LAC & another v MJC (Civil Appeal E119 of 2021) [2022] KECA 68 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 68 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E119 OF 2021

RN NAMBUYE, F SICHALE & S OLE KANTAI, JJA

FEBRUARY 4, 2022

BETWEEN

LAC .... 1ST APPELLANT

PFC .... 2ND APPELLANT

AND

MJC .... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Achode, J.) delivered on 8th April, 2020 in HCCA No. 108 of 2018)

JUDGMENT

1. This appeal traces its roots to the Children's Court at Milimani, Nairobi, being Children's Case No. 1282/2017. In the plaint filed in that court, which was "In The Matter of The Custody of AFC" (hereinafter 'the minor'), the appellants here, LAC and PFC sued the respondent, MJC. In that plaint which was dated 16th October, 2017 it was stated amongst other things that the minor was born on 11th September, 2011 at [Particulars Withheld] Hospital Nairobi during the cohabitation between the respondent and the minors mother KNC (deceased). The marriage between the respondent and the deceased was formalized at [Particulars Withheld] in Kenya and on 22nd December, 2012 (after the minor had been born) the respondent and the deceased relocated from Kenya to [Particulars Withheld] with the minor child in pursuit of employment. The marriage between the respondent and the deceased broke down in 2014 while they were residents in [Particulars Withheld] and the deceased separated from the respondent and she commenced divorce proceedings at the family court at Yeovil – United Kingdom.

2. Following separation, the deceased moved with the minor to Singapor from Malaysia, again in pursuit of employment but thereafter in 2015, the deceased returned with the minor to Kenya as she wished to be close to her family. The appellants alleged that when the deceased and the minor came back to

Kenya it is the appellants who provided support in form of rented house accommodation, school fees for the minor, vehicle to facilitate movement and their living expenses as the respondent who was then residing in England had abdicated from his parental responsibilities for supporting the minor child.

3. The marriage between the deceased and the respondent was formally dissolved by the court of England on 22nd December, 2015. As fate would have it, the deceased then developed serious health complications which required provision of primary care giving which the appellants alleged that they gave together with material and emotional support to the minor. The health complications turned out to be duodenal cancer in 2017 which unfortunately led to her death on 4th October, 2017. The deceased left a will dated 8th June, 2017 appointing the appellants as the executor of the will and guardian of the minor but at the hearing of the case and even of the 1st appeal, no proceedings had been taken to prove the will.

4. It was further alleged that the respondent attended the burial ceremony of his late wife and immediately after the ceremony, he indicated his intention to withdraw the minor from the jurisdiction of the Kenyan courts and take the minor to England. Further that the minor had never been a resident of the United Kingdom and removing the minor from Kenya would affect her psychologically and emotionally. The appellants alleged that being the minor's maternal grandparents, they were the suitable guardians possessed of sufficient means to guarantee the minor a good life, better education and a sense of belonging. Further that the minor had developed a special bond or relationship with the appellants and the appellants did not wish the child to be removed from Kenya.

5. For good measure, the appellants alleged that the respondent was single, he was highly likely to remarry and therefore was unfit to have actual physical custody, care and control of a female child aged 6 years. The appellants prayed against the respondent for permanent physical and actual sole custody, care and control over the minor; a permanent order restraining the respondent from withdrawing the minor from the jurisdiction of the court or interfering with the appellants physical custody care and control over the minor and finally an order to issue granting the minor's father (the respondent) access or visitation rights to the minor on reasonable terms as the court deemed just in the best interest of the minor.

6. The respondent took out a defence and counter-claim where he admitted that his marriage with the deceased had broken down but he denied the grounds for that breakdown. According to him, the divorce was sought and obtained on the basis of irretrievable breakdown of the marriage; further that any chance of redeeming the marriage was frustrated when the deceased relocated to [Particulars Withheld] with the minor and thereafter returned to Kenya despite his efforts to salvage the marriage. He denied abdicating parental responsibility and alleged that after the deceased died, he made frequent trips to Kenya to see the minor and would sometimes take the minor with him to Britain to spend time with him and his family. According to him, the best interests of the minor were that her biological father who had been present in her life should become the primary care giver with her maternal grandparents having access to the minor; further that the minor's immigration status was that she was a British national while the appellants are Ugandan citizens who could not guarantee any immigration status in Kenya for the minor.

   Paragraph 13 of the defence states:

   > "That it is regrettable that the plaintiffs wish to make it clear like Britain is a foreign destination for the child which is not correct because the deceased and the defendant deliberately got her British citizenship, and even their divorce case in which the maintenance of the child was determined, was filed in the United Kingdom, despite the marriage and the birth having happened in Kenya. It is evidence (sic) therefore that the United Kingdom was

their preferred central destination. It is also instructive that Britain is where the deceased sought to have her cancer operation performed."

7. In the counterclaim, the respondent stated that he had had parental responsibility of the minor since her birth and that before separation with the deceased, he was the minor's primary care giver together with the deceased; further that the minor had bonded strongly with her paternal family in Britain; that the respondent had obtained gainful employment as a teacher at [Particulars Withheld] College Preparatory School as a director of sports earning substantial income; that he loved the child, that he was the only living parent; that the child was British and she would be able to access free or cheaper education; that he had a comfortable home in Britain; and that due to their advanced ages the appellants could not cope with the demands of a six year old child who was constantly in the care of a nanny. While praying for the suit to be dismissed, the respondent asked for sole legal custody, care and control of the minor with reasonable access to the appellants; that the respondent be allowed to take the minor to Britain; that the appellants be ordered to release the minor's passport to the respondent; that the appellants be restrained from leaving Kenya with the minor; and the court do make any other orders as it may deem fit.

8. There was a fairly lengthy reply to defence and defence to counterclaim but it is not necessary to go into that here.

9. Hearing of the suit commenced before a Magistrate who took the evidence of a number of witnesses but in a dramatic turn of events, the respondent asked the trial Magistrate to disqualify herself for reasons given. That application was allowed and the trial was taken over by T. B. Nyangena, Senior Resident Magistrate and thereafter by H. M. Mbati (Mrs.), Resident Magistrate who in a judgment delivered on 17th September, 2018 found that the minor was then 7 years old; that the overriding principle in children's cases was the best interests of the child and in that regard she found that it was in the best interests of the minor that she remain in the custody of the appellants until she attained the age of 10 years. The magistrate granted the respondent access to the minor during all school holidays and he was also granted one hour of telephone access/skype/WhatsApp/video calls every day after 6 pm and the appellants were ordered to facilitate the same.

10. Those orders led to the appeal at the High Court of Kenya at Nairobi, being HCCA No. 108/2018 where the respondent was the appellant while the appellants were the respondents. The appeal was heard by Achode, J. who in the judgment delivered on 8th April, 2020 the Judge found that the appellants herein had no legal obligation to assume parental responsibility while the minor had a surviving parent who is legally bound and was ready and willing to take on parental responsibility. The appeal succeeded and it was ordered that the custody of the minor be placed with the surviving parent, the respondent.

11. Those orders provoked this second appeal.

12. Our mandate in a second appeal like this one is donated by Section 72 *Civil Procedure Act* (Cap 21 Laws of Kenya) which states in essence that except where otherwise expressly provided in the Act or by any other law for the time being in force, an appeal shall lie to this Court from every decree passed in appeal by the High Court, on any of the following grounds, namely that, the decision being contrary to law or to some usage having the force of law; the decision having failed to determine some material issue of law or usage having the force of law; a substantial error or defect in the procedure provided by the Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

In [*Charles Kipkoech Leting vs. Express (K) Ltd and Another [2018] eKLR*](#) this Court stated of the said mandate as follows:

> "This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of *Martin versus Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

13. Having identified our mandate and considering the applicable law, the only issue that calls for our consideration is whether the High Court erred in setting aside the findings of the subordinate court and holding that it was the respondent, as a natural parent, who could take care of the best interests of the minor.

14. In the Memorandum of Appeal filed on behalf of the appellants by their lawyer on record, A. F. Gross Advocate, 11 grounds of appeal are taken and these may be summarized thus: that the learned Judge erred and abdicated her responsibility and did not re-evaluate the evidence; that the learned Judge reached an erroneous decision; that the learned Judge erred in dismissing the appellants cross-appeal and in taking irrelevant factors into account; that the learned Judge erred in granting immediate custody of the minor to the respondent without taking into account factors in Section 83 of the *Children's Act;* and finally that the Judge did not consider the best interests of the child.

15. Both parties filed elaborate written submissions and Digest of Authorities which we have carefully considered.

16. The High Court in the impugned judgment considered various provisions of law and case law.

17. The importance of the best welfare of the child has constitutional imperatives in Kenya because Article 53 (2) of the *Constitution of Kenya, 2010* declares:

> " a child's best interest are of paramount importance in every matter concerning the child."

18. Section 83 of the Children's Act which the Judge relied on in extenso lists principles to be taken into account in making a custody order in respect of a child. These are elaborated to be the conduct and wishes of the parent or guardian of the child; the ascertainable wishes of the relatives of the child; 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; the ascertainable wishes of the child; whether the child has suffered any harm or is likely to suffer any harm if the order is not made; the customs of the community to which the child belongs; religious persuasion of the child; 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; and the circumstances of any siblings of the child concerned, and of any other children of the home if any and finally the best interests of the child.

19. So, it will be noted that the principle that cuts through in all this is the best interests of the child.

20. As we have noted in this judgment, the mother of the child died. When the minor was interviewed before the Magistrate and even by clinical psychologists, the minor was happy to live either with the respondent (her father) or the appellants.

21. In evidence before the Magistrate, the respondent stated that he was a teacher in the UK and he resided about 6 miles from the school. He stated that the minor would be able to live with him and recounted the many good times he had had with the minor when he visited in Kenya and they took safaris. He was unhappy with the way the appellants were bringing up the minor stating that in the UK a child is not brought up by a nanny. According to him, it is better for his family to be with the child. He decried that the minor then aged 6 years had not only a mobile phone but an iPad, something that he would not allow a child to have in his own home. His house was close to his parents' house and his grandmother and sister also lived in the neighborhood. His sister had 2 children aged 4 & 6 years.

22. SNC, the respondent's mother testified before the magistrate. She stated that she had visited Kenya on various occasions with the respondent to visit the minor. She had two other grandchildren who lived 6 miles from her and she dedicated time to be with her grandchildren and in her own words:

> "We live in a small village of about 160 houses situated around [Particulars Withheld]. M's property is across the Green and around the corner. It is very close. I believe M has the physical, emotional and financial ability to bring up A. He has secured employment. His divorce and residing in Kenya has cost a lot of money. He is a sought after director of sports. Physically he is fit and agile. He encourages A to swim, catch balls and ride bikes. I would support A the same way I support my daughter's children. I would be able to pick A from school 3 days in a week".

23. The learned Judge on first appeal considered that the minor's mother lived with her husband (the respondent) and the minor until they separated. The deceased relocated to Kenya where she moved in with the appellants, (her parents) and at that point in time custody of the child was between the respondent and the deceased. This situation changed dramatically when the deceased was taken ill and died. The learned Judge also considered the psychologist's reports that had been produced in Court. In the end, the Judge held that the best interests of the child were with the surviving parent.

24. In the English case of *Re G* [2006] 545, Lord Nicholl was considering the best interests of a minor and this is the way he expressed himself thereon:

> "In reaching its decision the court should always have in mind that in the ordinary way the rearing of a child by his or her biological parent can be expected to be in the child's best interest in the short terms and also, and importantly, in the longer term. I decry any tendency to diminish the significance of this fact. A child should not be removed from the primary care of his or her parents without compelling reason. Where such a reason exists the judge should spell this out explicitly".

25. Upon our own consideration, we agree with conclusions reached by the Judge in that appeal. The respondent was able to show in evidence that he had secured employment, he had extended family in the UK who lived with him in the same neighborhood, he would secure free or near free education of the minor in the UK and he was best suited to take care of the best interests of his daughter, then and in the long term. He was the remaining parent, his wife having died. He had shown through the visits to the minor in Kenya, the holidays he spent with her and the time he spent with her that he loved the minor and was committed to her wellbeing. There were no exceptional circumstances for the child to

be taken away from the surviving parent. The High Court was right to find that the best interests of the child were with the surviving parent, the respondent.

26. This appeal has no merit and we hereby dismiss it. Considering the relationship of the parties, let each party bear their own costs.

DATED AND DELIVERED AT NAIROBI, THIS 4TH DAY OF FEBRUARY, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR