MAO v CO (Civil Appeal E028 of 2022) [2023] KEHC 113 (KLR) (16 January 2023) (Judgment)

Neutral citation: [2023] KEHC 113 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E028 OF 2022

RE ABURILI, J

JANUARY 16, 2023

BETWEEN

MAO ..... APPELLANT

AND

CO ..... RESPONDENT

(An appeal arising out of the judgement and decree of the Honourable C.I. Agutu in the Principal Magistrate's Court at Ukwala delivered on the 7th January 2022 in Ukwala Children's MCCC/E2 of 2022)

JUDGMENT

Introduction

1. This appeal arises from the Judgment and decree passed by the Learned Senior Resident Magistrate Hon CI Agutu in Children's MCCC/E2 of 2022 delivered on January 7, 2022 in the Principal Magistrates Court at Ukwala.

2. A brief background of the case before the trial court is that the appellant and the respondent had an intimate relationship while they were students and in 2017, the Appellant conceived and bore a baby boy, AO, the subject of the custody dispute between the two parties.

3. In the trial court, the respondent sought judgement against the appellant for orders of joint custody of the minor, visitation rights as well as costs of the suit. On his part, the appellant sought physical custody of the minor and joint parental custody. The appellant also sought that the father pays school fees in its entirety as well as monthly upkeep of Kshs 5,000.

4. In her one page judgement, the trial magistrate granted the respondent physical custody of the minor and further ordered the respondent to cater for all the needs of the minor specifically school fees, Medicare and clothing and further proceeded to grant the appellant visitation rights and physical custody during the school recess.

5. The appellant was aggrieved by the decision of the Trial Court. She therefore filed this appeal vide a Memorandum of Appeal dated June 2, 2022 raising the following grounds of appeal:

   i. That the learned trial magistrate erred in law and fact by making orders vesting custody of a child of tender years to the father without evidence impeaching the mother's suitability to have custody.

   ii. That the learned magistrate erred in fact by holding that the minor would be best suited being in custody of the father despite evidence showing that the said father was still attending school hence unable to fully care for the minor.

   iii. That the learned magistrate erred in law and fact by attaching unreasonably high probative value to the respondent and his witnesses' evidence despite glaring contradictions on their various affidavits, written statements and oral testimony.

   iv. That the learned magistrate erred in fact by failing to appreciate the fact that it is indeed the respondent's mother (since deceased) who would be granted custody of the child and not the respondent himself as he is still undertaking his studies in Nairobi.

   v. That the learned trial magistrate failed to appreciate the well settled principle of law in all actions concerning children whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

   vi. That the learned trial magistrate erred in law by failing to apply the rule that gives custody of children of tender years to the mother.

   vii. That the learned trial magistrate erred in law and fact by failing to call for a social inquiry report into the suitability of the appellant to have custody of the minor.

   viii. That the learned trial magistrate erred in law and in fact by attaching undue importance on financial capability of the respondent's parents in granting custody orders.

   ix. That the learned trial magistrate erred in law and in fact by failing to get a children's officer's report to establish ascertainable wishes of the minor before making the adverse orders.

   x. That the learned magistrate erred in law and in fact by issuing the orders that were not prayed for to the detriment of the appellant and without considering the facts placed before her.

   xi. That the learned magistrate failed to appreciate the law vis-à-vis the material placed before her, all of which did not support the judgement made.

   xii. That the learned trial magistrate erred in law and fact in proceeding on wrong principles and thereby arriving on a wrong decision.

   xiii. That the learned trial magistrate erred in law and in fact in failing to set out point of determination and giving reasons for court decisions on each point.

6. The Appellant seeks orders that "this appeal be allowed and the judgement of the trial magistrate be set aside and the same replaced by a suitable judgement of this court and further that this court proceed to adjudicate and determine the matter".

7. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

8. The appellant submitted that the best interest of the child shall be the primary consideration in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies as provided for in Section 8 of the *Children's Act*.

9. It was submitted that in giving her judgement, the trial magistrate attached high probative value to the respondent and his witnesses despite the contradictory nature of their testimonies, affidavits and witness statements whereas the respondent's mother who had since passed on stated that the minor was under her care while the respondent undertook his studies in Nairobi.

10. The appellant further submitted that it is a well settled principle that where custody of a child of tender years is in issue, such custody shall be with the mother unless there are extenuating circumstances as was held in the case of *KMM v JIL* (2016) eKLR and the Court of Appeal case of *Mehrunnisga v Parves* (1981) KLR 547.

11. It was submitted that there was an error in law and fact as the trial magistrate failed to call for a social inquiry report into the suitability of any party having the custody of the minor as was upheld in the case of *SMW v EWM* [2019] eKLR, and that a social inquiry would have aided the trial court in determining whether the appellant's living conditions were suitable to offer care and protection to the minor.

12. The appellant further submitted that while considering the order for financial provision for maintenance of the minor, the trial court was obligated to take into account the income or earning capacity, property and financial resources of the parties as it was brought out in court that the respondent was still pursuing his studies whereas the appellant was able to support the minor as she was a hairdresser and having supported the child since birth.

13. The appellant submitted that she should be granted custody of the minor whereas parental responsibility ought to be vested on both parents.

The Respondent's Submissions

14. On behalf of the respondent, it was submitted that the judgement of the trial court though being one page long was in compliance with the provisions and requirements of Order 21 Rule 4 of the *Civil Procedure Rules* as it contained a concise statement of the case, the points for determination, the decision thereon and reasons for said decision.

15. The respondent further submitted that it was clear that the trial magistrate placed the minor's interest first as she had the opportunity to observe the demeanour of all parties to the suit.

16. It was submitted that the respondent started having physical custody of the minor when he was still a toddler when the appellant was still in school and that the appellant's new partner had denounced the minor and refused to stay with him and as such, it would endanger the minor's life by placing him in the appellant's custody.

Analysis and Determination

17. This is a first appeal. The duty of a first appellate Court is spelt out in section 78 of the *Civil Procedure Act* and as was succinctly stated in Sielle v Associated Motor Boat Company and restated in *JWN v MN* [2019] eKLR in the following words:

> " It is settled law that the duty of the first appellate court is to re-evaluate the evidence tendered in the subordinate court, both on points of law and facts and come up with its findings and conclusions."

18. This is the standard of review upon which it is incumbent upon the Court to utilize in determining this appeal. In addition, it is imperative that the prime directive is that the best interests of the children is first and paramount and everything must be done to safeguard, conserve and promote the rights and welfare of the children. Sections 8 (1) (a) & 2 and section 103 (1) of the *Children Act* as well as Article 53(2) of the *Constitution* set out this prime directive and give bright-line contours on their application to real cases.

19. The *Constitution of Kenya, 2010* in Article 53(2) provides that:

> " A child's best interests are of paramount importance in every matter concerning the child."

20. Section 8 (1) (a) & (2) of the *Children's Act* echoes the Constitutional imperative 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;

(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 the adopting a course of action calculated to –

a. Safeguarding and promoting 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."

21. Section 103 (1) of the *Children Act*, on the other hand, lists down the factors to be considered in making a custody award. It 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. 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, or a supervision order, or a 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 the order under this section; and

j. The best interest of the child.

22. The evidence adduced before the trial court was as follows: PW1, the respondent's mother, who has since died, and there is no contrary evidence to that assertion, testified that she took care of the minor as the respondent pursued his studies in Nairobi. She testified that the appellant's new boyfriend was not welcoming of the minor. She further testified that the minor was best left in the respondent's custody as she had enrolled the minor in a school that he was attending and further that she had a young child who usually played with the minor.

23. The respondent testified as PW2 and stated that even though his mother had passed away, he was able to take care of the minor and thus he ought to be granted custody. He testified that the minor was healthy when he was with him and neglected when he went to the appellant's residence. He further testified that the appellant had no fixed abode although she was remarried. It was his testimony that the appellant stated that her own parents mistreated the minor.

24. On her part, the appellant testified that as at the time of the trial, she had not seen the minor for the last 3 months as he was with the respondent. She testified that she left the minor when he was 4 months old to go back to school and that her mum used to stay with the minor. She denied going on drinking sprees with the minor. She further testified in cross-examination that even though she knew the respondent's home, she had not gone back to see the child. She further admitted that the respondent used to care for the minor when he was young and that he still takes care of the baby.

25. I have considered the aforementioned evidence, grounds of appeal and the rival submissions by both parties. In my view, the following issues fall for determination:

a. Whether the impugned judgement meets the threshold for drafting of a Judgment as contemplated in Order 21, Rule 4 of the Civil Procedure Rules and whether it is therefore sustainable on its merit;

b. Who should be awarded custody of the minor; and

c. What appropriate orders for maintenance should issue?

26. On the first issue, Order 21 Rule 4, of the *Civil Procedure Rules* provides as follows:

> "Judgments in defended suits shall contain a concise statement of the cause, the points for determination therein and the reason for such decision."

27. The above position was reiterated in the case of *Wamitu v Kiarie* (1982) KLR 481, where the court held inter alia that:

> " in defended suits, the Judgment shall contain a concise statement of the case, points of determination, the decision thereon and the reason for such a decision as required by Order XX, rule 4 of the CPR (as it was then cited) and now Order 21 rule 4."

28. I have revisited and construed the above provision, in light of the reinstatement of the principle enshrined therein as enunciated in the Wamitu case [supra] and applied it to the rival positions herein. I find that since the custody proceedings filed by the respondent were defended by the appellant, the learned trial magistrate was enjoined to ensure that in the concise statement of the case, both the rival pleadings and the evidence in support thereto were addressed.

29. I have perused the impugned judgement and with utmost respect to the learned magistrate, whereas brevity is encouraged in judgment writing and there is nothing wrong with that, I find no point for determination identified as is required of the Court by the prerequisite in the above Rule. Further, the trial magistrate provides no reasoning for her decision to award the appellant visitation rights and the respondent custody of the minor.

30. In light of the above, I find fault with the trial court's judgement for failure to comply with the provisions of Order 21 Rule 4 of the *Civil Procedure Rules*.

31. That being said, the duty of this court, being a first appellate court is to re-evaluate the evidence tendered in the subordinate court, both on points of law and facts and make its own findings and reach its own independent conclusions. I will thus turn to the other issues framed for determination.

32. As regards custody, the Learned trial Magistrate gave actual custody of minor who was five (5) years old and now six (6) years to the father against the protestations of the mother without even undertaking the requisite analysis impeaching the suitability of the mother to be the primary care giver as required by our decisional law. In Kenya, there is a prima facie rule that absent exceptional circumstances, the custody of children of tender years should be awarded to the mother. It is incumbent upon the father or other person seeking custody of children of tender years to demonstrate the exceptional circumstances.

33. The Court of Appeal, in *J.O. v S.A.O* [2016] eKLR stated as follows on this issue:

> " 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 suitable 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."

34. The decision in *Sospeter Ojaaamong v Lynette Amondi Otieno*, Court of Appeal CA of 2006 described exceptional circumstances in the following words:

> " The exceptional circumstances would include if the mother is unsettled, has taken a new husband or her living quarters are in a deplorable state."

35. In *Martha Olela & another v Jackson Obiera* C.A 16 of 1979 the Court explained the general principle that custody of young children should be awarded to the mother unless special circumstances and

peculiar circumstances exist to disqualify her for being awarded custody. The Court stated that the exceptional circumstances would include "disgraceful conduct, immoral behavior, drunken habit, or bad company."

36. In *JKN v HWN* [2019] eKLR, the Court contextualized the exceptional circumstances to bring them in line with the values of our Constitution thus:

> " As I read our case law now, sexual indiscretion or extra-marital sexual behaviour will only be a factor in a custody award if it rises to the level where it harms the children as for example is assumed to happen when the parent in question has behaved so dishonorably that it affects the children through trauma. If there is no showing of harm, sexual indiscretion alone, without more, is not an inexorable rule excluding a Court from awarding custody to a parent where other favourable factors are present."

37. In the present case, the minor, A.O. is a child of tender years. The trial magistrate did not carry out any analysis required to determine if there were exceptional circumstances to displace the presumption that actual custody of children of tender years should be awarded to the father. This, on its own, is a reversible error.

38. In addition, had the trial magistrate called for a social inquiry, the Learned Trial Magistrate would have benefitted from that Social Inquiry Report by the Children's Department. Such a report would have guided on whether the custody arrangements that the Learned trial Magistrate ordered were truly in the best interests of the child. The Learned Trial Magistrate neither requested nor received such a Report. Neither did she interview the subject minor to inform herself of its situation, views or preferences. To this extent, I find and hold that the custody award was premature.

39. As regards the order on maintenance, the law relating to maintenance of a child is found the *Constitution of Kenya, 2010* and the Children's Act. Article 53 of the *Constitution* provides that:

(1) Every child has the right–

(e) 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."

40. This is further buttressed by section 110 (a) of the *Children's Act* which provides that:

> " It shall be the joint duty and responsibility of both parents to maintain the child whether or not the parents are married to each other."

41. The learned trial magistrate ordered that the respondent cater for all the needs of the minor to the exclusion of the appellant despite the fact that the appellant expressed the desire and capability to provide for the minor. She did not give reasons for that order. To that extent, I find that the trial court was in error of law and fact.

42. Following my above findings, I conclude that the order that commands to issue is to remand the case back to the Trial Children's Court at Ukwala so that it can deal with the question of custody of the minor in accordance with the established legal guidelines stated above. In particular, the Trial Court must request and receive a Social Inquiry Report on the minor to be filed by the Children's Department. It must also consider whether it would be beneficial to interview the minor before making its final determination.

43. In the end, I allow this appeal to the extent stated above. I set aside the judgment and decree of the trial court passed on 7/1/2022 and substitute it with an order remanding this case back to the trial court at

Ukwala principal Magistrate's Courts for consideration of the issues identified herein afresh prior to appropriate orders being made in accordance with the law.

44. Each party to bear their own costs of the appeal as the matter involves a minor.

45. This file is accordingly closed.

46. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 16TH DAY OF JANUARY, 2023

R.E ABURILI

JUDGE