when other magistrates handled this matter, objectivity was seen. However, when the matter was placed before Hon. Mbogo bias was evident. Points in case; Hon Jackie Kibsia granted the defendant's request to have a Children Officer's Report (COR)

done. Strangely, Hon. Mbogo granted interim orders without requesting that the Children Officer's Report be taken out. Same case where, Hon. Kibe saw the need to place a ban on the minor travelling out of the Kenyan jurisdiction. Whereas Hon. Mbogo, consistently worked towards getting the quickest way to have the minor travel to Canada in favour of the plaintiff. While always disregarding the rights of the defendant who is also a biological parent.

16. That the trial court erred in fact and in law by not allowing a competent court in Nairobi handle the case, this particular file had to be sent to the transfer court.

17. That the trial court erred in fact and in law by taking too long to deliver the ruling, 'justice delayed is justice denied' . the file got lost on four different occasions under peculiar circumstances and what followed was postponement each and every time. It was after the appellant wrote letters to the court's head section and office of the ombudsman did the judgment ruling finally get delivered.

5. He sought the following prayers in the appeal: -

   i. That the appellant to have physical and actual custody, care and control of the minor in the country she has already familiarized herself with the respondent be allowed access every time she travels to the country as she has claimed she does every three months.

   ii. That the costs of this appeal be granted to the appellant

6. This appeal was canvassed by way of written submissions. The Appellant's submissions are dated 14th February 2024 . The Respondent did not put in any written submissions.

Appellant's Submissions.

7. The Appellant submitted that the following issues fall for determination;

   i. Whether the court erred in granting the Respondent sole permanent legal custody of the minor with leave to take the minor from Kenya.

   ii. Whether the court erred in directing the defendant to execute the minor's travel documents.

   iii. What appropriate orders should this court issue.

8. The appellant hinges his appeal on Article 53 (e) of the *Constitution* of Kenya which states that every child has a right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not. It was submitted that the appellant was denied the right to care and protect the minor and an equal opportunity to provide for the minor. That taking the minor to Canada denied him joint legal custody of the child and is not in the best interest of the child. He sought to rely on the decisions in *In re ABE (Minor)* [2021] eKLR , *JWAN v VOO & another* [2020] eKLR and *K.M.N v Children's Court, Tononoka & another* [2015] eKLR where the courts in these decisions did not allow the minor to leave the jurisdiction of the court on the ground that it would destabilize the minors who were in a stable environment.

9. Also, that the court did not ascertain the wishes of the child as stipulated in Section 103(1) (b) and Section 8(3) of the *Children's Act*.

10. Counsel submitted that the trial court erred by directing the appellant to execute travel documents without providing a mechanism under which the appellant can exercise his right to access.

Analysis And Determination

11. I remind myself that this court is sitting on a first appeal and as such I am under a duty to subject the evidence presented before the trial court to scrutiny in order to arrive at my own conclusions bearing in mind always that this court did not have the opportunity to observe the witnesses first hand. In *Selle & another v Associated Motor Boat Co. Ltd.& others* (1968) EA 123, the Court had the following to say in respect of the duty of a court sitting on first appeal:

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it 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 this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

12. I have read the entire record of proceedings from the lower court specifically the evidence by the Appellant and the Respondent on the issue of the custody of the child and the issue raised in this appeal concerning taking the child outside the jurisdiction of the Court. I have taken into account the wishes of the Appellant and those of the Respondent as well regarding the relocation to Canada where the Respondent resides and works.

13. It is clear to me that the central issue before the trial court and before this court is the issue of who, between the Appellant and the Respondent should have actual custody, care and control of the child. The trial court granted the respondent permanent legal custody of the minor, the appellant was granted access during school holidays in accordance with the Canadian educational system and pay for the flight ticket for the child, the respondent was required to provide for all the child's needs while in Canada and the appellant was required to execute travelling documents for the child within 7 days .

14. It is trite law that in all matters touching on the child and in all decisions touching on the child, the best interest of the child is to be given paramouncy. Therefore in determining this appeal this court is alive to the fact that it is under an obligation as provided under Article 53(2) of the *Constitution* of Kenya 2010 and Section 4(3) of the *Children Act* to give primacy, while considering any disputed matters involving children, to the best interest of child. The law provides factors to consider when determining a child's best interests. In determining what constitutes the best interest of the child, each case is considered in its own peculiar circumstances. Further it is a settled legal principle that in determining matters of custody of children, especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother (see *J.O v. S.A.O* [2016] eKLR).

15. I find relevant to this case the pronouncement of the Court of Appeal in *C K v T K M* [2016] eKLR, while considering a custody dispute and the issue of taking the child out of the jurisdiction, and the Court having observed that 'Ordinarily precedent is of limited assistance when determining what is the best interest of the child because these types of cases must notoriously hinge on the peculiar circumstances of each case.' ,stated as follows:

> " We cannot agree with the appellant that the ruling of the High Court in KWK v. JMW, HCCC. NO. 2173 of 1999 (OS), lays down any immutable proposition that in a custody

dispute, a child cannot be taken out of jurisdiction except in exceptional circumstances. First, the views in that ruling which the appellant urges us to apply were made obiter. Secondly, the application in which they were made was an application by an advocate for leave to cease acting, rather than in the application for custody itself. Thirdly, because the express provision of Article 53 (2) of the *Constitution* and Section 4 (2) and (3) of the *Children's Act* which require that in all matters concerning the child, his best interest is of paramount importance, it is conceivable that there may be situations, without being in any way exceptional, where the best interest of the child is served by allowing him to travel out of jurisdiction." (emphasis added).

The Court went further in the above case, to state that:

"Nevertheless, *M v. P* [1980] eKLR, is a good illustration of the Court allowing a child to be taken out of the jurisdiction notwithstanding claims that he would not be brought back into jurisdiction. In that case, the Muslim mother of the child was granted custody of the child until he attained seven years of age, after which the father was to assume custody. Before the child attained seven years, the mother decided to immigrate to the United Kingdom, as she was unable to sustain herself in Kenya. Notwithstanding objections by the father, the court allowed the child to be taken out of jurisdiction because that was in his best interest and upon further finding that no evidence existed to sustain the allegation that the child would not be brought back to jurisdiction upon attaining the age of seven years."

16. In the above Appeal (*C K v T K M*), the Court was dealing with a contested custody dispute where the High Court while sitting on appeal allowed the mother of the child to take the child out of jurisdiction when she had custody of him. The Court of Appeal affirmed the decision of the High Court in allowing the child out of jurisdiction. The Court stated that:

> " Having carefully considered this appeal, we are satisfied that the first appellate court, in making its orders on custody of the child attached due primacy to the best interest of the child as demanded by Article 53 (2) of the *Constitution* and Section 4 (2) and (3) of the *Children's Act*....."

17. In arriving at my decision, I note that the trial Court had the opportunity to hear both the parties first hand and further the trial magistrate considered at length the past conduct of the each parent of the child and their respective testimonies.

18. The mother has been the primary care giver of the minor. She has an opportunity to advance herself by pursuing studies in Canada and has made arrangements for the Child to accompany her. She has demonstrated that she is willing to facilitate unrestricted access by the father to the minor. It is not lost on me that with modern day technological advances it is possible to maintain contact that is not limited by distance and time.

19. Having regard to the circumstances of the case, I find that this is an appropriate case to allow a parent to travel with the child out of the jurisdiction of the Court. Accordingly the appeal fails on this ground. I will make the following orders

    a. The father (Appellant) and mother (Respondent) shall have joint legal custody of the child.

    b. The child shall remain in the physical custody of the mother and in this regard the mother is granted leave to travel with the Child to Canada.

c. The father to have access to the Child, while in Canada, the mother shall facilitate digital access by the father to the Child (via conference call). The Father shall have access to the child and if the Child is to travel to Kenya he shall facilitate her travel arrangements.

d. The mother shall provide for the maintenance needs of the child, while the child is in Canada.

e. The Father to execute document to facilitate the travel of the child to Canada within 14 days from the date hereof.

f. This being a family matter each side will meet is own costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS...5TH DAY OF JULY 2024

P M NYAUNDI

JUDGE

In the Presence of

Fardosa Court Assistant

Ms Gicheha for the Appellant