



**Swafford Jr v Marabi (Family Appeal E038 of 2024)
[2024] KEHC 10736 (KLR) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10736 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E038 OF 2024
G MUTAI, J
SEPTEMBER 16, 2024**

BETWEEN

ROBERT LAVERN SWAFFORD JR APPELLANT

AND

CHRISTINE AJIAMBO MARABI RESPONDENT

RULING

1. The Children's Court delivered a judgment on 20th May 2024 in MCCHCC. NO E184 of 2023; Christine Ajiambo Marabi vs Robert Lavern Swaford Jr vide which it, inter alia, granted actual physical custody of the child to the respondent and ordered the appellant/applicant to pay Kes.50,000.00 as monthly upkeep to the Respondent.
2. The Appellant/Applicant was aggrieved by the said decision and filed an appeal on 17th June 2024. The appellants/applicant also filed the application dated 4th July 2024. This is the application now before the Court.
3. The said application seeks the following orders:-
 1. Spent;
 2. Spent;
 3. Pending the hearing and determination of the appeal the minor Indigo Lavern be returned to the actual care and control of the Respondent's sister; Susan Marabi;
 4. That in the alternative the minor Indigo Lavern Swaford be put in the actual care and control of a person whom both the Appellant and the Respondent mutually agree on pending the hearing and determination of this application;



5. That this honourable Court do issue orders restraining the Respondent from making any important decisions regarding the minor Indigo Achieno Lavern Swaford without involving the Appellant; and
6. The costs of this application be in the cause.
4. The appellant/applicant stated that for three years prior to the filing of the matter before the Court below, and also during the subsistence of the case, the minor was in the custody of the respondent's sister, Susan Marabi, as both the appellant and the respondent live outside Kenya. However, immediately before the delivery of the judgment, the respondent removed the minor from the custody of her sister without consulting the appellant/applicant, changed her school and placed the child in the custody of her niece, who is not keen to have custody. It was averred that the respondent's action was unlawful and not in the best interest of the child. It was also offensive as it disregarded the interest of the appellant/applicant who had access orders to the child.
5. The respondent opposed the application. The respondent filed a replying affidavit that she swore on 15th July 2024. The respondent deposed that she had complied fully with the orders of the subordinate court and had not done anything without consulting the appellant/respondent. She stated that the minor was moved from the Coast Academy to Kinder School in a process that they both consented to and in which the appellant/applicant played a great role, including paying a Kes.17,000.00 school fee deposit.
6. She accused the appellant/applicant of being a manipulative person who had driven a wedge between her and her sister, Emily. She said he wanted Susan to have custody of the child as she is quiet and easy to manipulate. According to her, the child is in an apartment she rents, in the custody of her elder sister, a nanny, and her daughter from a different relationship. She thus prayed that the application be dismissed.
7. The application was heard on 17th July 2024. Ms Kimani, learned counsel for the appellant/applicant, urged the Court to compel the respondent to consult her client before making decisions regarding the child. She submitted that the child was removed from the custody of Susan, her previous caregiver, and taken to a different home and that the changes were made without consultation. She denied that there were consultations and argued that what was said to be consultations were decisions made by the respondent, which were then imposed on the appellant/applicant. Since the relationship between the parties has deteriorated, it was urged that the matter be referred to the Court annexed mediation.
8. The respondent denied that she made decisions without consulting the appellant/applicant. She submitted that upon coming back from Bahrain she informed the appellant/applicant that she would be moving the child from the sister's house as it was on 3rd floor, was crowded, and did not have space for the child to play. The house she moved to is a three-bedroom apartment with CCTV cameras. She stated that she has a nanny. The respondent accused the appellant/applicant of being arrogant and of having accused her of being of unsound mind.
9. I have considered the application and the response thereto, as well as the parties' oral submissions. This being a matter about a child, the best interest of the child, as defined in section 8 of the *Children Act*, 2022, and Article 53(1) of *the Constitution*, is paramount. I reproduced the said provisions for emphasis Article 53(2) of *the Constitution* of Kenya, 2010 states that:-

“(2) A child's best interests are of paramount importance in every matter concerning the child.”



Section 8 of the *Children Act*, 2022 provides that:-

- “(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—
- (a) the best interests of the child shall be the primary consideration;
 - (b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.
- (2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, 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; and
 - (c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.
- (3) In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child’s age and degree of maturity.”

10. As parents of the child the appellant and the respondent have equal parental responsibility to her. This is clearly stated in section 32(1) of the *Children Act* which provides as follows:-

- “(1) Subject to the provisions of this Act, the parents of a child shall have parental responsibility over the child on an equal basis, and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility whether or not the child is born within or outside wedlock.”

11. Regarding custody of the child I note that the appellant does not reside in Kenya. The child is of a tender age. The appellant/applicant did not show that there were exceptional circumstances to warrant displacement of the presumption that a child of tender years should be with the mother.

12. What amounts to exceptional circumstances was defined by the Court of Appeal in JO VS SAO [2015]eKLR. The Court expressed itself as follows:-

- “ 13. There is a plethora of decisions by this Court as well as the High Court that in determining matters of custody of children, and especially of tender age, except where exceptional circumstances exist, the custody of such children should be



awarded to the mother, because mothers are best suited to exercise care and control of the children. Exceptional circumstances include: the mother being unsettled; where the mother has taken a new husband; where she is living in quarters that are in deplorable state; or where her conduct is disgraceful and/or immoral. See *Sospeter Ojaamong V Lynnette Amondi Otieno*, Civil Appeal No. 175 Of 2006, *Karanu V Karanu* [1975] E.a. 18, *Githunguri V Githunguri* [1979] eKLR.”

13. It was the duty of the appellant /applicant to bring his application within the ambit of the above case. Further, the issue of custody is a substantial matter that ought to be determined on merit after hearing the appeal.
14. The upshot of the foregoing is that I am unable to interfere with the orders of the Court below at this point. Consequently, prayers 3 and 4 are dismissed.
15. Regarding prayer 5, it is apparent that the parties discussed which school the child should attend. Having said so, it isn't clear whether discussions were made regarding all issues. In the interest of justice and for the best interest of the child, I order that all discussions regarding the child be made by the parties jointly, save for those matters already determined by the Court below.
16. As I was writing this ruling, it came to my attention that the parties desire to attempt to resolve their disputes through court-annexed mediation. This Court is required by Article 159 of *the Constitution* to promote alternative forms of dispute resolution. In the circumstances, I order that the matter be referred to court-annexed mediation.
17. As this is a matter regarding a child, I make no order as to costs.
18. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 16TH DAY OF SEPTEMBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Ms Kimani for the Appellant/Applicant;

Ms Marabi (pro se litigant); and

Arthur – Court Assistant.

