

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
FAMILY DIVISION
APPEAL NO. E086 OF 2021

AMOS MALABA SABWAMI **APPELLANT**

VERSUS

MERCY MWENDE MUTUKU **RESPONDENT**

*Being an Appeal from the Ruling and Order of Hon. R.O Mbogo, Resident Magistrate
delivered on 22 July 2020 in Nairobi Children's Case No. 738 of 2019)*

JUDGEMENT

1. The dispute before this Court encapsulates one of the most profound, legally complex, and emotionally charged dilemmas in modern family jurisprudence: the intersection of a custodial parent's fundamental right to pursue socio-economic and educational advancement across international borders, and the competing, equally fundamental right of the left-behind parent to maintain a meaningful, continuous, and legally protected relationship with their child. The resolution of such disputes demands a delicate balancing act, heavily weighted by the overarching, non-derogable standard that binds this Court—the paramountcy principle enshrined in Article 53(2) of The Constitution, which decrees that a child's best interests are of paramount importance in every matter concerning the child.

2. The Appellant, who is the biological father of the subject minor, moves this Court to set aside the Ruling and orders delivered by Hon. R.O. Mbogo on 22 July 2021. The impugned Ruling effectively varied a pre-existing Consent Judgment, stripped the Appellant of his joint legal custody, granted sole legal and actual custody to the Respondent, enjoined the maternal grandparents as interested parties, and permitted the permanent international relocation of the subject minor to the United States of America.
3. The Appellant contends that the subordinate court's decision was procedurally flawed, substantively inequitable, and fundamentally antagonistic to the best interests of the child, effectively orchestrating the judicial erasure of his parental rights. Conversely, the Respondent defends the trial court's decision as a pragmatic, welfare-centric determination designed to afford the minor unprecedented educational opportunities and specialized medical care in a developed jurisdiction.
4. As a first appellate court, the duty imposed upon this Court is not merely to rubber-stamp the findings of the trial court, but to subject the entire evidentiary record to a fresh and exhaustive scrutiny, evaluating the facts and the law to arrive at an independent conclusion. This mandate was succinctly articulated in the persuasive authority of ***Abok James Odera & Associates v John Patrick Machira t/a Machira & Co Advocates eKLR***, and further reinforced by Mativo J (as he then was) in ***Mursal & Another v Manese KEHC 282 (KLR)***, where it was held that a first appellate court is empowered to subject the whole of the evidence to a fresh review, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand.

Brief Background

5. The Appellant and the Respondent previously cohabited and were blessed with a male child, born in November 2015. Following the deterioration of their relationship and their subsequent separation—variously placed between

2013 and 2017 in the pleadings—the minor primarily resided with the Respondent and her parents.

6. In a bid to amicably settle the ensuing custody dispute and formalize their parental responsibilities, the parties recorded a Consent Judgment on 17 October 2019 in Nairobi Children’s Case No. 738 of 2019. The trial court adopted this agreement as a final decree. The structured custodial and maintenance responsibilities under the 2019 Consent Judgment provided a balanced framework for co-parenting.
7. The consent provided that legal custody would be shared jointly between the Appellant and Respondent, while actual custody would vest in the Respondent. The Appellant was access on alternate weekends (Saturday 0800 hours to Sunday 1700 hours), with drop-off and pick-up at Donholm Steers. School holidays would be share on an equal 50:50 basis between the parents. The Appellant was obligated to provide a medical cover, pay school fees and related expenses, and remit KES 5,000/= monthly for upkeep (with a 10% annual increment). The Respondent was tasked with providing NHIF coverage.
8. This equilibrium was disrupted in January 2020 when the Respondent secured a partial scholarship to pursue further studies at Gordon College in Lynn, Massachusetts, USA. She subsequently relocated to the United States, leaving the minor under the actual, physical custody of his maternal grandparents in Kitui County. Following her departure, the custodial dynamic fractured completely. The Appellant alleged that the maternal grandparents systematically frustrated his access to the minor, leading to hostile altercations that necessitated the involvement of the Directorate of Criminal Investigations (DCI) and local Children's Officers.

9. Consequently, the Appellant filed a Chamber Summons on 7 January 2021, seeking a review of the 2019 Consent Judgment. He prayed for sole legal and actual custody of the minor, citing the Respondent's absence from the jurisdiction, his constitutional right to exercise equal parental responsibility as the only parent presently residing in Kenya, and the maternal grandparents' alleged hostility and deliberate alienation tactics.
10. In a counter-move, the Respondent filed a Chamber Summons dated 6 March 2021 under a Certificate of Urgency. She sought to enjoin her parents as Interested Parties, prayed for sole legal and actual custody, and requested the court's leave for the minor to permanently relocate to the United States to join her. The Respondent anchored her application on the premise that Gordon College had extended an opportunity to cater for the minor's expenses through an I-20 Certificate of Eligibility, and that the relocation would allow the minor to access superior medical healthcare. Evidence was adduced demonstrating that the minor suffered from a chronic chest condition (suspected asthma or adenotonsillar hypertrophy) that caused recurrent congestion and necessitated frequent nebulization and hospital admissions.
11. On 22 July 2021, the trial court delivered a consolidated Ruling determining both Applications. The court found in favor of the Respondent, effectively vacating the 2019 Consent Judgment. In its Ruling, the court awarded sole legal custody to the Respondent. Actual custody was vested in the Respondent, with leave to relocate to the USA. The maternal grandparents were enjoined as Interested Parties. The Respondent was granted leave for the minor to travel and relocate to the USA. The Appellant was granted access only while the minor is in the USA.
12. The trial court reasoned that the minor, being of tender years, required the presence of the mother. It further accepted the Respondent's assertions

regarding the availability of superior medical care and educational opportunities in the United States, ruling that denying the child the opportunity to travel would contravene his best interests. Addressing the Appellant's profound fears of losing contact with his son, the trial court tersely ordered that the Appellant be granted access while the child is in the USA, leaving the logistical and financial modalities of such access to be engaged by the parties at a later date.

13. Aggrieved by the entirety of the trial court's Ruling, the Appellant lodged the present appeal on 20 August 2021, advancing seven distinct grounds in his Memorandum of Appeal. The grounds can be consolidated into five core thematic issues for the determination of this appellate court:
- a) Whether the trial court erred in law and fact by enjoining the maternal grandparents as interested parties to the suit.
 - b) Whether the trial court erred in varying the Consent Judgment of 17 October 2019, and whether such variation was supported by a material change in circumstances.
 - c) Whether the trial court erred in relying on a Children's Officer's report dated 15 February 2021 without affording the Appellant an opportunity to peruse, critique, or cross-examine the maker of the report.
 - d) Whether the trial court erred in stripping the Appellant of legal custody and granting sole legal and actual custody to the Respondent, contrary to the constitutional principle of equal parental responsibility.
 - e) Whether the trial court erred in granting leave for the minor to relocate to the USA without instituting adequate jurisdictional safeguards, such as mirror orders, to protect the Appellant's access rights.

Analysis & Determination

The Joinder of the Maternal Grandparents

14. The Appellant faults the trial court for enjoining the Respondent's parents as interested parties, arguing that their rights as grandparents cannot supersede or equate to his primary, constitutionally protected rights as a biological father. The Appellant submits that the grandparents did not file any formal pleadings expressing their distinct interest in the suit, and therefore their joinder was irregular and legally unfounded.
15. The jurisprudence governing the joinder of parties is anchored in Order 1 Rule 10(2) of the Civil Procedure Rules, which empowers the court, at any stage of the proceedings, either upon or without the application of either party, to add the name of any person whose presence may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all questions involved in the suit. As elucidated in ***Erdemann Property Ltd v Co-operative Bank (K) Ltd (Civil Case E271 of 2022) [2024] KEHC 10187 (KLR)***, a proper party is one who has a direct and substantive interest in the issues arising in the litigation, which interest the court will recognize and enforce.
16. Applying these civil procedure principles to the specialized and sensitive realm of family law, the legal reality is that while biological parents undeniably possess primary constitutional rights and responsibilities towards a child under Article 53 of the Constitution and section 31 of the Children Act, third parties who exercise *de facto* care and control often possess a substantive, tangible interest in the child's welfare. The courts have increasingly recognized the vital role played by extended family members, particularly grandparents, in the upbringing of children. In the persuasive decision of ***Ramadhan Ali Athman v Peter Mwingo Chirima [2020] eKLR***, the Court upheld a trial court's decision to grant custody to a minor's maternal

grandparents, noting that the best interests of the children required stability. Similarly, in *In re KWW (Minor) [2025] KEHC 3335 (KLR)*, the Court affirmed that while grandparents do not have an automatic statutory right to custody, their *de facto* caregiving roles make them critical stakeholders in welfare determinations.

17. In the present case, it is an uncontroverted fact that following the Respondent's departure to the United States in January 2020, the minor remained in the continuous physical custody of his maternal grandparents in Kitui. The Appellant himself acknowledged their central role by actively accusing them of frustrating his access, leading to police involvement. When a court is called upon to make orders affecting the day-to-day physical environment, schooling, and handover mechanisms of a minor, the individuals holding actual physical possession of the child are necessary and proper parties. Their joinder does not elevate their status to that of biological parents, nor does it extinguish the father's rights; rather, it brings them within the personal jurisdiction of the court so that binding orders—such as injunctions against harassment or mandatory orders to facilitate access—can be directly enforced against them.
18. Consequently, the trial court did not err in law or fact by enjoining the maternal grandparents. Their joinder was a procedural necessity to effectively adjudicate the dispute, ascertain the true living conditions of the minor, and ensure compliance with any subsequent access orders. This ground of appeal fails.

The Variation of the Consent Judgment

19. The Appellant asserts that the trial court erred by vacating the Consent Judgment of 17 October 2019 and substituting it with an entirely new decree. He posits that a consent order, being a product of a binding contractual agreement between parties, cannot be altered arbitrarily by the court.

20. It is a well-established tenet of civil litigation that a consent judgment has contractual effect and can ordinarily only be set aside on grounds that would justify vitiating a contract, such as fraud, coercion, mutual mistake, or misrepresentation. This principle was cementing in the seminal Court of Appeal decision in ***Flora N. Wasike v Destimo Wamboko eKLR***, where it was held that a court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.
21. However, family law, particularly matters concerning the welfare of children, departs significantly from the rigid, unforgiving strictures of commercial contract law. When the subject matter of a consent order is the custody, care, maintenance, or access to a minor, the agreement is never immutable or cast in stone. The law recognizes that children are dynamic, growing individuals whose needs, environments, and circumstances evolve over time.
22. Sections 119 and 120 of the Children Act expressly confer upon the court the continuous, supervisory jurisdiction to vary, modify, or revoke an existing custody or maintenance order if it is satisfied that there has been a material change in circumstances. The Court, in ***EWM v EK (Civil Appeal E149 of 2023) KEHC 16827 (KLR)*** recently reaffirmed that the court retains the jurisdiction to review consent orders concerning children, provided the applicant demonstrates a material change in circumstances that warrants the variation in the best interests of the child.
23. In the instant case, the 2019 Consent Judgment was predicated on the factual matrix that both parents were resident in Kenya, allowing for the practical execution of alternate weekend access and shared school holidays. The Respondent's subsequent acquisition of a scholarship and relocation to the United States in January 2020 constituted a fundamental, objectively

verifiable, and material change in circumstances. The geographic reality rendered the 2019 access schedule physically and logistically impossible to execute. Therefore, the trial court undeniably possessed the requisite statutory jurisdiction to entertain the applications to review and vary the consent orders.

24. However, possessing the jurisdiction to vary an order does not automatically immunize the substance of the variation from appellate scrutiny. Whether the specific variations made by the trial court—namely, stripping the father of legal custody and granting permanent international relocation—were lawful and in the minor's best interests forms the crux of the subsequent grounds of analysis. The trial court was right to open the inquiry, but the conclusions it reached must be tested against constitutional standards.

Procedural Fairness, Article 50, and the Children's Officer's Report

25. The Appellant contends that the trial court committed a fatal procedural error by relying on a Children's Officer's report dated 15 February 2021 without affording him the opportunity to peruse the report, file a rebuttal, or cross-examine its maker.
26. Article 50(1) of the Constitution guarantees every person the fundamental right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court. In the context of children's proceedings, Section 103 of the Children Act, and the procedural rules guiding family courts often necessitate the production of a social inquiry report by a Director of Children's Services or a designated Children's Officer to aid the court in ascertaining the child's living conditions, the suitability of the parents, and the overall welfare of the minor.
27. While such reports are invaluable, independent tools for the court, they are not infallible edicts immune from scrutiny. They remain evidentiary

documents subject to the rigors of adversarial testing. If a report contains adverse findings, subjective interpretations, or recommendations that prejudice a party's parental rights, procedural fairness dictates that the aggrieved party must be supplied with a copy of the report and be afforded the opportunity to challenge its contents. This includes the constitutional right to cross-examine the maker of the report to test their methodology, biases, and the factual basis of their conclusions.

28. The record of appeal reveals that the trial court directed the filing of a comprehensive Children's Officer's report on 8 January 2021. The Appellant legitimately complains that he was not given the chance to interrogate this report before the court rendered its final judgment in July 2021. The trial court's failure to formally admit the report into evidence through its maker, thereby denying the Appellant the right of cross-examination, constitutes a procedural misdirection.
29. Nevertheless, as a first appellate court engaged in a retrial on record, this Court has the inherent power to cure procedural irregularities by evaluating the totality of the substantive evidence independently of the contested report. The resolution of this appeal will, therefore, pivot on the legal principles governing custody and relocation, derived from the uncontested affidavits, the medical records, the college admission documents, and the pleadings of the parties, rather than relying on the procedural flaw regarding the social inquiry report. While the Magistrate erred procedurally, the error is not fatal to the entire appellate process, as sufficient alternative evidence exists to determine the best interests of the child.

The Extinguishment of Joint Legal Custody and the Tender Years Doctrine

30. The most legally troubling and conceptually flawed aspect of the trial court's Ruling is the arbitrary stripping of the Appellant's legal custody. The 2019 Consent Judgment expressly granted joint legal custody to both parents. In

the impugned 2021 Ruling, the Magistrate revoked this shared responsibility and granted sole legal and actual custody to the Respondent.

31. The distinction between legal custody and actual custody is a cornerstone of Kenyan family law. Section 2 of the Children Act defines actual custody as the physical possession, care, and control of a child. Conversely, legal custody encompasses the overarching parental rights and duties, including the authority to make significant, life-altering decisions regarding a child's education, religious training, and healthcare.
32. The promulgation of the Constitution of Kenya, heralded a seismic paradigm shift in family law. Article 53(1)(e) guarantees every child the right to parental care and protection, which explicitly includes the equal responsibility of the mother and father to provide for the child, whether they are married to each other or not. This constitutional edict establishes a rebuttable presumption of joint legal custody and shared parental responsibility, decisively moving the jurisprudence away from gender-based presumptions.
33. As articulated by the Court in ***P.M.W v C.M.M [2015] eKLR***,

"In the absence of any adverse conduct of any of the parents of the children of the marriage or any exceptional circumstances that adversely impact the welfare of the children... both parents are entitled to joint legal custody".
34. More recently, the Supreme Court in ***MAK v RMAA & 4 Others (Petition 2 of 2022) [2023] KESC 21*** laid down exhaustive guidelines for determining custody, emphasizing that the "tender years doctrine" is now strictly subordinate to the best interests principle and cannot operate as an inflexible presumption. Furthermore, in ***SMM v ANK [2022] eKLR***, the Court observed that while the doctrine is persuasive, its inflexibility has been eroded by the

evolving standards of decency reflected in Article 53 of the Constitution. A father is equally capable of nurturing a child.

35. There is absolutely no evidence on the trial court's record to suggest that the Appellant is an unfit parent, that he poses a danger to the child, or that exceptional circumstances exist to warrant the termination of his legal rights to participate in the major decisions affecting his son's life. The fact that the mother was granted an opportunity to study abroad does not, by any stretch of legal imagination, justify the judicial amputation of the father's legal custody. The trial court conflated the practical need to determine the child's physical residence with the fundamental right of parental authority (legal custody).
36. In stripping the Appellant of joint legal custody without cause, the trial court erred in law and fact, violating the constitutional principle of equal parental responsibility. This Court consequently sets aside that portion of the Magistrate's ruling. Joint legal custody must be unequivocally reinstated.

International Relocation and the Absence of Safeguards

37. The zenith of this appeal rests on the trial court's decision to grant the Respondent leave to permanently relocate the minor to the United States of America.
38. The jurisprudence surrounding international child relocation is fraught with complexity. When a primary caregiver wishes to emigrate, courts are tasked with balancing the relocating parent's right to freedom of movement, career advancement, and educational progression against the left-behind parent's right to family life and access, all while holding the child's best interests as the paramount consideration. The courts have grappled with this balance, establishing that relocation should be permitted if it is a genuine, well-

researched proposal that enhances the child's welfare, provided the left-behind parent's relationship with the child can be preserved.

39. The Respondent argued that Gordon College offered to fully sponsor the child's expenses through an I-20 visa framework, and that relocation to the US would provide the minor with superior educational opportunities and, crucially, specialized medical care for a chronic, severe chest condition that frequently required nebulization and hospitalization in Kenya. The Appellant, conversely, argued that the Respondent was on a partial scholarship, lacked the financial stability to support the child in a foreign jurisdiction with notoriously high medical costs, and that the primary motive for the relocation was parental alienation designed to sever his bond with the child.
40. The trial court heavily influenced by the prospect of superior medical facilities and better learning opportunities in the USA, granted the relocation. While a parent's desire to improve their socio-economic and educational status is a legitimate and commendable goal that indirectly benefits the child, the trial court's approach was fatally short-sighted and remarkably cavalier regarding the Appellant's rights. The Magistrate ordered: "*The Plaintiff shall be granted access while the child is in the USA parties to engage on the modalities of that access*".
41. For a father residing in Kenya, who previously enjoyed alternate weekend access, an order granting access solely while the child is in the USA is practically illusory. It places an insurmountable geographical, financial, and logistical barrier between the father and the son. Such an order amounts to a constructive termination of the father-son relationship. The trial court failed entirely to evaluate the psychological detriment the minor would suffer by losing regular, meaningful contact with his father.

The Necessity of "Mirror Orders" in Transnational Relocation

42. Even if a court concludes that the educational and medical benefits of relocating to a foreign jurisdiction outweigh the disruption to the child's life, the court bears a mandatory, non-delegable duty to institute robust legal safeguards to ensure that the left-behind parent is not permanently alienated. Once a child leaves the jurisdiction of Kenyan courts, enforcing access orders becomes a monumental jurisdictional hurdle.
43. This brings the Court to the critical, yet increasingly vital, legal mechanism of Mirror Orders in transnational custody disputes—a jurisprudential tool that the parties did not reference in their submissions, but which this Court is bound to apply to prevent a gross miscarriage of justice.
44. In the landmark transnational custody litigation of ***Smriti Madan Kansagra v Perry Kansagra***, Supreme Court of India, which was subsequently adopted and enforced in ***Miscellaneous Application No. E031 of 2020, In the Matter of AVK (A Child) eKLR***, the Court grappled with the exact scenario of transferring a child from one sovereign jurisdiction to another. The Court recognized that in the absence of a universally applicable international treaty ensuring the automatic enforcement of custody and access orders (noting the complexities and limitations of the 1980 Hague Convention frameworks between specific states, such as Kenya and the USA), the originating court must require the relocating parent to obtain a "Mirror Order" in the destination country before the child is permitted to leave.
45. A Mirror Order is an ancillary or auxiliary order passed by a competent court in the destination country (in this case, the State of Massachusetts, USA) that identically reflects, registers, and adopts the custody, access, and return conditions issued by the originating court (Kenya). The primary purpose of a Mirror Order is to safeguard the interests of the child in transit and to guarantee that the left-behind parent's visitation and communication rights are legally recognized and enforceable in the foreign jurisdiction, thereby

detering international child abduction, unilateral retention, or deliberate parental alienation. Under the Foreign Judgments (Reciprocal Enforcement) Act, Cap 43, the principle of comity requires such cross-jurisdictional cooperation to protect vulnerable minors.

46. The trial court in this matter committed a grave error by permitting the permanent removal of the minor from the jurisdiction of Kenya without requiring the Respondent to secure a Mirror Order, or providing any structured holiday visitation schedule, or demanding a financial security bond to guarantee the Appellant's access rights. By granting relocation on a blank cheque, the trial court exposed the minor to the risk of total alienation from his father and left the Appellant legally defenceless in a foreign jurisdiction.
47. This Court notes that the minor is now roughly 10 years old. The Respondent has been in the United States since 2020. The child has a documented, recurrent medical condition that requires consistent management, and an educational opportunity has been extended to him.
48. If the Respondent wishes to exercise actual custody of the minor in the United States, she must bear the reciprocal burden of ensuring the Appellant's parental rights are preserved. Relocation cannot be used as a sword to sever the paternal bond.
49. Given the totality of the circumstances, this Court finds that while the relocation may offer substantial medical and educational benefits, it cannot be permitted unconditionally. The trial court's blanket authorization for travel is hereby set aside and substituted with a strict, conditional framework. The Respondent shall only be permitted to relocate the minor to the United States upon the satisfaction of jurisdictional safeguards designed to protect the Appellant's access. If the Respondent cannot or will not comply with these safeguards, the minor shall remain in Kenya, and actual custody shall revert

to the Appellant, as the Respondent's presence in the USA renders her incapable of exercising daily physical care in Kenya, and the grandparents' derivative custody cannot triumph over a willing, capable biological father.

50. In light of the foregoing analysis, and guided by the paramountcy of the child's best interests under Article 53(2) of The Constitution, this Court makes the following orders:

i. The Appeal is allowed in part. The Ruling and Order of the trial court delivered on 22 July 2021 is hereby set aside and substituted with the following orders.

(a) The Appellant and the Respondent are hereby granted joint legal custody of the minor. Both parents shall have an equal right to participate in all major decisions concerning the minor's education, religious upbringing, and medical healthcare.

(b) The Respondent is granted leave to relocate the minor to the United States of America to reside with her, strictly subject to and conditional upon the fulfillment of the following safeguards:

(i) Prior to the minor's departure from Kenya, the Respondent shall initiate proceedings and obtain a "Mirror Order" ,or an equivalent legally binding registration of this Court's judgment, from a court of competent jurisdiction in the State of Massachusetts, USA, recognizing and registering the Appellant's joint legal custody and access rights as decreed herein. Evidence of the filing and/or registration of such an order must be deposited with the Deputy Registrar;

- (ii) The Respondent shall facilitate unhindered, unmonitored virtual access between the Appellant and the minor at least twice a week, at times reasonably accommodating the time-zone differences.
 - (iii) The Appellant is granted physical access to the minor during the US summer school holidays. The Respondent shall bear the responsibility of ensuring the minor travels to Kenya for a period of not less than four (4) weeks annually, or alternatively, the Respondent shall facilitate the Appellant's access to the minor in the USA if the Appellant chooses to travel, subject to mutual agreement on travel costs.
 - (iv) In the event that the Respondent fails, neglects, or refuses to comply with the condition precedent regarding the Mirror Order within ninety (90) days of this Judgment, the leave to relocate the minor shall automatically lapse. Consequently, actual physical custody of the minor shall immediately vest in the Appellant and the maternal grandparents (Interested Parties) shall be directed to hand over the minor to the Appellant forthwith.
- (c) The Appellant shall continue to bear his parental responsibility by contributing to the minor's upkeep and providing comprehensive medical insurance coverage, whether the minor is resident in Kenya or the USA, in proportion to his financial means and subject to any future variations by a competent court.
- (d) Each party shall bear their own costs for this appeal.

DATED AND DELIVERED AT NAIROBI THIS 30 DAY OF APRIL 2026

HELENE R. NAMISI
JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For Appellant: Mr Webale
For Respondent: Ms Gicheha
Court Assistant Lucy Mwangi

Judgement