REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 40 OF 2018

AMA...APPELLANT

VERSUS

NSY...RESPONDENT

(Being an appeal against the Judgment of the Children's Court at Milimani in Nairobi

by Hon. Z.W. Gichana (SRM) delivered on 29th March 2018)

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CHILDREN'S CASE NO. 1087 OF 2015

NSY..PLAINTIFF

VERSUS

AMA..RESPONDENT

JUDGMENT

1. The appellant AMA. and the respondent NSY were Muslims. They got married under Islamic law and lived together until their divorce on 1st January 2013. In the course of their marriage they got two children, one born on 13th February 2006 (MAM) and the other born on 17th November 2007 (MAM). Following the divorce the children lived with the appellant who had another wife. The respondent had access.

2. In a cause filed before the Children Court on 18th August 2015 the respondent sought legal custody, care and control of the children. She also sought orders that the appellant provides Kshs.20,000/= monthly for their maintenance, and for him to be restrained from removing them from her physical custody. It was claimed that the children were suffering under the hands of the appellant's wife who was subjecting them to cruel forms of punishment. She stated that the children were being treated unequally in relation to the children between the appellant and his wife. The result was that the children were suffering physical, emotional and social abuse which had caused their academic performance to drop.

3. The appellant filed a defence denying these allegations. Although he pleaded that the children were comfortable with him, he went on to say as follows:-

> **"6. That the defendant prays for unlimited access to the children be allowed to attend full madrasa classes but not part-time tutors. That the defendant earns Kshs.32,000/= and taking care of elderly parent and his 1st family. The defendant cannot afford Kshs.20,000/= per month as prayed. The defendant herein can afford only Kshs.10,000/= per month.**

7. ……………………………………………………..……….

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8. The defendant loves his children he prays for at least 10 days' time with his children (above mentioned) over school holidays."

4. Following a chamber application, orders were issued on 5th November 2015 giving the respondent legal custody, care and control pending the hearing and determination of the cause. The court asked the appellant to contribute Kshs.20,000/= monthly towards their maintenance, and he be given access to the children on terms to be agreed on by the parties.

5. It would appear not disputed that before the cause was heard and determined, the respondent got married to an Israel man. In November 2016 she and the man relocated to Israel. They went with the children whose names were changed to Jewish names.

6. When the cause was finally heard, the trial court on 29th March 2018 delivered a judgment granting the respondent legal custody, care and control of the children. The appellant was granted access to the children through reasonable phone access at least once every fortnight at his cost. If the parties had "technology", it was ordered that the appellant accesses the children through video link calls on alternative saturdays from 10.00 am to 11.00 am. The appellant was, lastly, asked to contribute Kshs.20,000/= per month towards the children's maintenance. Each party was at liberty to apply.

7. The appellant was aggrieved by these orders and on 13th April 2018 filed this appeal seeking that all the orders of the trial court be set aside. The grounds on which the appeal was based were that:-

(1) the learned magistrate erred in law and fact by failing to recognize the principles that govern granting of custody of the children under Section 83 of the Children Act;

(2) the learned magistrate erred in law and in fact by issuing orders that will make it impossible for the appellant to ever see his own children;

(3) the learned magistrate erred in law and fact by failing to recognize the appellant's right to determine the names of his children, a right which is recognized by the Children Act and the Constitution;

(4) the learned magistrate erred in law and fact when he failed to recognize the multiple rights of the appellant as the biological father which rights are outlined in both the Children Act and the Constitution;

(5) the learned magistrate erred in law and fact in failing to find that the respondent misused the interim orders to change the names of the children and to take the said children out of the jurisdiction without the consent of the appellant as the biological father; and

(6) the learned magistrate erred in law and fact in ordering the appellant to be making a contribution of Kshs.20,000/= for the maintenance of the children subject matter herein despite the same court denying the appellant an opportunity to ever see his own biological children.

8. It should be noted that before the cause pending before the trial court was heard and determined, the appellant filed in the High Court at Nairobi **Judicial Review Misc. Application No. 106 of 2017** against the Registrar of Documents, the Director of Immigration, the Registrar of Persons, the Attorney General, the Ministry of Foreign Affairs and the respondent to complain about the fact that the respondent had been allowed to change the names of the children to get them passports and to allow them to relocate to Israel without reference to him as their father. The application was heard and dismissed for lack of merits. The respondent had defended her actions of changing the names of the children and taking them out of the country. She had argued that she had had the right to do this following the interim order of legal custody, care and control. The Judicial Review Court observed that these were matters that could be taken up in the pending cause in the Children Court. The appellant did not take up these complaints at the trial court for the same to be heard and a determination to be made. The trial court ought to have been asked to determine whether, on the basis of the interim orders, the respondent could change the names of the children, obtain passports for them and leave jurisdiction with them. Without a hearing and determination on these matters, the same cannot be legitimately raised during this appeal. The appeal can only be limited to the plaint, the defence and the judgment that followed on 29th March 2018. It is also notable that the decision in the Judicial Review was not appealed against.

9. The Judicial Review proceedings were commenced by application dated 17th July 2017 and the judgment was rendered on 24th July 2018. By the time this appeal was filed on 13th April 2018 the judgment had not been delivered. I am sure that the appellant had hoped to get favourable orders in the application.

10. This is a first appeal. This court is obliged to reconsider the evidence tendered in the trial court, assess it and make appropriate conclusions on it, remembering that it had not seen or heard the witnesses and making due allowance for this **(Selle –v- Associated Motor Boat Company Ltd [1968]EA 123).** Secondly, an appellate court will not normally interfere with the findings of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the court is shown demonstrably to have acted on wrong principles in reaching the findings it did **(Bundi Marube –v- Joseph Onkoba Nyamuro [1983]KR 403)**. Lastly, the appellate court would not interfere with the decision arrived at by the exercise of discretion by the lower court unless it is satisfied either that the lower court had misdirected itself in some matter and as a result arrived at the wrong decision, or that it was manifest from the case as a whole that the lower court was clearly wrong in the exercise of its discretion and that, as a result there was injustice **(Choitram –v- Nazari [1984] KLR 327).**

11. It is reiterated that when the respondent went to the children court she wanted to be granted legal custody, care and control of the children, Kshs.20,000/= in maintenance for the children; and an order to restrain the appellant from removing the children from her. The appellant filed a defence. He did not have a counterclaim. He did not say he wanted legal custody, care or control of the children. Instead, he pleaded to be given "unlimited access". The access he sought was –

> **"for at least 10 days' time with his children (above mentioned) one school holidays."**

If he did not ask for custody, legal or physical, during the trial he cannot ask for it on appeal.

12. On the issue of access, the trial court directed that he talks to the children through the phone at least once every fortnight at his cost and, if technology made it possible, he communicates with them through video link on alternative Saturdays from 10.00am to 11.00am. It is clear from the judgment that the respondent was with the children in Israel. This is why it was ordered that the appellant accesses the children by phone or video link.

13. The trial court acknowledged that, in dealing with the dispute between the appellant and the respondent, the paramount consideration was the best interests of the children. That was the requirement under **section 4(3)** of the **Children Act (Cap. 141)** and **Article 53(2)** of the Constitution. The Court, in reaching the decision on custody and access, had heard the parties, heard the views of the children (who indicated they wanted to stay with their mother and not their father) and had received evidence of a therapist who had interviewed the children. This was done under **section 83** of the **Act**. Once legal custody, care and control had been given to the respondent, the court grappled with the issue of access. How was he, in Kenya, going to access the children who were in Israel with the respondent?

14. I consider the peculiar facts of this case. I consider that the appellant is the father of the children. The access only through the phone and video link was quite limiting, and not in the best interests of the children. I will modify the order on access by ordering that, over and above what the trial court ordered, the respondent shall allow the children to visit the appellant in Kenya and stay with him for up to 30 days in a year. The parties will agree on the date and time of the year, and the appellant will meet the travel expenses.

15. On the issue of maintenance a sum of Kshs.20,000/= per month was the order of the lower court. I consider the figure to be reasonable. The appellant had offered Kshs.10,000/= monthly which I find low in the circumstances.

16. To this limited extent, I allow the appeal, and ask each party to bear own costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST NOVEMBER 2019.

A.O. MUCHELULE

JUDGE