REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 40 OF 2017

OGM (SUING AS THE FATHER OF KG W)....APPELLANT

VERSUS

FG.....1ST RESPONDENT

PGM.....2ND RESPONDENT

(From the Original Civil Suit Children Cause No. 16 of 2017 of Children's Court at Kerugoya)

JUDGMENT

1. The appeal arises out of the Judgment in the Children's Civil Suit case number: 16 of 2017 at Kerugoya which was delivered on the 28th day of August, 2017. In the case the Plaintiff who is now the Appellant in this appeal OGM was seeking an order that he be granted physical, legal and actual custody over KGW and that the court be pleased to order that the defendants do deliver and/or surrender the minor to the appellant. That the defendants' who are the respondents in this case be restrained by an order of the court from denying the appellant access to the subject minor and that the appellants' be allowed to reside and or stay with the minor at his residence.

2. The Respondents' had filed a counter claim and they were seeking an order that they be granted the full legal custody of the subject minor.

3. In the Judgment of the trial magistrate, the appellant's suit was dismissed, and the Trial Magistrate entered judgment in favor of the respondent in the counter claim and granted them the custody of the minor until she attains the age of **11** years, when the order may be reviewed or extended as per the child's wishes, and the prevailing circumstances. It was further ordered that the defendant shall have unlimited access and full parental responsibility.

4. That visitation terms to be agreed by the parties.

5. The appellant was dissatisfied with the entire judgment of the trial magistrate and filed this appeal. The appeal is based on the following grounds:

(I) THAT the Learned Magistrate erred in Law and in fact by misdirecting himself and granting custody of one K.G.W to the Respondents against the weight of the evidence and law.

(II) THAT the learned Trial Magistrate erred in Law in holding that the trial court would review and/or extend the Judgment when the minor reaches the age of 11 years and thereby failed to consider that having issued the Judgment, the Trial court had become *functus officio* and therefore cannot review and or extend its own Judgment.

(III) THAT the Learned Trial Magistrate erred in Law in failing to appreciate that having delivered its Judgment it had exercised its jurisdiction fully and in finality.

(IV) THAT the Learned Trial Magistrate failed to consider that the appellant and his wife had been providing and caring for the minor and had continued to be in the life of the minor and therefore could not be said to be strangers to the minor.

(V) THAT the Learned Trial Magistrate erred in Law and in fact by holding that the Respondents were better placed to take care of the peculiar challenges of the minor when no peculiar, special and or unique challenges were either pleaded, proven and/or demonstrated.

(VI) THAT the Learned Trial Magistrate erred in Law and in fact and made a biased determination by holding that the minor's safety would not be guaranteed in the hands of the Appellant's wife when there was no evidence at all questioning

her suitability and capacity to take care of the minor.

(VII) THAT the Learned Magistrate erred in law and fact in putting the interest of the Respondents before those of the minor contrary to the Children's Act No. 8 of 2001.

(VIII) THAT the Learned Trial Magistrate erred in law and in fact in failing to take into account the incontrovertible fact that the Appellant and his wife had been visiting and bonding with the minor and therefore were not strangers.

(IX) THAT the Learned Trial Magistrate erred in law in fact in failing to appreciate that the Respondents had promised to return the minor back to the Appellant but had continued to refuse to do so because of alleged un fulfillment of customary rites and/or failure to pay dowry for their deceased daughter.

(X) THAT the Learned Trial Magistrate erred in law and in fact in failing to give due regard to the material contradictions, discrepancies and inconsistencies in the Respondents' case thereby arriving at a wrong decision and resulting into a miscarriage of justice and basing his Judgment on mere speculation and conjecture.

(XI) THAT the Learned Trial Magistrate misinterpreted and misconstrued the reports provided by the Children Officers from Kerugoya and Nairobi and completely misapprehended the law and procedure applicable thereto.

(XII) THAT the Learned Trial Magistrate erred in both Law and fact and failed to consider the undisputed essential facts that the Appellant had secured a school for the minor with a certain, bright and stable future.

(XIII) THAT the Learned Trial Magistrate misdirected himself and misinterpreted the Constitution and the Children Act 2001 thereby arriving at an erroneous decision.

(XIV) THAT the Learned Trial Magistrate erred in law and fact in wholly believing the respondents' submissions and disregarding the submissions of the Appellant.

(XV) THAT the Learned Trial Magistrate erred in law and fact in proceeding on wrong principles and thereby arriving at a wrong decision.

(XVI) THAT the Learned Trial Magistrate's decision is inconsistent with, and in contravention of, the Constitution and the Children's Act.

(XVII) THAT the Learned Trial Magistrate erred in law in failing to scrutinize/ evaluate the submissions, documents and testimony of the Appellant and his witness and to correctly relate them to the case and thereby failed to arrive at a fair Judgment.

(XVIII) THAT the Learned Trial Magistrate completely failed to consider the minor's right to live with and bond with her father.

(XIX) THAT the Learned Trial Magistrate erred both in Law and fact in failing to uphold the doctrine of precedent.

(XX) THAT the Learned Trial Magistrate erred in both Law and fact in basing his decision on issues not pleaded and proven by the Respondents.

(XXI) THAT the Learned Magistrate failed to exercise his judicial powers and discretion judiciously and failed to consider all relevant facts.

6. The Appellant seeks orders that the judgment delivered on 28th August, 2017 and all other consequential orders arising therefore and the respondents counterclaim be set aside. The Honorable court be pleased to allow and grant the orders prayed for in the appellant's plaint dated 5th April, 2017.

7. The respondents opposed the appeal and urged the court to dismiss it with costs. And they pray that the appeal be struck out with costs as the same is unmerited.

8. When this matter came up for directions, the parties agreed to argue the appeal by way of written submissions. For the Appellant submissions were filed by *Murage Juma and Company Advocates*, while those of the respondents were filed by Ramadhani Abubakar Advocates on behalf of Magee Law LLP.

A. APPELLANTS SUBMISSIONS:

9. By way of introduction the appellants submitted that the appellant is the biological father of KGW (to be referred to as the minor), who was born on 8th of July, 2014. EMG (deceased) who was the biological mother of the minor, died at childbirth. Upon the death of minor's mother death the appellant informed the respondents who were the minor's maternal grandparents. On receiving the information, the respondents went to St. Francis Community hospital, where they found the appellant with the minor.

10. The respondents proposed to the appellant that they would stay with the subject minor as the appellant cleared with the hospital bills, and embarked on making burial arrangements. After the burial, the respondent requested the appellants that they stay with the minor, as the appellant organized himself and make necessary arrangements to welcome the newborn daughter home, upon an undertaking that they would release the minor once he settles down and that in any case he would have unlimited access to minor at all times.

11. That though the respondents were accommodating the minor the appellant provided all the financial support to cater for her needs, including but not limited to food, medical expenses, clothing and all other essential necessities. Thereafter the respondents refused to hand over the minor to him. It is the contention by the appellant that he is in gainful employment, capable and willing to cater for the subject minor. It is the wish of the appellant to provide a stable loving home to the subject the minor, but the respondents have unreasonably frustrated the appellant by refusing to release the child to him.

12. Towards the end of 2015, the appellant approached the respondent requesting to be allowed to take his daughter home. The respondents advised him to look for some elders within his family, as they ascertained that there were certain cultural functions including payment of dowry, that he would fulfil before he would be allowed to take the minor from the respondents. The appellant agreed and invited some elders from his family, who travelled to the respondents' home at Kerugoya, where after some discussions they demanded that the appellant pay Kshs; 20,000/= which was the dowry, the appellant agreed and paid. Later the appellant called the 2nd respondent informing that he would go for the minor. To his shock, the 2nd respondent categorically stated that the appellant was never to set foot in his compound and he was further no longer allowed to see, visit or take away the minor. The appellant tried to involve the family and community elders and other relatives to impress upon the respondents to allow him to leave with his daughter but the said efforts seem to be futile. It is then that the appellant filed the suit at the Children's court at Kerugoya so that he could be given physical and legal custody of the minor, however the judgment delivered by the trial magistrate dismissed the appellants' suit, allowed the respondents counter claim effectively granting sole custody of the minor to the grandparents as against the father.

13. The appellant's submits that this being the 1st appellate court has a duty to evaluate the whole evidence tendered before the lower court, and has referred the court to the case of: **SELLLE & ANOTHER -VERSUS- ASSOCIATED MOTOR BOAT COMPANY AND ANOTHER (1988) E.A. 123** where it was held that the duty of the 1st appellate court is to evaluate and examine the evidence, adduced in the trial court, in order to reach a finding taking into account the fact that the appellate court had no opportunity of hearing, or seeing the parties as they testified. That in line with the **Section 78 of The Civil Procedure Act** this court is not bound to adopt the trial courts finding of fact if it appears that, it fails to take into account particular circumstances or probabilities or if the impressing demeanor of a witness is inconsistent with the evidence generally.

14. On the principle of ***"functus officio***" the appellant's address the court on clause 2 and 3 of the memorandum of appeal. This arises from the judgment and order of the learned trial magistrate, when he remarked thus:

> ***"the defendant are granted custody of the minor, until the minor reaches the age of 11 years, when the order may be reviewed or extended as per the child's wishes and prevailing circumstances."***

15. It is submitted that, the trial magistrate having delivered the judgment, it became ***functus officio***, and the learned trial magistrate, made a monumental era when he determined as he did, that the court could review the judgment after **11** years depending on the circumstances. He referred the court to the Court of Appeal decision in: **Telkom Kenya Limited –Vs- John Ochanda & Others (Civil Appeal No. 60 of 2013) held that;**

> ***"Functus officio is an enduring principle of law that prevents the re-opening of a matter before Court that rendered the final decision thereon…… we are of the respectful view that the learned Judge was clearly wrong when he failed to declare Court functus officio and devoid of jurisdiction to grant the respondents' prayers. This was only compounded by the order directing that the Appellant file an affidavit. The Judge in our view was trying to convert the Judgment in rem into a judgment in personam using a procedure alien law in that he was trying to improperly re - admit evidence after a suit had been heard and concluded."***

16. He also referred this court to the Canadian case of: **Chandler -versus- Alberta Association of Architect (1989)** which was quoted by the Court of Appeal where it was held that;

> ***"The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in re- St Nazaire Co., (1989), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions;"***
>
> **(i) Where there had been a slip in drawing it up, and**
>
> **(ii) Where there was an error in expressing the manifest intention of the court**

17. It is submitted that the learned trial magistrate ignored the basis tenents of law and in particular the principle of ***functus officio,*** which bars a court from re-admitting new evidence after judgment, and/or changing the final decision.

18. The 2nd issue was that the minor would be put in the hands of a stranger. That the learned trial magistrate against the strength and weight of the evidence held in his judgment thus: "***if the child is given to the plaintiff who has a wife, then the child will be placed in the care of a stranger, and her safety cannot be guaranteed."***

19. It is submitted that the appellant's wife in her statement informed the court that the appellant had informed her before they got married that she had a daughter who was living with her grandparents and his desire was for him to live together as a family, and she had on several occasions visited the minor at the grandparents and bonded with the minor. And this was corroborated by the 1st respondent who under cross-examination confirmed that she knew Grace.

20. The holding by the trial magistrate was unfortunate was not based on any allegations that the appellant's wife was violent and any aversion against the minor. In any case the respondent admitted that they employ a house help to take care of the minor, since they have a lot of work. In particular the respondent had stated that, they had employed a house help who they did not know before to take care of the minor. And that the trial magistrate ignored that fact which was admitted by the respondent that the minor was and is still been taken care of by strangers.

21. That the court as independent and impartial arbiter is supposed to determine issues based on evidence, not assumptions and insinuations.

22. On the minor's right to live with its father It is submitted that, there is no dispute that the appellant is the biological father of the minor, this was admitted by the 2nd respondent, and the appellant produced the birth notification, showing that the appellant is the biological father of the minor. This court was referred to **Section 6 (1) of the Children Act.** Which state:

> ***"A child shall have a right to live with and to be cared for, by his or her parents."***

23. That similarly under Article 7 of 1989**, Conventions of the right of the child,** the child shall have a right to know, live and to be cared for by his *or her parents.*

Article 19 of African Charter, on the rights and welfare of the child, stipulates that: "Every child is entitled to parental care and protection and shall whenever possible reside with his/her parents."

24. It is submitted that no evidence was presented or presumption created before the lower court to show and/or proof the unsuitability of the appellant as a father or his inability to live with and care for his daughter. The court was referred to; **Noordin -versus- Karim Misc. Civil Case No. 58 of 1985 (O.S)** where the court held that;

> ***"That children's father is alive and it is normally wrong to take over the place of their father. The respondent is a suitable parent. He has sufficient income to guarantee the children a good life, better education and a sense of belonging. He does not have a large family. At present, the children have been alienated from the respondent and it is not for their long term wellbeing that they should be made to forget their father."***

25. It is submitted that the trial magistrate ignored all the essential aspects of the minors life by granting custody to the grandparents and not the child's own father. That the reality of life is that the minor herein has a step-mother people that will be around her life longer than the respondents who are now elderly. It is morally right that the minor bond with her parents at her tender years, rather than waiting when she is old.

26. On the minor's custody and undertaking to return her to the appellant, it is submitted that the learned trial magistrate mis-directed himself by granting custody of the subject minor to the grandparents against the weight of the evidence.

27. The trial magistrate failed to appreciate and to consider the undisputed evidence that the respondent promised to return the minor to the appellant, but later refused due to alleged failure to perform customary rights or failure to pay dowry of their deceased daughter.

28. Actual custody, care and control of the minor are defined under ***Section 81 of the Children Act.***

> ***"Custody with respect to a child means so much of the parental rights and duties as relates to the possession of the child."***

29. Care and control means actual possession of a child whether or not that possession is shared with one or more persons.

It is submitted that, upon the demise of the minor's mother the respondents' offered to accommodate the minor, on undertaking that they would deliver her back to her father. That in cross-examination the respondents' dwelt on the fact that the appellant needed to complete some cultural processes (simply put pay some more money). That this should be seen for what it is extortion, 2nd respondent stated during cross-examination that;

> ***"Traditionally dowry was to be paid first then Oscars parents be introduced to the child. They came but they did not fulfill all the requirements. We went to Oscars home. Even if all the requirements are fulfilled, we can't give out the child because the child is not an object."***

30. Further that this demands by the respondents' are contained in the Children officer's report, where it was stated: they also feel that observing customary rites is important to establish a peaceful co-existence between the two families, and continuity of the blood line of their first (1st) born daughter.

The trial magistrate failed to notice that the reason that the respondents failed to give the appellant the minor to her biological father was that they were demanding dowry. The appellant referred the court to ***Article 9 (3)*** of United Nations Convention on the rights of the child, which states that; "

> ***" states shall respect the rights of the child, separated from one or both parents, to maintain personal relations, and direct contact with both parents on regular basis."***

31. He submits that since that the minor's mother is deceased, the only other parent is the appellant, and the minor has a right to live with his living parent.

32. He submitted that the appellant had already secured a school with greater and better standards for the minor, however the trial magistrate failed to appreciate that the welfare of the child superseded the traditions.

33. It is submitted that appellant and his wife have been providing for all the needs of the minor and yet the trial magistrate held that the appellant's wife was a stranger. It is trite law that in all actions involving a child the best interest of the child shall be of primary consideration.

34. The appellant submits that, he has a good job unlike the respondents, who are retired peasant farmers with no stable jobs or income. The appellant had taken out a medical cover for the minor which he produced before the court. The appellant has been providing money to buy foodstuffs, and other items. A fact which was admitted by the respondents. It would be in the best interest of the minor if she grows up with the appellant, his wife and her step-brother.

35. They submitted that, on the alleged minor peculiar challenges, the magistrate had a chance to see the minor, and did not record anywhere in the proceedings, and had not observed such peculiar challenges.

36. He submits that in absence of any evidence that the minor had any peculiar challenges the trial magistrate erred by basing his judgment on an issue which was never pleaded, raised, canvassed or proven by any party. The trial magistrate put the interest of the respondent over those of the child. In the case of**: Joachim Ndaire Macharia -versus - Mary Wangare Ndaire & Another**, the court held thus:

"It must be born in mind that the Children Act was enacted

> ***"…… to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institution; to give effect to the principles of the convention on the rights of the child and the African Charter on the rights and welfare of the child and for connected purposes…..*** *" **As can be seen from this preamble, customary law with regard to the rights of the child have no place."***

37. The Appellant relies on: ***Section 6 (1) of The Children's Act*** on the right of the child to live with his parents. That it is not a requirement that a child should only live with parents who are married. **Under Article 35 (2) of the Universal Declaration of human rights**

> ***"all children whether born in or out of wedlock, shall enjoy the same social protection."***

He has quoted the case of; **Joachim Ndaire Macharia -vs- Mary Wangare Ndaire & Ano (Supra)** where the court observed that :

> ***"So that marriage perse of the parents of the child or lack of it is not hindrance to the application of the Children Act nor is the fact that the father paid some compensation resulting from out of marriage pregnancy. The convention on the rights of the child and the African Charter on the rights and welfare of the child outlaws customary rights which have the effect of discriminating against a child. If the position of the appellant was to be upheld, in effect we will be according different treatment to the child on account of a customary rite which is oppressive. A customary claim cannot oust a mandatory provision of the written law governed by an Act of Parliament. So that whether or not there was a marriage between the appellant and the respondent is immaterial***."

38. Appellants submits that the assertion that the appellant was not married the minor's mother, or that he has not paid dowry, cannot and should never be the foundation of custody, as to do so is to put the interest of the respondent over those of the minor.

39. It is further submitted that the evidence by the respondents' was full of inconsistencies and contradictions and self-defeating. That the respondents' peddled lies to misled the court for their selfish gain without caring about the needs and welfare of the minor and her right to live with her father.

40. It is finally submitted that the judgment of the learned trial magistrate and the consequential orders were not based on evidence, and most importantly did not take into account, the best interest of the minor.

41. They pray that the appeal be allowed and the judgment of the trial magistrate be set aside.

B. RESPONDENTS SUBMISSIONS:

42. The respondents have submitted that the appeal is incompetent bad in law and incurably defective, that the appellant, has failed and/or neglected to include the decree appealed against. And they have relied the decision of this court in**; NANCY WAMUYU GICHOBI - VERSUS – JANE NYAWIRA GICHOBI SUCCESSION [2018] eKLR**. Which quoted with approval the decision in **MUNICIPAL COUNCIL OF KITALE –VERSUS- FEDHA (1983) eKLR** where the Court of Appeal stated that the failure to include the decree appealed from the record of appeal rendered the appeal incompetent. The omission could not be cured, by including the decree in a supplementary record. Supplementary record cannot comprise documents which ought to be included in the original record of appeal.

43. They have also cited **KIBORO-VERSUS- POST AND TELECOM CORPORATION (1974) E.A. 185**. They have also cited PAUL **KARENYI LESHUEL –VERSUS – EPHANTUS KAREITHI MWANGI** and **Another** (**2015) eklr** and **CHEGE -VERSUS - SULEIMAN (1988) eklr** and based on this they pray that the appeal be struck out as the same is incompetent, and of no consequence.

44. The respondents further submits that, matters concerning children should be guided by **Article 53 of the Constitution,** which at Sub-Article (2) has established the principle of the best interest of the child. The principle of the best interest of the child has also been provided under **Section 4 of the Children Act.** He has referred the Court to**: JGM -versus - CMW Civil Appeal No. 40. 2004.**

45. He submits that from the finding of The Children's court, the best interest of the child is what informs the decision. That what the court has to consider is whether, it would be in the best interest of the child to grant the custody to the appellant. This can only be determined by the guidance provided under **Section 83 of The Children Act.** Which at Section 83 (c) the consideration is the ascertainable wishes, of any foster parent, or any other person who has had custody of the child, and under whom the child has made his home, in the last three (3) years, preceding the application for custody.

46. That the minor has been with the respondent for the last five (5) years, and to uproot her and take her to Nairobi, shall have adverse mental effects to the minor, that is why the court in its wisdom granted the respondents custody. That this court must know the appellant as a person before granting custody, but being that the lower court had the opportunity to take the evidence of the party, this court can rely on the record available, that the appellant, during cross-examination confirmed that, his name does not appear in the post-natal booklet, where the mother of the minor had declared that she is single, and the - mother 1st Respondent, is the next of kin. That the appellant during cross-examination, confirmed that he had not paid school fees, but the appellant claimed that he is married, allegation which they challenged in the lower court. He has referred this court to the **Marriage Act Section 43, 44, and Section 45**, which lays down the formalities of a Kikuyu Customary Marriage. He has also cited the case of**: Eliud Maina Mwangi -versus – Margaret Wanjiru Gachangi Civil Appeal No. 281 'A' (2003**) Court of Appeal. The respondents urge the court to find that the appellant, brought an actress to act or pretend to be a wife, with the sole reason, to be granted custody of the child.

That it is a known principle in Civil matters that a Single man can never be granted custody of a girl child of tender years that is why the plaintiff has attempted to deceive this court and urges the court to stop him in his tracks. This however, with respect is not the correct position, the *Children Act* only prohibits adoption of a female child by a sole male**- See Section 158**.

47. It is further submitted that as it emerged from the proceedings that the appellant attempted to steal the minor. That the appellant has been absolutely hostile to the grandparents. That the appellants' claim that he has been sending money for the minor's upkeep has been denied. That some of the monies sent were from the proceeds of the kuku shop that the deceased owned which business the appellant took over and continued sending the proceeds for a while to the respondents. That they also denied that the appellant had been catering for the upkeep of the minor's expenses, a fact that was denied. That the medical insurance has expired and the appellant never made any attempt to renew the same. That the Children's court granted the defendant unlimited access and full parental responsibility. That it is however unfortunate that the appellant has never abided by this. That the number of times the appellant has visited, is negligible and that the father has failed to take full parental responsibility.

48. He submits that, it is not true that the appellant catered for the funeral expenses of the minor's mother. It is denied that the respondents' said that they would stay with the subject (minor), as the appellant cleared with the deceased's hospital bills, and also made burial arrangement. That the negotiations for dowry payment was not the condition for giving the minor to the appellant.

49. On the issue ***"functus officio***" it is submitted that; that the Children's court can never be said to be functus officio. That the children's court has powers to issue orders even after judgment, so long as there is still a minor, whose interest must be protected. That the strict rules of procedure do not apply in Children matters. And that the court has powers to make orders from time to time as captured under **Section 114** 'B' of The Children Act, and **Section 87 (4).** The court was referred to; **JNM -vs- JGK (2014) eKLR**, where the court stated:

> ***"The law does not permit the court to reopen the matter, however, in respect of maintenance, and provision for children, the court does not become functus officio."***

50. The respondents pray that the appeal be struck out with costs and the appeal be dismissed. I have considered the appeal, the proceedings before the trial court and the submissions:

51. This being a 1st appeal the Court has a duty to evaluate the evidence and come up with its own findings.

See: SELLE & Another -VERSUS- ASSOCIATED MOTOR BOAT COMPANY LIMITED & OTHERS (1968) E.A. 123 and **WILLIAMSONS LIMITED -VERSUS BROWN (1970) E.A**

52. Having considered the appeal and the submissions, I find that the Issues which emerge for determination are follows;

> ***1. Competence of Appeal***
>
> ***2. Functus officio***
>
> ***3. Custody.***

A. COMPETENCE OF APPEAL.

This is based on the ground that the appellant failed to include the decree appealed against. The Court was referred to various decisions of the Court of Appeal and the High Court, which I have quoted above.

- The appellant did not include the decree appealed against in the record of appeal. He however, filed a Supplementary record and cited authorities. In the Court of Appeal decision in: **Peter Obwongo O. & 2 Others -versus- H. O. & Another (2017) eKLR**

(Civil Application 8/2017 C.A. Eldoret) it was stated**;**

> ***"Whereas the rules of procedure are handmaidens of Justice and play an important role in administration of Justice they should not in appropriate cases impede the administration of Justice. Article 159 (2) (d) of the Constitution now requires that, "Justice shall be administered without undue regard to procedural technicalities"***
>
> ***The omission to include a certified copy of the decree can be cured by the filing of a supplementary record which act will not occasion any undue prejudice to the respondent. Any prejudice likely to be suffered can be compensated by an award of costs."***

The respondents have not alleged that they have suffered any prejudice. In the Contrary the respondents have hotly contested the appeal. Further the Court of Appeal in a recent decision in: ***Auto parts Freight Terminal limited –versus- Kenya Ports Authority C. A(Application No. 76/2018) (2019) eKLR.*** Stated**;-**

> ***"As stated by this Court in the case of Mukenya and Crater Automobiles limited - We take the view that rules of procedure are designed to assist in administration of Justice. They are supposed to serve as hand maidens of Justice, not to defeat it…"***

The Court further stated that it could exercise discretion and grant leave to the respondent to file the supplementary record of appeal. It held:

> ***In so doing we invoke the court's inherent jurisdiction under Section 3A and 3B of the Civil Procedure Act to admit the respondent Supplementary record of appeal dated 26-9-2018"***

I also refer to Ngitarios Mwangi -versus- Washington Odhiambo Wanyanyi (2017) eKLR, where the Court was considering a matter where a decree was not included in the record of appeal. It reiterated that under **Article 159** of the Constitution that courts should not pay undue regard to technicalities. The Court of Appeal in the above cited decisions which are quite recent has been emphatic that Courts should not give undue regard to procedural technicalities as provided. **Under Article 159 of the Constitution** but should exercise discretion and do Substantive Justice. The decision cited by the respondent including the one I cited in: **NANCY WAMUYU GICHOBI –VERSUS- JANE WAWIRA (2018) eKLR** were before the promulgation of the Constitution of Kenya 2010. The recent decisions bind this court. I should exercise discretion and lean towards doing justice without undue regard to procedural technicalities under Section 3**A & 3B Civil Procedure Act and Article 159 (2) d of the Constitution.** The respondents have not suffered any prejudice. I find that since the appellant filed a Supplementary record to include a certified copy of the decree, the appeal is not incompetent. The ground is without merits and is dismissed.

B. FUNCTUS OFFICIO

- The Court of Appeal in ***Telkom Kenya Limited Case (supra),*** cited by the appellant, stated that the doctrine bars merit based decisional re-engagement with the case once a final judgment has been entered and a decree there on issued.

- In this case the trial magistrate entered a final judgment and therefore became ***functus officio.***

- I do not agree with the respondents that the law allows the court to re-open matters. The authority cited **JNM - versus- JGK (2014) eKLR** held that in matters of maintenance and provision for children the court does not become ***functus officio.*** I agree with the holding as it relates to maintenance and provision for the child. This only applies to orders made by the Children Court but not to final judgments. **Section 100 of the Act provides;**

> ***"Where the parents, guardians or custodians of a child, have entered into an agreement whether oral or written in respect of the maintenance of the child the court may, upon application, vary the terms of the agreement if it is satisfied that such variation is reasonable and in the best interests of the child***."

Section 117 of the Act provides for review of orders issued under the part. The Act provides for review of the orders not a final judgment. Where the court has entered a final judgment in a contentious matter like the present one, the Court becomes *functus officio*. It is a determination which is merit based and the Court of Appeal in the case of**: Telkom Kenya Limited** clearly stated that there can be no re-engagement once a final judgment has been entered.

The Act has provided that such matters should be appealed in the High Court or Court of Appeal as the case may be. **Section 80 of the Act provides:**

> ***"Unless otherwise provided under this Act, in any civil or criminal proceedings in a Children's Court, an appeal shall lie to the High Court and a further appeal to the Court of Appeal."***

The Trial magistrate erred in law by holding that the Judgment could be reviewed after eleven (11) years. The court became *functus officio* after entering a final judgment on the contentious issue of custody.

C. CUSTODY

The appellant is the biological father of the minor and the only living parent.

- The law, that is the Constitution, the Children Act and the International instruments on the rights of the child like Convention on the Rights of the child and African Charter speak in one voice concerning the determination of matters involving a child. That voice is loud and clear and it is that in every matter concerning a child, the best interests, of a child are of paramount consideration. This acts as the guiding principle to Courts, tribunal and other bodies when considering a matter concerning a child.

Article 53(2) of the Constitution provides.

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

The Children Act has buttressed the Constitutional provision. At **Section 4(1)** it provides:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

- Convention on the Rights of the child and the African Charter on the Rights of the child have emphasized the Centrality of the best interest of the child. There is no definition of the best interest of the child. The best interest of the child is determined on the circumstances of the case as they specifically relate to the child. The focus must be on the child and what is best for him. Consideration will be guided by the basic rights of the child which are provided under the Constitution, Children Act and International Instrument which have been ratified under;

Article – 2 (5) of the Constitution:

"The general rules of international law shall form part of the law of Kenya."

Under **Article 53 (1) (e) of the Constitution provides**

"Every child has the 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."

- The emphasis is that it is the father and mother who has the responsibility to give their child parental care and protection. This is a responsibility which the courts has a duty to enforce by compelling the parent to provide for the child where he or she has neglected that duty.

Under the **Children Act** safeguards for the rights and welfare of the child are stated at Part 11 of the Act.

- These rights are, survival and best interest of the child, non – discrimination, rights to parental care, right to education, right to religious education, right to health care and other protections for the welfare of the child.

Section 6 (1) of the Act provides that;

" A child has a right to live with and to be cared for by his (or her) parents"

Article 7 of the 1989 Conventions on the rights of the child states that a child shall have a right to live with and be cared for by his or her parents.

This is also echoed at **Article 19 of the African Charter on Rights and Welfare of the Child** which states that -

"Every child is entitled to parental care and protection and shall whenever possible reside with his or her parents"

- Parental responsibility attaches to the right of the child as it is the parent who has the responsibility to ensure that the needs of the child are catered for. The law provides that it is the parent of a child who has parental responsibility, The child has a right to parental responsibility and it is in the best interest of the child that he brought up and cared for by his or her parent. This right can only be denied if is proved with cogent evidence and valid grounds that the parent is not suitable or is incapable of taking care of the child. **Section 76 (1) of the Children Act provides:**

" Subject to Section 4 where a court is considering whether or not to make one or more orders under this Act with respect to a child it shall not make the order or any other orders unless it considers that doing so would be more beneficial to the welfare of the child than making no order at all"

- The trial magistrate appreciated the guiding principle in determining custody. He however fell into error by failing to consider the Constitutional provision and the provisions of the Children Act which categorically provide that it is the biological parents who have parental

responsibility.

- The responsibility is not determined by the fact of the marriage. The determining factor is whether the person is the mother or the father of the child. This is well captured under **Article 53 (1) e of the Constitution which states –**

"whether married to each other or not."

- The Trial magistrate in his judgment stated that:

> ***" it would not be in the best interests to take her away from the grandparents since they have been with the child since birth and understands the child's peculiar challenges. Taking the child away from the grandparents is likely to impact negatively on her mental and physical growth since she has already bonded with the grandparents. If the child is given to the plaintiff who has a wife, then the child will be placed in the care of a stranger and her safety cannot be guaranteed."***

- This finding was Contrary to the Law which places parental responsibility on the parents of a child.

Grandparents have no right to assume parental responsibility over a child when his parent is alive and have the means and is willing to take up parental responsibility voluntarily. The child has a right to parental care and denying the child the right cannot be in his best interests. The Act provides that even where the father and mother were not married, the father shall acquire parental responsibility.

Section 25 of the Act provides:

1. "Where a child's father and mother were not married at the time of his birth-

(a) the court may, on application of the father, order that he shall have parental responsibility for the child; or

(b) the father and mother may by agreement (a parental responsibility agreement") provide for the father to have parental responsibility for the child.

2. Where a child's father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for a period or periods which amount to not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child. "

- The law is leaning mostly towards a child being raised by a parent. The best interest of the child are determined depending on the circumstances of the case. Children are unique human beings who are known to adopt to their surroundings very fast. It would not take long for the minor to adopt to the new environment with the father who is his fresh and blood.

- The appellant testified that he had been seeing the child and the child knows him and calls him daddy. Although the 1st respondent denied that the appellant never visits the child, she admitted that he sends item for the child and had given her a medical card. The statement of the card shows that it was used for the minor severally at Kerugoya Contrary to what 1st respondent said it could only be used at Embu.

- The Children officers report from Kerugoya confirmed that the appellant kept contact with the minor because he was allowed to visit her at her maternal grandparents home. It further states that the respondents were reluctant to handover the child as he was too young. It further stated that the appellant has demonstrated good will by voluntarily acknowledging his child and by participating in her welfare.

- It is clear that the appellant had equally bonded with the child as he had access to the child. The best interests of the child is that she should be brought up by her only surviving parent who is ready and willing to take his responsibility over the child.

- The minor will not be impacted negatively if she is in the custody of the father as he is not a stranger to her. In any case from the report by the children officer, the respondents were willing to handover the child to the appellant but changed heart after the appellant abandoned the dowry negotiations for the minor's mother.

- The Respondents are peasant farmers who are advanced in age. They are not in a position to meet the demands of the minor in the current realities of life. The law does not favor them. ***Section 27 (1) (a)* of the Act** gives priority to the father.

- This brings me to the second error of law by the trial magistrate. The Children officer's report which I have considered confirmed that the respondents had agreed with the appellant to handover the child, but developed a change of heart. The law requires that a person holding the child in the manner the respondents were holding the minor to be appointed guardians of that child.

See Section 102 to 104 of the Act.

- I find that the appellant being the undisputed father of the minor is the right person to have legal and actual custody of the minor. It is not only morally wrong but also unlawful to deny the father of the child who is alive and readily willing to take

care of the child. He is not only suitable but has demonstrated that he has a stable job and income which will ensure that the minor enjoys a good life where his basic rights are provided and most of all parental love which he can only get from the appellant. The earlier she enjoys this parental love the better. There is absolutely no good reason why she should be denied parental love and care until she attains the age of eleven (11) years.

- The Act has emphasized that the first stop shop when considering custody is the parent. **Section 82 (3) (a)** provides that

"custody of the child may be granted to the following persons –

(a) ***a parent***"

There is no provision in the Act which provides that custody of the child be granted to grandparents. The trial magistrate fell into error by granting the respondents custody despite the fact that they had unreasonably and unlawfully denied the child parental love and care.

- Secondly, the consideration by the trial magistrate that the minor would live with a stranger and her safety cannot be guaranteed was unfortunate as it was made without basis. The wife of the appellant appeared in Court and testified. She was known to the respondents. The allegation that she was an impostor had no basis. Her marriage to the appellant was not in dispute as what was in issue was custody of the minor. The fact that the appellant had a wife and a child should have been considered positively as the minor would then grow up in a family set up which is in her best interest.

- The trial magistrate erred by arriving at a finding which was not supported by evidence tendered before her. I find that the best interest of the minor and the requirements under the law is that the custody of the child be granted to the father who is the appellant in these proceedings.

- I hold that the Appeal succeeds;

I order that;

(i) The Judgment of the trial magistrate is set aside and substituted with an order dismissing the counter claim with no orders as to costs.

(ii) Judgment is entered for the plaintiff as prayed in the plaint dated 5th April, 2017 with no orders as to costs.

Dated at Kerugoya this 18th day of May 2020.

L.W. GITARI

JUDGE