WCK v EC (Suing through guardian ad- litem EKA) (Civil Appeal 102 of 2016) [2019] KEHC 4590 (KLR) (4 July 2019) (Judgment)

WCK v EC (Suing through Guardian Ad-litem EKA) [2019] eKLR

Neutral citation: [2019] KEHC 4590 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 102 OF 2016

SM GITHINJI, J

JULY 4, 2019

BETWEEN

WCK ..... APPELLANT

AND

EC ..... RESPONDENT

SUING THROUGH GUARDIAN AD- LITEM EKA

(Being an Appeal from the Judgment of the Resident Magistrate Honourable T. Olando in Eldoret CM Children Case No. 224 of 2013, dated 26th May, 2016)

The legal principles applied when making of a Custody Order

The appeal arose from a custody dispute of a child between the mother of the child and the paternal grandmother of the child. The trial court awarded custody to the paternal grandmother of the child on grounds that under Luhya Customary Law, the child belonged to the father. Aggrieved, the mother filed the instant appeal. The appellate court held that the trial court erred in applying customary law as the respondent did not accurately establish the customary law and consequently it should not have been applied. At the time of judgment, the child fell within the definition of a child of tender years. The trial court failed to take the principles concerning custody with regards to children of tender years. The court did not give the special circumstances under which custody was awarded jointly and not to the mother. Ultimately the court awarded custody to the mother.

Reported by John Ribia

Family Law *– child custody – child custody and maintenance orders – application for child custody and maintenance – applicable principles in making child custody orders - what were the principles to be applied by a court in making a child custody order - whether the trial court erred in making of the joint custody order without making provisions for maintenance – whether the trial court erred in issuing the father of a child with custody of a child of tender years without there being special circumstances to disqualify the mother -) sections 82, 83 and 90.*

Family Law *– child custody – conditions precedent – prerequisite for the consent of a parent/guardian – prerequisite for an applicant to have had custody for at least 3 months - whether in child custody applications, the conditions for the consent of a parent/guardian and the requirement for the applicant to have had custody for at least 3 months were mutually exclusive –) sections 82 and 83.*

Legal Systems *– sources of law – African customary law – circumstances that African customary law as applicable to civil cases – applicability in child custody cases - under what circumstances would courts apply African customary law in civil cases - whether the trial court erred in making child custody orders based on African customary laws where the same had not been accurately established - of section 3(2); Ernest Kinyanjui Kimani v Muiru Gikanga and another [1965] 1 EA 735 (CAN).*

Brief facts

The instant appeal arose from a custody dispute of a child between the mother of the child and the paternal grandmother of the child. The trial court awarded custody to the paternal grandmother of the child on grounds that under Luhya Customary Law, the child belonged to the father. Aggrieved, the mother filed the instant appeal on grounds that African customary law was applied without any proof of the alleged customary law and without considering that any such custom, if proved to exist, was discriminatory and contrary to article 27 of the of Kenya. The appellant contended that the trial court erred in law and in fact in finding that the parental responsibilities of a son vested in the paternal grandmother of the child upon the demise of the son and who could therefore exercise joint parental responsibilities with the surviving biological mother of the child.

Issues

i. What were the principles to be applied by a court when making a child custody order?
ii. Whether in child custody applications, the conditions for the consent of a parent/guardian and the requirement for the applicant to have had custody for at least 3 months were mutually exclusive.
iii. Whether the trial court erred in making of the joint custody order without making provisions for maintenance.
iv. Under what circumstances would courts apply African customary law in civil cases?
v. Whether the trial court erred in making child custody orders based on African customary laws where the same had not been accurately established.

Relevant provisions of the Law

82. Custody

(1) A court may, on the application of one or more persons qualified under subsection (3) of this section, make an order vesting the custody of a child in the applicant or, as the case may be, in one or more of the applicants.

(2) An order under subsection (1) may be referred to as a custody order, and the person to whom custody of the child is awarded is referred to as the custodian of the child. (3) Custody of a child may be granted to the following persons—

(a) a parent;

(b) a guardian;

(c) any person who applies with the consent of a parent or guardian of a child and has had actual custody of the child for three months preceding the making of the application;

(d) any person who, while not falling within paragraph (a), (b) or (c), can show cause, having regard to section 83, why an order should be made awarding that person custody of the child.

83. Principles to be applied in making custody order

(1) 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 any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;

(d) the ascertainable wishes of the child;

(e) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;

(f) the customs of the community to which the child belongs;

(g) the religious persuasion of the child;

(h) 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;

(i) the circumstances of any sibling of the child concerned, and of any other children of t he home, if any;

(j) the best interest of the child.

(2) Where a custody order is made giving custody of a child to one party to a marriage, or in the case of joint guardians to one guardian, or in the case of a child born out of wedlock to one of the parents, the court may order that the person not awarded custody shall nevertheless have all or any rights and duties in relation to a child, other than the right of possession, jointly with the person who is given custody of the child.

(3) In any case where a decree for judicial separation or a decree, either nisi or absolute for divorce, is pronounced, and the court pronouncing the decree either nisi or absolute finds the parent by reason of whose misconduct the decree is made to be unfit to have the legal custody of the child or children of the marriage, the parent so declared to be unfit shall not, upon the death of the other parent, be entitled to legal custody of the child except with the leave of the court.

Held

1. Section 82(d) of the) provided that any person who required an order granting them custody to be made was required to show cause as to why they should be granted custody of the child. Section 83 provided the principles to be applied by the court in making a custody order.
2. Section 82(d) of the) was to be read with regards to section 83 in instances where the parent had not given consent to the application. The trial court erred in its interpretation of section 82(d) of the). For it to apply it would require consent from the parent or the guardian of the child as per section 82(c). A clear interpretation of section 82(c) was that there needed to be both consent of a parent or guardian and the applicant had to have had custody for at least 3 months. The two requirements were not mutually exclusive. It was clear that the parent did not consent to the application and therefore the correct section to apply would be 82(d).
3. Section 82(d) of the) would then require that the applicant show cause as to why they should be granted custody of the child. There was no cause shown as to why the respondent should have been granted custody over the appellant. There were no compelling reasons as to why the biological mother was denied full custody of the child in favour of respondent.
4. The general principle was that where custody of a child of tender years was in issue, the mother should have the custody unless special circumstances were established to disqualify the mother from having of such in child. A child of tender years was defined under section 2 of the) as a child under the age of 10 years.
5. At the time of judgment, the child fell within the definition of a child of tender years. The trial court failed to take the principles concerning custody with regards to children of tender years. The court did not give the special circumstances under which custody was awarded jointly and not to the mother.
6. Under section 3(2) of the , courts were to be guided by customary law in so far as it was applicable and was not repugnant to justice and morality or inconsistent with any written law. As a matter of necessity, customary law must be accurately and definitely established. The court had a wide discretion as to how that should be done but the onus to do so must be on the party who puts forward the customary law. That might be done by reference to a book or document of reference and would include a judicial decision but in view, especially, of the present apparent lack in Kenya of authoritative text

books on the subject, or of any relevant case law, that would in practice, usually mean that the party propounding the customary law would have to call evidence to prove that customary law, as he would prove the relevant facts of his case. The trial court erred as the respondent did not accurately establish the customary law and consequently it should not have been applied.

7. The court gave directions of joint custody but failed to give consideration to financial contributions of either party in its judgement. On that principle, and on the provisions of section 90 of the), the court erred.

Appeal allowed.

Orders

i. *The custody of the child and the maintenance are bestowed upon the appellant.*
ii. *Costs awarded to the appellant.*

Citations

Cases

1. *EAO v SON* Civil Application 170 of 2013 (UR 118/2013); [2014] eKLR) — Mentioned
2. *HZM v BOO* Civil Appeal 52 of 2008; [2014] KEHC 6206 (KLR) — Explained
3. *JKW v MAA* Civil Appeal 68 of 2015; [2015] KEHC 3805 (KLR) — Explained
4. *NMM v JOW* Civil Appeal 30 of 2016; [2016] KEHC 3112 (KLR) — Explained
5. *SO v LAM* Civil Appeal 175 of 2006; [2009] eKLR — Explained

Regional Court

1. *Ernest Kinyanjui Kimani v Muiru Gikanga and another* [1965] 1 EA 735 — Explained
2. Kimani v Gikanga [1965] EA 735 — Followed
3. Re. L (infants) [1961] A11 RE1 — Mentioned

Statutes

1. Children Act, 2001 (Act No 8 of 2001) sections 4(2); 82(3)(d); 83, 90(c); — Interpreted
2. Constitution of Kenya articles 27, 53(2); — Interpreted
3. Judicature Act (cap 8) section 3(2); — Interpreted

International Instruments

1. Convention on Elimination of All Forms of Discrimination against Women (CEDAW), 1979 — In general

Advocates

None mentioned

JUDGMENT

1. The appellant filed the present appeal *vide* a memorandum of appeal dated June 23, 2016 being dissatisfied with the judgment of Tom M Olando (RM) delivered on May 26, 2016.

2. The grounds of the appeal are:

    1. That the learned trial magistrate erred in failing to grant exclusive custody rights to the appellant as the biological mother of the minor.

    2. That the learned trial magistrate erred in law and in fact in adopting a narrow interpretation of section 83 of the *Children's' Act, 2001* and in failing to consider other factors such as best interest of the child, the circumstances of any siblings of the child concerned, any other children at home, the religious persuasion of the child and ascertainable wishes of the child.

3. That the learned trial magistrate erred in law and in fact in finding that under Luhya customs a child belonged to the father without any proof of the alleged customary law and in any event without considering that any such custom if proved to exist was discriminatory and contrary to article 27 of the *Constitution of Kenya 2010*.

4. That the learned trial magistrate erred in law and in fact in finding that the parental responsibilities of a son vest in the grandmother of the child upon the demise of the son and who can therefore exercise joint parental responsibilities with the surviving biological mother of the child.

5. That the learned trial magistrate erred in law and in fact in making joint custody orders without considering any provisions for maintenance of the minor while such custody was being exercised.

Appellants' Case

3. The appellant submitted on the grounds of appeal as follows;

a) Grounds 1 & 2 – failure to grant exclusive custody rights to the appellant as the biological mother of the minor girl child and the sole surviving parent of the minor and a narrow interpretation of the law.

4. The appellant submitted that the evidence before the court was that the minor was born on April 15, 2008 and she is indicated as the biological mother on the birth certificate contained at page 81 of the record of appeal.

5. Based on section 82(3) of the *Children's Act* the appellant was entitled to sole custody of the child.

6. The appellant submitted that under section 82(3)(d) the respondent was under a duty to show cause why she was entitled to custody and she failed to do so.

7. The appellant submitted that the magistrate erred by granting joint custody to the respondent based on the fact that she had been in custody of the respondent and she belonged to the Luhya community whose customs dictated that the child belonged to the father.

8. The appellant further submitted that the respondent had not shown cause why she should be granted custody whereas the appellant had tendered evidence of the existence of 2 siblings of the minor who needed to bond with her.

9. The appellant submitted that she tendered evidence of religious orientation by the letter from the [particulars withheld] of Christ in Nairobi. She also gave evidence that she was employed and could take care of the minor.

10. The appellant relied on the decision of *Re L (infants)*[1961] A11 ER 1 and Nairobi civil application No 170 of 2013 *EAO v SON* to support her grounds.

b) Grounds 3&4 – Application of Luhya Customary Law, its discriminatory nature and whether it would vest parental responsibilities in the grandmother.

11. The appellant submitted that the court was never told the specific sub-tribe of the Luhya community the respondent and the father of the child belong to as the community is comprised of many sub-tribes with unique customs. It was therefore erroneous for the magistrate to find for the respondent on account of customary law.

12. Relying on *Kimani v Gikanga* (1965) EA 735 the appellant submitted that if such a custom was to be established it would be repugnant to justice as the law provides for the right of the biological mother of the child to custody under section 82 of the *Children's Act 2001*.

13. Further, relying on article 27 of the *Constitution* the appellant invited the court to consider *SO v LAM* (2009) eKLR where the court held that the principles in the *Convention on the Elimination of All forms of Discrimination Against Women* were rehashed in the *Children's' Act* and therefore the same was applicable over customary law and thereby invited the court to ignore the customary norms. She further cited section 4(2) of the *Children's' Act* which provides that the best interest of the child should be the primary consideration of the court.

c) Ground 5 – The making of the joint custody order without making provisions for maintenance

14. The appellant submitted that the court erred in placing the burden of paying for the basic needs of the minor on the appellant whilst she was in joint custody as the respondent would also benefit from the same.

15. She submitted that the respondent should meet the costs during the 2 weeks the minor stays with the respondent.

16. She relied on section 90(c) of the *Children's Act*.

Respondents' Case

17. The respondent did not file submissions as per the court record.

Issues for Determination

a) Whether the court erred in failing to grant exclusive custody to the only surviving parent of the minor.

b) Whether the court erred in its application of Luhya customary law

c) Whether the court erred in making of the joint custody order without making provisions for maintenance

Whether the court erred in failing to grant exclusive custody to the only surviving parent

18. Section 82 of the *Children's Act* states;

> 82. Custody
>
> (1) A court may, on the application of one or more persons qualified under subsection (3) of this section, make an order vesting the custody of a child in the applicant or, as the case may be, in one or more of the applicants.
>
> (2) An order under subsection (1) may be referred to as a custody order, and the person to whom custody of the child is awarded is referred to as the custodian of the child.
>
> (3) Custody of a child may be granted to the following persons—
>
> (a) a parent;
>
> (b) a guardian;

(c) any person who applies with the consent of a parent or guardian of a child and has had actual custody of the child for three months preceding the making of the application;

(d) any person who, while not falling within paragraph (a), (b) or (c), can show cause, having regard to section 83, why an order should be made awarding that person custody of the child.

19. Under section 82(d) the Act states that any person who requires an order granting them custody to be made is required to show cause as to why they should be granted custody of the child.

20. Section 83 of the *Children's Act* states the principles to be applied by the court in making a custody order as follows;

83. Principles to be applied in making custody order

(1) 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 any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;

(d) the ascertainable wishes of the child;

(e) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;

(f) the customs of the community to which the child belongs;

(g) the religious persuasion of the child;

(h) 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;

(i) the circumstances of any sibling of the child concerned, and of any other children of the home, if any;

(j) the best interest of the child.

21. The court needs to determine whether the magistrate applied the principles correctly in awarding custody. Further, the court should also take note that the provisions of section 82 are not couched in mandatory terms hence the right is not to be construed as exclusive.

22. The trial court cited section 83(c) and (f) as the principles it applied in determining the custody. The court also relied on article 53(2) of the *Constitution* of Kenya article 53(2) of the *Constitution* of Kenya states;

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

23. Section 82(d) gives the provision that it is to be read with regards to section 83 in instances such as the present where the parent has not given consent to the application.

24. The court erred in its interpretation of this section as for it to apply it would require consent from the parent or the guardian of the child as per section 82(c). A clear interpretation of section 82(c) is that there needs to be both consent of a parent or guardian and the applicant has to have had custody for at least 3 months. The two requirements are not mutually exclusive. It is clear that the parent did not consent to the application and therefore the correct section to apply would be 82(d).

25. Section 82(d) would then require that the applicant show cause as to why they should be granted custody of the child. Upon perusal of the record of appeal, it is clear that there was no cause shown as to why the respondent should have been granted custody over the appellant. There were no compelling reasons as to why the biological mother was denied full custody of the child in favour of respondent.

26. In *HZM v BOO* [2014] eKLR the court held:

> Section 82(3)(c) of the Act allows custody order to be made to any applicant other than the parent or guardian of the child but on condition that the consent of the parent or guardian is granted and the applicant has had actual custody of the child for three months preceding the making of the application. If these conditions are not met, the applicant should not be granted custody.

27. In *NMM v JOW* [2016] eKLR the court relied on the decision in civil appeal No 30 of 1978 at Nairobi: [2008] I KLR *G v G* at page 497, where the Court of Appeal held:

> .... Basically, these reasons are that the custody of very young female children should be granted to their mother, in the absence of exceptional circumstances which do not in my opinion exist in this case. The learned judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children. He rejected the proposition, advanced before him by the mother's advocate, that there was a 'rule' in favour of the mother. With respect, this was misdirection. When dealing with the paramount consideration of welfare, especially where young female children are concerned, there is a rule that the mother is normally the person who should have custody. As Roxburgh J said in *Re S (an infant)* [1958] 1 All ER 783, at 786 and 787:
>
> "I only say this; the *prima facie* rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the *prima facie* rule".

28. In *JKW v MAA* [2015] eKLR the court held;

> In addition, the general principle that has been approved by our courts is that where custody of a child of tender years is in issue, is that the mother should have the custody unless special circumstances are established to disqualify the mother from having of such in child.

29. A child of tender years is defined under section 2 of the Act as;

> "child of tender years" means a child under the age of ten years;

30. At the time of judgment, the child fell within the definition of a child of tender years. The trial court failed to take the principles concerning custody with regards to children of tender years. The court did not give the special circumstances under which custody was awarded jointly and not to the mother.

31. On this particular aspect I find that the court erred in failing to grant exclusive custody to the mother of the child.

Whether the court erred in its application of luhya customary law

32. The *Judicature Act* (cap 8 Laws of Kenya) section 3(2) guides the courts in Kenya in the manner the African Customary Law is to be applied. The Luhya Customary Law is part of the African Customary Law. The section states as follows:

> The High Court, the Court of Appeal and all subordinate courts shall be guided by African Customary Law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

33. In *Ernest Kinyanjui Kimani v Muiru Gikanga & another* [1965] 1 EA 735 (CAN) the court held;

> As a matter of necessity the customary law must be accurately and definitely established. The court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially, of the present apparent lack in Kenya of authoritative text books on the subject, or of any relevant case law, this would in practice, usually mean that the party propounding the customary law would have to call evidence to prove that customary law, as he would prove the relevant facts of his case.

34. The court should consider whether the awarding of custody based on the criteria set in *Ernest Kinyanjui Kimani v Muiru Gikanga & another* [1965] 1 EA 735 (Can) is repugnant to justice. In my opinion the trial court erred as the respondent did not accurately and definitely establish the customary law and consequently it should not have been applied.

Whether the court erred in making of the joint custody order without making provisions for maintenance

35. Section 90 of the *Children's Act* states;

> Joint maintenance of children
>
> Unless the court otherwise directs, and subject to any financial contribution ordered to be made by any other person, the following presumptions shall apply with regard to the maintenance of a child—
>
> (a) Where the parents of a child were married to each other at the time of the birth of the child and are both living, the duty to maintain a child shall be their joint responsibility;
>
> (b) where two or more guardians of the child have been appointed, the duty to maintain the child shall be the joint responsibility of all guardians, whether acting in conjunction with the parents of the child or not;
>
> (c) where two or more custodians have been appointed in respect of a child it shall be the joint responsibility of all custodians to maintain the child;

(d) where a residence order is made in favour of more than one person, it shall be the duty of those persons to jointly maintain the child;

(e) where the mother and father of a child were not married to each other at the time of birth of the child and have not subsequently married, but the father of the child has acquired parental responsibility for the child, it shall be the joint responsibility of the mother and father of the child to maintain that child.

36. Emphasis is placed on the phrase 'unless the court otherwise directs and subject to any financial contribution ordered to be made by any other person...'

37. The court gave directions but failed to give consideration to financial contributions of either party in its judgement and therefore on this principle the court erred.

38. The appeal therefore succeeds as the trial court misapplied various principles of law in arriving at its decision. The custody of the child and the maintenance are bestowed upon the appellant. Costs goes to the appellant.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 4th day of July, 2019

In the absence of:

Mr. Mugambi for the appellant

Mr. Kiprono for the respondent

Ms Sarah – Court assistant