PMK v JMM (Civil Appeal E025 of 2023)
[2024] KEHC 12263 (KLR) (3 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12263 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CIVIL APPEAL E025 OF 2023

LW GITARI, J

OCTOBER 3, 2024

BETWEEN

PMK ..... APPELLANT

AND

JMM ..... RESPONDENT

JUDGMENT

1. This appeal arises from the proceedings in the Principal Magistrate's Court at Marimanti Children Case No.E006/2023. The appellant M.I.K who is a minor had filed a plaint dated 6/7/2023 seeking a declaration that-

    a. The minor is entitled to unlimited access by the biological mother.

    b. A declaration that the continuous and sustained actions by respondent to deny the minor access to the biological mother is unlawful.

    c. A right of custody of minor until attaining the age of 18 years and above.

    d. A permanent injunction restraining the respondent from denying, blocking and or preventing the biological mother to visit the minor.

    e. Any other relief that this court deems fit to grant in enforcement of the Children's Act.

2. The appellant had also filed a notice of motion seeking orders that pending the hearing and determination of the suit, the court do issue interim orders restraining the respondent from access to the minor and allowing the next friend to access the minor at all time as may be convenient both to the minor, applicant and respondent particularly during weekend, school holidays and during scheduled school parents visit.

c) That in the alternative the court do provide and or issue instances, places that the minor could be accessed in the best interests of the child.

d) That the court to issue a notice of penal consequences to the respondent in case of disobedience.

3. The application was declined on the basis that it was during the transition period of term and the all rounded welfare of the child is key to his wellbeing. He ordered that the status quo be maintained. The appellant was dissatisfied with the ruling and filed a Memorandum of Appeal based on the following grounds:-

1. The learned Principal Magistrate erred in law and in general knowledge by dismissing the applicant's application without giving reasons.

2. The learned Principal Magistrate's ruling infringed on children's rights and as provided for under the Children's Act 2021.

3. The Principal Magistrate's ruling amounted to discrimination and infringed on Article 27 of *the Constitution* of Kenya 2010.

4. The Principal Magistrate's ruling went against Article 53 of *the Constitution* of Kenya 2010.

5. The principal Magistrate's ruling in all round circumstances was unfair, unreasoned and wasn't made in the child's best interest.

4. The appellant prays that the appeal be allowed. The order dismissing the appellant's application be set aside and be substituted with an order allowing the application dated 6/7/2023.

1. The respondent opposed the appeal and prayed that it be dismissed.

5. The brief background is that the appellant is the biological mother of the minor herein. The appellant and the respondent got married in church on 19/12/2015 at Tunyai Catholic Church and cohabited as husband and wife and were blessed with two children. The minor M.I.K aged eight (8) years old and S.K. who is deceased. The parties separated sometimes in October 2020 to date. The respondent has been having the custody of the minor and has denied the appellant access to the child. She filed the suit in the Children's Court and an interlocutory application seeking an interim order of access to the child. The learned trial magistrate gave a ruling and dismissed the application. The appeal was disposed off by way of written submissions. The respondent submits that the ruling delivered on 5/9/2023 went against the Kenyan Constitutional provisions and amounted to discrimination based on gender in contravention of Article 27 of *the Constitution*. That no evidence as presented before the learned magistrate to suggest that access of the minor by the appellant would be injurious and against the child's best interests. That for the minor's development, the mother has an equal role to play as a parent just like the father. That no evidence was tendered to show that the minor's mother was dangerous or harmful in any way whatsoever. That the allegation that the appellant was of unsound mind is in contention that the learned trial magistrate failed to address the issue at hand and gave a ruling which was not in the child's best interest custody of the respondent since the year 2020.

6. That the minor is school going. That the other child of the parties passed away while with the appellant, in unknown circumstances. That the appellant's state of mind was returned by a doctor as mild bipolar disorder. That the issue of the fitness of the appellant to stay with the minor is yet to be determined and therefore the learned trial magistrate was right in ordering that the status quo be maintained pending the hearing and determination of the suit.

Analysis and Determination

7. I have considered the impugned ruling, the memorandum of Appeal and the submissions. The issue that arises for determination is whether the learned trial magistrate erred in failing to allow the appellant to have access to the minor. This is a first appeal and the law is now well settled that the role of the court is to revisit the evidence on record, evaluate it and reach its own conclusion. However the court will not interfere with the findings of facts by the trial court unless they were based on no evidence at all or on a misapprehension of it, or the court is shown demonstrably to have acted on wrong principles in reaching its findings, See Mwana Sokoni –v- Kenya Bus Service Limited. (1982-1988) KAR 278. The dispute herein touches on the rights of a child. The paramount consideration in this type of case is the welfare of the child. The law is clear that the best of the child forms the paramount consideration in every matter concerning the child. Article 53 of *the Constitution* provides that-

> " A child best interest are of paramount important in every matter concerning the child."

Thus each parent has a duty to provide for the child.

8. In this case the applicant was seeking to have access to the child pending the hearing and determination of the case. There is a distinction between custody and Access.

Custody is defined under the *Children Act*, as;

> " with regard to a child means so much of the parental rights and duties as relates to the possession of the child"

9. See Section 101 of the *Children Act*.

> On the other hand, "Access order," shall require the person with whom the child is residing to allow the child to visit or stay periodically with the person named in the order, or to allow the person to have such other contact with the child as may be directed by the court. See Section 135 of the Children's Act. The respondent has the custody of the child. In this case the appellant was seeking an order to have access. The learned magistrate in the impugned ruling noted that, "we are in the catchment period to transition to term 3 and all the rounded welfare of the child is key to his wellbeing."

10. The learned magistrate did not rule that that the appellant was not capable of performing her parental duties to the child. The appellant had attached documents showing that she had sufficiently recovered and could comfortably resume her normal duties. The *Children Act* recognizes that the parents are entitled to equal rights. Article 45 (3) of *the Constitution* states that parties to a marriage are entitled to equal rights at the time of the marriage during the marriage and at the dissolution of the marriage.

11. I find since parental responsibility is shared equally, the appellant should not be denied the right to access the child. To deny her the right to access the child is discriminatory.

> " Section 32(1) of the *Children Act* provides that where a child's father and mother were married to each other at the time of his birth they shall have parental responsibility for the child 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."

12. The paramount consideration in cases involving a child is his/her welfare and his best interest, see Section 95(1) of the Children's Act. It is best interest of the child that he gets emotional, material

support from his/her parents. To deny a parent access to the child is to deny the child the much needed contributor to the minors emotional and material support for his formation and growing up and goes counter the paramount consideration which is the best interest of the child. The reason given by the learned magistrate was not sufficient to deny the appellant access which can be determined depending on the circumstances of the case. In this case, the appellant was not suffering from any mental incapacity. It was the duty of the learned magistrate to determine the way the appellant could exercise her right to access the child other than denying her the right altogether.

13. In any case if the learned magistrate was of the view that the applicant was not suitable, the Act provides for a supervisory order during that visit. See Section 135 of the *Children Act*. Which provides that

> " the court may from time to time where appropriate make any of the following orders: (a) and access order, which shall require the person with whom the child is residing to allow the child to visit or stay periodically with the person named in the order or to allow such person to have such other contact with the child as may be directed by the court."

14. It is true that cases take long in court and an order of access to the child by the parent pending hearing and determination of the suit is necessary to ensure that the child gets to have time to bond with child as the case progresses. The decision by the learned magistrate to order status quo cannot be supported as it was not based on cogent evidence. It was discriminatory to give an upper hand to one parent when the law provides that parental responsibility is shared equally. The decision cannot be upheld.

Conclusion:

15. I find that the appeal has merits and I allow it. I order as follows:

    1. The ruling by the learned magistrate is set aside.
    2. It is substituted by an order allowing the Notice of Motion dated 6/7/2023.
    3. The trial magistrate to call for a Children Officer's Report to give a recommendation on how the order of access by the applicant shall be enforced.
    4. Costs to the applicant.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 3RD DAY OF OCTOBER 2024.

L.W. GITARI

JUDGE