**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 82 OF 2013**

**R N N.....APPELLANT**

**VERSUS**

**D K K.....RESPONDENT**

**JUDGEMENT**

1. The appeal herein was filed on 4th December 2013 through a memorandum of appeal of even date, and it arises from a ruling delivered in Nairobi Children's Court Children's Case No. 406 of 2006 on 5th November 2013. There is a record of appeal on record dated 8th August 2014.

2. The memorandum of appeal raises several grounds -

(a) That the trial court failed to find that the respondent had refused to foster and encourage father/son relationship between the appellant and the child was a ground to divest the respondent the custody of the child and grant the same to the appellant;

(b) That the trial court erred in granting the appellant access to the child but failed to structure when that right was to commence and how and where the child was to be collected and or dropped;

(c) That the trial court made an error in failing to grant the appellant custody of the child;

(d) That the trial court failed to take into account past court orders their failures and the reasons for the same;

(e) That there was failure to take into account the report of the Children's Officer and also the submissions of the appellant;

(f) That the court also failed to appreciate that the parties have equal right and duty to care for the child under Article 53 of the Constitution of Kenya; and

(g) That the court failed to accord both parties equal treatment contrary to Articles 27 and 45 of the Constitution.

3. Directions were given on 2nd June 2016 for the disposal of the appeal, and it was directed that it be disposed of by way of written submissions to be highlighted. There was compliance with directions, for both sides filed their respective written submissions. The appellant's submissions are dated 1st June 2016 and were filed herein on 16th June 2016. The respondent's submissions are dated 22nd December 2015 and were filed herein on 5th January 2016. The written submissions were highlighted on 22nd September

2016. I have carefully perused the written submissions, and noted the arguments made therein, and considered the oral arguments made by counsel.

4. The ruling delivered by the lower court on 5th November 2013 was said to be a follow-up of an earlier ruling delivered on 15th June 2012, on an application dated 14th February 2012, where the appellant sought review of earlier court orders. He wanted to be granted actual custody and the respondent granted access, and his case was founded on alleged denial of access to the child by the respondent.

5. In his first ground of appeal, the appellant argues that there was failure by the respondent to encourage and facilitate access by the appellant, and the trial court ought to have used that as criteria for divesting the respondent of custody, and to grant the custody to the appellant. I have carefully considered the written submission filed herein by the appellant, and I have not seen any statutory provision or any case law, to the effect that where a parent fails to encourage access of the child by the other parent then that other parent ought to be divested of custody. The guiding principle in all cases relating to children is that stated in Article 53(2) of the Constitution of Kenya 2010 and section 4 of the Children Act, Cap 141, Laws of Kenya, both of which state the best interests of the child principle. The trial court grappled with that and eventually held that the child was still of tender years and had been with the respondent since birth, and chose not to disturb the status *quo* in the best interests of the child. The court applied the correct principles in handling that issue and it cannot be faulted.

6. The second ground of appeal is that the court did not structure when the order on access was to take effect and where the child was to be collected and or dropped. I note from the ruling that the court directed that the appellant was to spend alternate Saturday's with the child from 9.00 am to 4.00 pm, to be reviewed after two months, and that such visits were to be unsupervised. I do not think that the matters raised with respect to that order really merit being appealed against. These are issues of detail which could be addressed, by any party who felt that the order was not clear, by going back to the trial court for clarification. In any event where the child is to be collected or dropped is a matter that would require agreement or input of the parties, and the court could not make final orders on that without pointers from the parties.

7. There other aspect of this ground touches on the direction that the school which the child attends, should suggest the time when the appellant can visit, which should be at least twice a week. The appellant is unhappy with this and feels that the school, which is not party to the proceedings, is being un-procedurally dragged into the matter. It is the appellant who moved the lower court on the plea that he wanted to be involved in the upbringing of the subject child. Orders were made to facilitate access, but from the material placed before the court, it appeared as if the same was not working perfectly for the child, as he upon being availed for contact purposes, was slow to warm up to the appellant. The court noted that the matter of access was not something that could be forced on the child, by compelling him to meet the appellant if he was not so inclined. The court counseled that mechanisms needed to be put in place to encourage the child bond with the appellant. In the opinion of the court, the best place to start this would be at the child's school, ostensibly away from what the appellant was calling the negative influence of the respondent. In any event, the Children Officer had proposed contact away from the respondent, and the school environment would have presented such opportunity for contact in a neutral place. The orders touching on the school should be seen in that light. In my opinion, the court had gone out of its way to answer the appellant's plea, but he does not appear willing to try what the court is offering. It is important for the parties to note that the law does not have answers to some of these issues, there are no legal solutions. The measures to encourage bonding are clearly extra-legal and extra-judicial. I trust the trial court was positively creative in trying to get a solution to the appellant's predicament. I do not see any reason for me to interfere with the order.

8. On the third ground, the court is faulted for failing to grant custody of the child to the appellant. The record is clear that the court did give reasons for not taking custody of the child from the respondent and granting it to the appellant. The court indicated that it was led by the best interests of the child principle. It found for a fact that the child was of tender years, and that no compelling reason had been given to divest her of custody. The appellant has not demonstrated that the trial court fell into error in coming to that decision. I have already observed that it has not been shown that there is jurisprudence that suggests

that a court should divest a mother of a child tender years who has had custody of the child since birth on the ground that she has failed to encourage the child bond with the father. I do not see any merit in the third ground.

9. The trial court is faulted for failing to take into account past court orders, their failures and the reasons for the same. I have gone through the record of the lower court. I have noted that matter was mainly handled by Mr. Mwicigi from 16th October 2010 when it was first placed before a judicial officer till 5th November 2013 when the impugned ruling was delivered. The orders that the appellant is referring to must have been made by the same magistrate. I do not think he would not have taken them into account in the ruling of 5th November 2013. The court in its opening paragraph of the impugned ruling stated that the application before it was for a review of earlier orders; the final orders could not have been made without consideration of what had been ordered earlier. In any event, the appellant has not identified the previous orders that he alleges the court failed to take into account.

10. The appellant charges that the trial court did not consider the Children Officer's reports and their recommendation. It is also averred that the trial court did not consider the submissions of the appellant. I do not think what is pleaded by the appellant is accurate; it not in tandem with what is on record. The trial court stated as follows at the second page of the ruling –

> *'The Children Officer at Langata filed two reports dated 27th March 2013 and 16th June 2013, the parties filed their respective submissions and observations to the reports. Both were dated 24th September 2013. This shall form the basis of this ruling. I will address the issues raised in the reports and consider the reactions of the parties through their counsels.'*

11. The next two paragraphs analyze the contents of the two reports by the Children Officer. The two paragraphs said as follows–

> *'The welfare reports revealed that, there was supervised access on 23rd March 2013 at Sebastian Café, Animal Orphanage, Nairobi. The plaintiff arrived with the child … The child was however conflicted on how to relate to the parents without compromising either of them. The Children Officer noted that the child was intelligent and knowledgeable on a wide range of topics and must have known who a father is. She recommended that the father accesses the child in the absence of the mother but that the access is supervised. She also recommended counseling of the parties.*
>
> *In her subsequent report the children officer reiterated that they proceeded to the defendants' residence to pick the child who refused to accompany them. She noted that he had inner conflict and the defendant did not encourage him to go for the access which would have resolved the conflict. This perplexed her because in the last access the child seemed to have enjoyed himself. She recommended that the child be picked and returned at a neutral place.'*

12. Regarding the submissions by the appellant, I have noted that the trial court devoted two paragraphs to handling the appellant's submissions and only one in discussing the respondent's submissions. On the appellant's submissions, the court said–

> *'I will now consider the reactions to the reports. I will start with the reactions by the plaintiff. It was the plaintiff's contention that access could not be supervised by the defendant because it was fraught with challenges … These deep questions of attitude and psychology would affect how he relates to his peers, the opposite sex, his self-esteem and fatherhood later on. He prays that the issue be addressed before more psychological damage is suffered by the child.*
>
> *The plaintiff contends that despite the numerous court orders he has not been recognized by his son as a father … He submits that the mother can easily introduce the child to the father … but is unwilling to do so and hence his application for variation of the orders as nothing else will work.'*

13. The appellant further argues that the court had failed to appreciate that both parents have equal right

and duty to care for the child as stated by Article 53 of the Constitution of Kenya. That is not consistent with the record. At the fourth page of the ruling the court said–

> *'I reiterate that the child has the right to live and be cared for by both parents as provided by section 6 of the Children Act. None of his parents has a superior right or claim to the child in exercise of parental responsibility as envisaged at section 25 of the Children Act and Article 53(1) (e) of the Constitution of Kenya.'*

14. Quite clearly, the court was appreciative of the dictates of Article 53 of the Constitution and section 25 of the Children Act. However, while aware of that constitutional and legal position, and taking into account the best interests of the child, which are for all intents and purposes of paramount consideration, it concluded as follows–

> *'The child is of tender years and there are no compelling reasons to divest the mother of his custody.'*

15. Finally, the appellant cites Articles 27 and 45 of the Constitution of Kenya, to argue that the court failed to accord equal rights to the parties in the dispute. I wish to state that this is a children's matter. The cause is about the child, not the parents. There is, of course, conflict here between the rights or interests of the child as against the rights or interests of the parents. The parents are battling over right of access to and custody of the child. However, the parents right to access and custody is subordinate to what ought to be the best interests of the child. Whatever Articles 27 and 45 of the Constitution may say, on the rights of the parents herein as parties to a dispute, is overridden by the provisions of Article 53(2) of the Constitution, so long as the dispute is about a child. The child's interests are of paramount importance compared to the rights and interests of the parents. For avoidance of doubt Article 53(2) states as follows–

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

16. I need not say more. The appeal herein is without merit. I shall dismiss the same, and award costs thereof to the respondent.

**DATED, SIGNED and DELIVERED at NAIROBI this 20TH DAY OF JANUARY, 2017.**

**W. MUSYOKA**

**JUDGE**