IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 43 OF 2015 (UR 16/2015)

BETWEEN

J.O ……..…… APPELLANT

AND

S.A.O ……...…….....… RESPONDENT

(Appeal from the Ruling of the High Court Of Kenya at Migori

(Majanja, J.) dated 8th May, 2015

in

CIVIL APPEAL NO. 87 OF 2015

(Formerly KISUMU HCCA NO. 32 OF 2015)

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JUDGMENT OF THE COURT

1. The central issue for determination in this second appeal is who, between the appellant and the respondent, who divorced on 16th June, 2015, is entitled to custody of their two young girls namely; J.B.O; aged 9 years, and A.T.O; aged 6 years. The appellant is the father of the children while the respondent is the mother.

2. Before grant of the divorce by the Chief Magistrate's Court at Kisumu, the appellant and the respondent had separated since 2012 and the children were living with their mother, the respondent.

3. Sometimes in 2013 the respondent filed a case before the Children's Court at Rongo seeking custody and maintenance of the children. The parties recorded a consent vide which custody of the two children was granted to the respondent. The appellant was granted right of full access to the children during school holidays and two weekends every month during school days, but during the day time only. The appellant was also ordered to pay Kshs.20,000/= per month to the respondent for maintenance and upkeep of the children. A decree in terms of the aforesaid consent orders was subsequently extracted.

4. On the weekend of 6th March, 2015, which was within the first term of the school calendar, the appellant took the children but did not return them by the end of the day. He alleged that it was the

children who refused to go back to their mother.

5. On 10th March, 2015 the appellant filed an application before the Children's Court at Rongo seeking to vary the consent order so that he could have custody of the children. According to him, the children's refusal to go back to the respondent had raised a "special circumstance" that was sufficient to enable the court vary the consent orders.

6. On 17th March, 2015 the Magistrate interviewed the children before hearing the application for review, which he went ahead to dismiss and restored the children's custody to the respondent.

7. Aggrieved by those orders, the appellant preferred an appeal to the High Court of Kenya at Migori. Pending hearing and determination of the appeal, the appellant sought a stay of execution of the orders granted by the Children's Court.

8. In the appeal before the High Court, the appellant's counsel argued that the best interests of the children lay in giving effect to their wishes to attend Aga Khan School in Kisumu, where the appellant was residing. The school has better facilities than [particulars withheld] School, Kisii, where the children were enrolled, and it was alleged they were being bullied by other children, and the school does not have swimming facilities.

9. The High Court, (Majanja, J.) declined to stay the lower court's order. He stated inter alia:

"The issue is whether at this interim stage I should reverse the custody of the children on account of the children's wishes to attend a different school. It is correct to state that in considering their best interests, the wishes of the children must be taken into account but the same are not decisive of the issue. The court must consider the same in light of all the circumstances of the case (see section 83 of the Children Act). At this stage, I find that the respondent is a capable parent, she was granted custody and I do not think it could be in the best interests of the welfare of the children to reverse the order of custody only on the ground the children wish to attend another school. I am alive to the fact that apart from the children's views, there has been no independent verification of the circumstances of both schools."

10. Undeterred, the appellant moved to this Court on a second appeal. In his memorandum of appeal, the appellant averred that the learned judge: erred in failing to appreciate that the best interests of the children overrides any prior consent between the parties; failed to re-evaluate the evidence of the children when they were interviewed by the magistrate in charge of the Children's Court at Rongo; failed to exercise his discretion under section 22 (1) (2) of the Children Act to enforce the rights of the children; failed to appreciate that pursuant to section 87 (2) (b) of the Children Act that custody orders can be revoked or varied owing to change of circumstances; and that he misdirected himself on the applicable law and principles and thereby arrived at the wrong decision.

11. When the appeal came up for hearing before this Court, both Mr. Amondi and Mr. Kisera, learned counsel for the appellant and the respondent respectively, relied on their written submissions and list of authorities that they had filed and exchanged in advance, which we have carefully considered.

12. Article 53 (2) of the Constitution of Kenya, 2010 stipulates that: "A child's best interests are of paramount importance in every matter concerning the child." See also section 4 of the Children Act, 2001.

13. There is a plethora of decisions by this Court as well as the High Court that in determining matters of custody of children, and especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother, because mothers are best suited to exercise care and control of the children. Exceptional circumstances include: the mother being unsettled; where the mother has taken a new husband; where she is living in quarters that are in deplorable state; or where her conduct is disgraceful and/or immoral. See SOSPETER OJAAMONG V LYNNETTE AMONDI OTIENO, Civil Appeal No. 175 of 2006, KARANU V KARANU [1975] E.A. 18, GITHUNGURI V GITHUNGURI [1979] eKLR.

14. Section 83 (1) of the Children Act outlines the principles to be applied in making custody orders. They include the ascertainable wishes of the child. But as Njagi, J. held in B. K. versus E.J.H. [2012] eKLR, "the test for the best interest of a child is not subjectively dictated by the selfish whims of a child. There has to be an element of objectivity. … a child's wish to stay with a particular parent might not be in his best interest. In such a situation, his own preference may not be automatically allowed. The wishes and feelings of a child must therefore be treated with a lot of caution."

15. In his application for review of the consent orders in the Children's Court, the appellant had deponed, inter alia, that the children are talented swimmers and the school which the children were attending did not have a swimming pool; that the respondent is a drunkard and had been spotted in various drinking joints in the company of men; that the respondent was not taking good care of the children; and that the children were being mistreated at the school they were attending. All these were exceptional circumstances which warranted a variation of the order on custody of the children, the appellant's counsel submitted.

16. The learned judge had in mind all the depositions made by the appellant. That notwithstanding, he exercised his discretion in favour of the respondent. An appellate court will not interfere with a judge's exercise of discretion unless it was based on a wrong principle or was clearly wrong. See GITHUNGURI V GITHUNGURI (Supra).

17. It was not demonstrated that Majanja, J. exercised his discretion in an injudicious manner so as to warrant this Court to interfere with his decision, which in any event was interim in nature. We find no merit in this appeal and consequently dismiss it.

This being a family matter, we order that each party bears their own costs of the appeal.

DATED and delivered at Kisumu this 29th day of July, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.