REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY APPEAL E033 OF 2012

IN THE MATTER OF THE CHIDLDREN ACT NO 8 OF 2001 MM (A MINOR)

GAM .....APPELLANT/APPLCIANT

VERSUS

HBAO ..... /RESPONDENT

JUDGMENT

1. Sometime the year 2018, HBAO (hereafter the respondent) started cohabiting with GAM (hereafter the appellant) as husband and wife. As a couple, they were blessed with a baby known as FMM born on 15th January, 2020. Following allegations of child neglect against the appellant, the respondent moved to Tononoka children's court on 15th January 2020 vide Children case No 8/2009 seeking various orders against the applicant as follows;

> ***1 A declaration that both the plaintiff and the defendant have equal parental responsibility for the issue herein namely FMM and order giving that effect.***
>
> ***2 A maintenance order requiring the defendant to make periodic financial payment as stated in paragraph 7 above or as the court shall deem fit, to the plaintiff in respect of the maintenance of the child herein.***
>
> ***3 The defendant do pay school fees in respect of his child when the same attains school age.***
>
> ***4 The defendant do take medical cover for the minor herein.***
>
> ***5 The defendant do meet the additional education and medical needs of the child herein as and when the same may arise.***
>
> ***6 Actual/physical custody of the child do vest in the plaintiff***
>
> ***7 The defendant be permanently restrained from removing the child herein from the local limits of the jurisdiction of the Republic of Kenya without prior consent of the plaintiff or an order from this honourable court***
>
> ***8 Costs of this suit and interest therein at court rates.***
>
> ***9 Any other relief that this honourable court may deem fit.***

2. The appellant filed a defence and counter claim dated 16th November, 2020 seeking that; interim orders made on 15th October, 2020 and 21st October, 2020 in favour of the respondent be discharged; a maintenance order requiring the plaintiff to make periodic financial payment for the child's upkeep be made, and lastly , legal custody, care and control of the baby be provided for.

3. Upon conclusion of the hearing, the court pronounced its judgment on 8th September, 2021 thus ordering that;

> ***1 That both parties have equal parental responsibility for the issue FMM***
>
> ***2 Legal custody to be joint between the parties.***
>
> ***3 Actual/physical custody care and control of the child to vest in the plaintiff***

4 The defendant be granted unlimited access to the child during day time on Monday, Wednesday and Saturday from 9.00 am ot 5.00pm on each day until he will be age of three years old when he will be able to have sleep overs at his father's house.

5 When the child becomes three years old, he can then be able to have sleepovers at the father's house as it may be agreed on by parties or during the weekends so as not to disrupt his schooling /education.

6 The defendant continues paying rent at the rate of not less than 15,000 per month for a period of one year from the date of this judgment and thereafter the plaintiff should have picked up financially so as to cater for her own rent, utility bills and to contribute towards the child.

7 The defendant pays child upkeep of Ksh 15,000 per month for food and daily upkeep payable to the plaintiff on or before the 5th day of every month through her M-pesa or to her bank account which she should provide. Which amounts should increase annually at the rate 10%

8 When the child become of age to join school, the defendant to cater for the child's school fees and school related expenses except stationeries , school bag and shoes which should be catered by the plaintiff

9 The defendant to take out a medical cover for the child and/or care for medical expenses as and when the same may arise.

10 The parties to share clothing equally

11 Each party to offer entertainment while with the child.

12 No orders as to costs.

4. Aggrieved by the entire judgment, the appellant moved to this court on appeal vide a memorandum of appeal dated 24th September, 2021 citing 30 grounds of appeal as follows;

1 The learned trial magistrate erred in law and fact by failing to grant all the prayers sought in the case by the appellant despite gravity of the evidence adduced during trial.

2 The learned trial magistrate erred in law and fact by failing to consider the principles of granting custody as enshrined in the provisions of the Children's Act No 8 of 2001.

3 The learned trial magistrate erred in law and fact in failing to consider the principles of grating maintenance as enshrined in the provision of the Children's Act No 8 2001.

4 The learned trial magistrate erred in law and fact in putting the interest of the respondent before those of the minor contrary to the provision of the Children Act No. of 2001 and the Kenyan Constitution.

5 The learned trial magistrate erred in law and fact by failing to consider the existing oral agreement in place on shared custody before the filing of the case.

6 The learned trial magistrate erred in law and fact by failing to consider that the appellant had been the primary care giver and nurturer of the child since birth while the respondent was going to work.

7 The learned trial magistrate erred in law and fact by failing to consider the dual nationality of the child and restricting the free movement of the child outside Kenya.

8 The learned trial magistrate erred in law and fact by failing to order shared custody with overnight stay of the child with the appellant.

9 The learned trial magistrate erred in law and fact in finding that the appellant had only exercised right of unlimited access during daytime yet the respondent had refused to let him stay overnight with the child as per the evidence on record.

10 The learned trial magistrate erred in law and fact in finding that the very rare occasions when the appellant hired a maid to assist with the child upkeep was a major factor in determining access period against the respondent.

11 The learned trial magistrate erred in law and fact in using assumption of breastfeeding to deny the appellant shared physical custody with overnight stay until the child reaches the age of three years contrary to the evidence on record.

12 The learned trial magistrate erred in law and fact in ordering the parties to agree on overnight stay when the child reaches age three when the evidence on record was that the respondent had totally refused to allow it.

13 The learned trial magistrate erred in law and fact in ordering the parties to agree on overnight stay when the child reaches age three during the weekends without considering the school holidays.

14 The learned trial magistrate erred in law and fact in failing to consider that the appellant had applied and paid for retirement visa to settle in Kenya and restricting the movement of the child outside Kenya.

15 The learned trial magistrate erred in law and fact in granting alternate intermittent access for less days than the existing oral agreement to the appellant yet he was the one nurturing the child.

16 The learned trial magistrate erred in law and fact in finding that the respondent should have more days of actual physical custody than the appellant during the week yet the appellant has been the primary care giver and nurturer of the child since he was born and he has been at home throughout as a retiree.

17 The learned trial magistrate erred in law and fact in ordering the appellant to pay cash directly to the respondent directly to the respondent rather than the appellant shopping and or providing shopping voucher for the child.

18 The learned trial magistrate erred in both law and fact in ordering the appellant to pay cash directly to the respondent rather than the appellant shopping for the child.

19 The learned trial magistrate erred in both law and fact in failing to make a finding on maintenance payable by the respondent and ordering the appellant to cater for all the needs of the child.

20 The learned trial magistrate erred in both law and fact in failing to make a finding on maintenance payable by the respondent yet she had deliberately stopped working in the business opened for her by the appellant and was also working at a restaurant.

21 The learned trial magistrate erred in both law and fact by failing to allocate the maintenance obligation in the best interest of the minor.

22 The learned trial magistrate erred in law and fact in finding that the appellant paid for service charge of Ksh 30,000.00 per month.

23 The learned trial magistrate erred in law and fact in finding that the appellant earned more money than what he had disclosed as his sources of income and assistance from his family.

24 The learned trial magistrate erred in law and fact in finding that the appellant lived in well of suburb and was capable of providing more for the child.

25 The learned trial magistrate erred in law and fact in failing to analyse the testimony of the witnesses, the documents produced in evidence and adopted by the witnesses as testimony.

26 The learned trial magistrate judgment was harsh punitive and biased against the appellant and the child and was against the weight of the evidence and law.

27 The learned trial magistrate erred in law and fact in failing to consider that parental responsibility as the obligation is equally shared by both parents.

28 The learned trial magistrate erred in law and fact in failing to consider and apply the law appropriately and arriving at the entire judgment on wrong principles of law.

29 The learned trial magistrate erred in both law and fact by failing to consider the appellant's written submissions and authorities.

30 The learned trial magistrate erred in fact and law in failing to adhere to the Constitution by denying the appellant a fair trial and discriminating him and the child by being biased against the appellant and the minor consistently on her judgment

5. On 4th October, 2021 the applicant filed a Notice of Motion dated 6th October, 2021 seeking stay of execution. However, parties agreed to compromise hearing of the application in favour of the appeal.

6. Parties submitted orally with Ms Osino appearing for the appellant. Counsel condensed the grounds of appeal into three. It was submitted that as a general rule, custody of a child aged below 10 years is normally given to the mother.

7. However, it was Ms Osino's submission that the limitation of access to the child against the father while the child is below 3 years is unfair. She contended that limiting access based on the age of the child will mean denying the appellant an opportunity to spend nights together with the child. Further, that the appellant will not have an opportunity to travel outside the country with the child who holds dual citizenship as a Kenyan and British national.

8. Ms Osino asserted that the excuse given that the child was still breastfeeding is not tenable as there are days the child has spent up to 6 nights without the mother. That the child requires emotional support from both parents. In support of the proposition that a child of tender age needs both parents' emotional support, counsel referred the court to the holding in the case of **In MVM (15986/2016 (2018)ZAGPJHC 4 (22Jan.2018** in the high court of south Africa, **MOA V HAO (2021) e KLR and HGG V YP(2017) e KLR.**

9. Regarding the issue of maintenance, counsel opined that the applicant was not opposed to the payment of Kshs 15000 per month but rather for the increase of the same by 10% every year until the child attains the age of majority. Learned counsel submitted that Sections 23, 24, 94 and 100 of the Children Act does provide for variation of orders. She contended that the order was premature hence advance variation of maintenance orders without appropriate application and reasons given.

10. Learned counsel further opined that the impugned orders were unconstitutional as they are discriminatory and a mounts to a violation of the appellant's rights of association with the baby while giving the mother superior rights over the baby. Further, it is in the best interest of the child that he enjoys fatherly love at all times.

11. In response, Ms Aroka for the respondent relied on the record of appeal and submissions tendered before the lower court. Concerning the issue of custody and limited access, counsel submitted that the child is aged 21 months and still breastfeeding hence not possible for the applicant currently living separately to stay with the a Child of that age overnight in the absence of the mother.

12. Counsel opined that the trial court considered the age factor and properly arrived at a meritorious conclusion. It was submitted that for an appellate court to interfere with a decision of the trial court, it must be satisfied that the same was arrived at based on wrong principles. To buttress that position, the court was referred to the holding in the case of **MOA V HAO (Supra).**

13. According to M/s Aroka, the appellant should be patient as the limited access was pegged on the child attaining 3 years which is one year away. Regarding the mode of payment of the monthly upkeep, counsel contended that, it should be paid through M -pesa or cash and not by submission of supermarket voucher system. As to 10% annual increment , counsel was of the view that the court was thinking big and should be lauded for being forward looking and thinking hence a saving in terms of costs as parties will not come to court regularly for review orders.

14. This is a first appeal. Being the first appellate court, I am duty bound to re-evaluate, re-examine and re consider the evidence tendered before the trial court and arrive at an independent conclusion or determination without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses to be able to assess their demeanour. See **Sielle Vs Associated Motor Boat Co. (1968) E.A 123** where the court held that;

> ***"…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 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…"***

15. I have considered the record and grounds of appeal herein. I have also considered oral submissions by both counsel. Although the appellant moved to this court citing 30 grounds of appeal he consolidated them into three grounds.

16. The first issue is the demand for unlimited access to the child. According to the trial court's judgment, legal custody was awarded to both parents and actual physical custody, care and control of the child to vest in the plaintiff. However, the appellant was granted unlimited access to the child during day time on Monday, Wednesday and Saturdays from 9.00 am to 5.00pm until the child attains the age of 3 years when he shall be able to have sleep overs at his father's house.

17. According to the appellant, the child needs both parents' emotional support hence the limitation of access was geared towards denying the child fatherly parental love and emotional support.

18. It is trite law that as a general principle, custody of a child of tender age is normally awarded to the mother unless there are exceptional circumstances. This position was indisputably expressed by the court of appeal decision in the case of **J O V S A O (2016) e KLR** where the court stated that;

> ***"…there is a plethora of decisions by this court as whereas 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 un settled; where the mother has taken a new husband; where she is living in quarters that are in deplorable state; where her conduct is disgraceful and /or immoral …"***

19. The underlying factor for award of custody of a child of tender age to the mother is the suitability to look after the child. The word suitability characterises a mother as a special personality in the life of a child of tender age than the father. One of the factors making the mother suitable is breast feeding which a father cannot do.

20. In this case, there is no dispute that the child is almost two years old and still breastfeeding. In the circumstances, the trial court in its holding found it fit to limit access for some time until the child attains 3 years.

21. For all purposes and intent, the child cannot forcibly be stopped from breastfeeding for the sake of spending a night with the father. To allow such scenario will be tantamount to denying the child proper nutritional health support which he needs. At an earlier age of growth, a mother's milk is required for mental and biological development of the body of a child. It cannot be compromised unless in exceptional circumstances which do not apply in this case. It will not be in the best interests of the child that he be denied maternal milk for the sake of spending with the father.

22. In any event, at the age of two, the baby has unique needs which only a mother can provide. The claim that the mother had once left the child for 6 nights as a ground to stop breastfeeding is not sufficient. At page 22 of the proceedings (page 393 of the record of appeal) the

respondent admitted on cross examination that between 29th December, 2020 and 4th January, 2021 she left the child with a nanny. She however claimed she was forced out of their house by the appellant and that she made sure she had pumped enough breast milk for the baby.

23. I note from the trial court's judgment at page 8 (Record of appeal page 447) that the court extensively considered the element of daily access and found it tedious for the child. As to night sleep overs, the court found that it was not possible as the appellant lived alone with no sit in helper.

24. The court was pretty aware of the unique circumstances surrounding custody of the child below 3 years. All factors remaining constant, the best interests of the child demands that the child should remain under the care and control of the mother until the age of 3 years when a new set of conditions with unlimited access would possibly apply . In any event, 3 years is one year away hence the appellant will not suffer any prejudice by not spending a night with the baby. For those reasons, that ground is not available.

25. The second ground urged is the issue of maintenance which was argued in two fold. Firstly, the increase on the monthly expenses by 10% every year .The appellant felt that the court over stretched its powers by varying the order without any review application in place.

26. It is trite that a children's court has the discretion to determine the extent of maintenance payable in favour of a child. However, this discretion must be exercised judicially and not whimsically or capriciously.

27. Nevertheless, as an appellate court, I am duty bound not to unnecessarily interfere with decisions of a trial court which is arrived at as a matter of discretion unless found that the trial court applied wrong principles .See **Mbogo Shah and another Vs Republic(1968) E.A93 and Richard Kaitany Chemagong Vs Republic (1984) e KLR** where the court held that an appellate court will normally not interfere with a finding of fact by the trial court whether in a civil or criminal case unless it is based on no evidence, misapprehension of evidence or judge is shown to have demonstrably acted on wrong principles.

28. In this case, there is no factual foundation laid to justify annual increment of maintenance by 10%. There is no provision in the children Act for anticipatory economic changes to warrant a 10% increase or interest. Maintenance is not a debt so to speak to called for interest.

29. The drafters of the Children Act were fully aware of changing circumstances that may warrant a review or variation of orders a court may have made. This is already provided under Section 94 and 100 of the Children Act. The order of variation of maintenance expenses would aptly be dealt with under the relevant provisions.

30. In my view, the court did prematurely vary its orders in advance hence acting on a wrong principle. Even if we were to assume existence of factors like inflation, it would affect the appellant as well. If the economy is bad, it will be bad for everyone. If inflation goes down, everybody will benefit. The court acted on the assumption that the appellant's income shall always be stable and improving. To that extent, I do agree with Ms Osino's submission that the court acted on a wrong principle while at the same time it overlooked relevant provisions which deal with variation of orders. To that extent , the order for increase by 10% of the maintenance expenses is set aside and substituted with the order that the applicant shall continue paying kshs15,000 as child maintenance monthly.

31. Regarding the mode of payment of the maintenance expenses, the appellant insisted in paying by buying vouchers in a super market. This is informed from the view point that the money if paid in cash will not serve the intended purpose. I think this is over stretching supervisory role on the respondent on how she should be spending the money. The needs of a child are unique and only the mother knows how to balance them. It is the duty of the mother to plan on how to support the child with the kshs15,000 per month. There is no proof tendered to prove that the money may have been misused before.

32. It is unfair to micromanage the little maintenance expenses the appellant was ordered to pay the respondent for the upkeep of the baby. I do not buy the idea of buying vouchers hence I do uphold the mode of payment directed by the trial court.

33. As to whether the orders made are in the best interest of the child as per Article 53 of the Constitution , I have no reason or evidence to suggest that the constitutional rights on the best interests of the child have been violated nor is there proof that the applicant's constitutional rights have been infringed. In fact, he should be happy that the entire judgment was in his favour and should be the last party to complain.

34. Having held as above, it is my finding that the appeal herein partially succeeds to the extent that the 10% annual increment of the maintenance expenses is set aside and the rest of the orders shall remain in force.

DATED SIGNED, AND DELIVERED VIRTUALLY AT MOMBASA THIS 15TH DAY OF FEBRUARY, 2022

J. N. ONYIEGO

JUDGE