IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A

CIVIL APPEAL NO. 41 OF 2016

BETWEEN

C K.....……APPELLANT

AND

T K M .....…….RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Mombasa, (Thande, J.) dated 16th May 2016 in HCCA No.1 of 2014)

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JUDGMENT OF THE COURT

In this protracted custody dispute, the appellant, ***C K***, is aggrieved by the judgment and decree of the High Court at Mombasa ***(Thande, J.)*** dated 16th May 2016 by which the learned judge, on appeal from the decision of the Children's Court, granted joint custody of ***TMK, (the child)*** to the appellant and the respondent, ***T K M.*** The learned judge further granted the appellant actual custody of the child during the school term and 25% during the holidays, but allowed the respondent actual custody of the child from 16th May 2016 till her return to Germany, where she is currently resident.

Although in the judgment the learned judge directed that the child's learning shall not be disrupted and that the child shall not be taken out of jurisdiction for the duration of his stay with the respondent, after the delivery of the judgment and upon an informal application made by counsel for the respondent in the presence of counsel for the appellant, the learned judge varied her order and allowed the respondent to take the child out of jurisdiction for the period she had custody of the child during the school holidays.

Before delving into the merits of the appeal, it is apposite to set out briefly the background to this appeal. From the evidence on record, the appellant, a Swiss national and the respondent, a Kenyan citizen cohabited in Kenya between February 2002 and September 2011. There is no evidence that they were ever formally married. The child was born on 20th June 2005 and in many of her affidavits on record, which the appellant has not controverted, the respondent has deposed that the appellant is not the biological father of the child. Indeed the Children's Court found as much in its ruling dated 24th January 2014. Be that as it may, in September 2011, the parties separated and the respondent, leaving the child behind with the appellant, went to seek employment in Germany where she is now cohabiting with another man, ***I S***. It is common ground that since his birth, the child has lived with and has been supported and maintained by the appellant.

On 6th July 2012, the appellant applied by an Originating Summons in the Children's Court, Tononoka Mombasa, to be appointed the child's guardian. Apparently that application was necessitated by the fact that he wished to travel to Switzerland with the child. The respondent swore an affidavit in support of the Summons and deposed further that it was in the best interest of the child for the appellant to be appointed his guardian and that she was not opposed to such appointment. Consequently, by an order issued on 18th July 2012, the Children's Court allowed the Summons and appointed the appellant the child's guardian.

On 13th January 2014, the respondent moved the Children's Court to revoke the order of guardianship and for an order giving her the actual custody, care and control of the child. The grounds upon which she sought those orders were that she was the biological mother of the child; that the biological father of the child was unknown; that she planned to relocate to Germany with the child; that she was duped by the appellant into consenting to his appointment as the child's guardian; and that it was in the best interest of the child to grant the orders. The appellant opposed the application contending, among others, that he had assumed parental responsibility over the child since birth and that it was not in the best interest of the child to relocate him to Germany.

After hearing both parties and considering a social inquiry report by the Children's Department dated 17th January 2014, the learned trial magistrate gave to the appellant custody of the child and to the respondent, unlimited access. The court found that in consenting to the appellant's appointment as the guardian of the child, the respondent did so voluntarily and was not duped as she had alleged. The respondent was aggrieved by those orders and lodged ***Civil Appeal No. 1 of 2014*** in the High Court at Mombasa. Thande, J., heard that appeal and in the judgment now impugned before us, made the following orders:

> ***i. joint custody of the child was given to both the appellant and the respondent;***
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> ***ii. the appellant to have actual custody of the child during the school term and 25% of the school holiday;***
>
> ***iii. the respondent to have actual custody of the child 75% of the school holidays; and***
>
> ***iv. the appellant to have unlimited access to the child during her visits to Kenya.***

As regards the respondent's visit to Kenya, which was then current, the court granted her immediate custody of the child from the date of judgment to the date of her departure for Germany. Lastly the court directed that the child's learning shall not be disrupted and that he shall not be taken out of jurisdiction for the duration of his stay with the respondent. However, as we have already adverted, the court soon thereafter varied the last order so as to allow the respondent to take the child out of jurisdiction when she had custody of him during the school holidays.

The appellant's appeal before us is premised on four grounds faulting the High Court for entertaining and determining issues that were not pleaded; for taking into account irrelevant considerations and misapprehending the issues on custody; for granting the respondent immediate custody of the child while the respondent already had such custody; and for making orders that were not in the best interest of the child.

Urging the appeal, ***Mr. Njoroge Mwangi***, learned counsel for the appellant submitted that the issue of whether the respondent could take the child out of jurisdiction was not pleaded and was not addressed by the parties and to that extent the High Court erred by entertaining and determining unpleaded issues and thereby denied the appellant an opportunity to be heard on the matter in violation of natural justice and the Constitution. Counsel relied, in support of those propositions, on the decisions of this Court in ***IEBC & Another v Stephen Mutinda Mule & 3 Others, CA. No. 219 of 2013*** and ***Japheth Pasi Kilonga & Others v Mombasa Autocare Ltd, CA. No. 61 of 2014.***

Counsel further assailed the judgment of the High Court contending that the learned judge took into account irrelevant considerations, among them that the appellant was not the biological father of the child.

It was also submitted that the learned judge erred by holding that only the name of a biological father can be entered in the notification of birth and the certificate of birth and in holding that the issue of custody of the child was not before the trial court.

Next learned counsel contended that the orders of the High Court were based on a misapprehension of the facts because the court ordered the respondent to assume actual custody of the child and if need be, to be assisted by the police in that regard, yet the appellant had voluntarily ceded to the respondent actual custody of the child as of the date of the order.

Finally as regards the appellant's compliant that the learned judge made orders that were not in the best interest of the child, it was submitted that the learned judge did not interrogate the living conditions which the child would be subjected to in Germany; that Kenya and Germany did not have reciprocal arrangements on matters of custody under the ***Foreign Judgments (Reciprocal Enforcement) Act;*** and that in the circumstance, if the respondent took the child to Germany and failed to return him to Kenya, he would be outside the reach of the court. Counsel cited the judgment of this Court in ***AOG v. SAJ, CA No. 188 of 2009*** and submitted that orders of a Kenyan court cannot be ignored in deference to orders of a foreign court and the judgment of the High Court in ***KWK v. JMW, HCCC. No. 2173 of 1999 (OS)*** in support of the submission that a party should not be allowed to take a minor out of jurisdiction, save in exceptional circumstances.

For the respondent, ***Mrs. Nyange,*** learned counsel, opposed the appeal submitting that the judgment of the High Court could not be faulted for granting joint custody of the child to both parties because the respondent was the biological mother; that the Children's Court had indeed erred in granting custody exclusively to the respondent; that in terms of custody the High Court allowed the appellant to have the child for longer period than the respondent; and that the High Court appreciated the primacy of the interest of the child in making its orders, including that the child had to have a mother in his life.

In answer to the contention that the High Court determined unpleaded issues and violated the appellant's right to be heard, it was submitted that the issue of custody was squarely before the court; that both parties were fully heard on the issue and that the variation of the order to allow the respondent to take the child out of jurisdiction during the holiday did not constitute determination of unpleaded issues.

Lastly it was submitted that the appellant's fear that the child would not be returned to jurisdiction was baseless and unfounded as the respondent had deponed on oath that she had no intention of taking the child permanently from Kenya; that the appellant's fears were adequately addressed by the ***Hague Conference on Private International Law*** to which both Switzerland and Germany were Member States; that the treaty aimed at progressive unification of the rules of private international law between member states; that the two States were also signatories to the ***Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 19th October, 1996*** and the ***International Convention on the Rights of the Child***. Regarding the right of the respondent to take the child out of jurisdiction, counsel relied on the judgment in ***M v. P, CA No 11 of 1979.***

We have duly considered the record of appeal, the ruling of the trial court, the judgment of the first appellate court, the grounds of appeal, submissions by counsel and the authorities cited. This being a second appeal, we are enjoined to consider only matters of law. ***Kainga v. Republic [1982] KLR 213.*** We shall eschew any challenge of the concurrent findings of fact by the two courts below, unless we are satisfied from the evidence on record that no reasonable tribunal, properly addressing its mind to that evidence, could have reached the conclusions arrived at by the two courts.

The statement of the law by the appellant that parties are bound by their pleadings and that a court should not decide issues that have not been pleaded or raised by the parties is correct and undisputed. (See in addition to the authorities cited by the appellant, ***Captain Harry Gandy v. Caspar Air Charters Ltd [1956] 23 EACA 139*** and ***Odd Jobs v. Mubea [1970] 476).*** The real question in this appeal however, is whether indeed the High Court determined issues that were not pleaded and placed before it. We have perused the record and it is plainly obvious that the issue of custody of the child was central to the appeal

in the High Court. Both parties addressed the issue at length in their written submissions between pages 218 and 246 of the record. As already pointed out, the High Court, having considered those submissions, granted the parties joint custody of the child. The appellant was to have actual custody of the child for the longer period, namely during the school term. On the other hand the respondent was to have actual custody of him for 75% of the school holiday time. The appellant is aggrieved by the order of the High Court, which allowed the respondent to take the child out of jurisdiction during the holiday period when she would have custody. He claims that the issue was not pleaded and that the court erred in determining it.

With respect we do not think this case falls within the main principle in ***Odd Jobs v. Mubea (supra)*** by which a court may not determine unpleaded issues. The main issue of custody was squarely before the court and in our view the question of taking the child out of jurisdiction when the respondent had custody was so intertwined with the issue of custody that it was not reasonable to expect separate and distinct pleadings on it. In addition, as the authorities consistently show, where evidence is led and it appears from the course followed at trial that an unpleaded issue has been left to the court to decide, the trial court may validly determine the unpleaded issue. In this case, the record shows that when the informal application to take the child out of jurisdiction was made, the appellant's counsel then on record, ***Ms. Kwaya*** was in court and neither objected to the application, nor sought to address the court on the issue. In the circumstances of this appeal, we do not see any basis for the contention that the High Court erred by addressing unpleaded issues.

We cannot agree with the appellant that the ruling of the High Court in ***KWK v. JMW***, ***(supra)***, lays down any immutable proposition that in a custody dispute, a child cannot be taken out of jurisdiction except in exceptional circumstances. First, the views in that ruling which the appellant urges us to apply were made *obiter*. Secondly, the application in which they were made was an application by an advocate for leave to cease acting, rather than in the application for custody itself. Thirdly, because of the express provision of ***Article 53(2)*** of the ***Constitution*** and ***section 4(2)*** and ***(3)*** of the ***Children's Act*** which require that in all matters concerning the child, his best interest is of paramount importance, it is conceivable that there may be situations, without being in any way exceptional, where the best interest of the child is served by allowing him to travel out of jurisdiction.

Ordinarily precedent is of limited assistance when determining what is in the best interest of the child because these types of cases must notoriously hinge on the peculiar circumstances of each case. Nevertheless, ***M v. P (supra),*** is a good illustration of the Court allowing a child to be taken out of jurisdiction notwithstanding claims that he would not be brought back into jurisdiction. In that case, the Muslim mother of the child was granted custody of the child until he attained seven years of age, after which the father was to assume custody. Before the child attained seven years, the mother decided to immigrate to the United Kingdom, as she was unable to sustain herself in Kenya. Notwithstanding objections by the father, the court allowed the child to be taken out of jurisdiction because that was in his best interest and upon further finding that no evidence existed to sustain the allegation that the child would not be brought back to jurisdiction upon attaining the age of seven. Speaking for the Court, ***Madan JA*** (as he then was) crisply stated:

> ***"I am not prepared to assume at this stage, about four years in advance of the event, that the wife will not observe her obligation when the time arrives for her to do so."***

In this appeal, the respondent is a Kenyan citizen. She has members of her family living in Kakamega. She has deponed that her intention is only to take the child to Germany during the school holiday, consistent with the period that the High Court has granted her custody. The appellant has not placed before us any cogent evidence upon which his fear that the child will not be brought back to jurisdiction is founded. In any event, we are not satisfied that in the unlikely event of the appellant breaching the order of the High Court, the appellant has no remedy.

We do find that the judgment of this Court in ***AOG v. SAG*** ***(supra)***, heavily relied upon by the appellant has no application in the circumstances of this appeal. In that case a foreign court had issued an order while litigation was pending in Kenya and the High Court directed compliance with that order. On appeal

this Court held that the High Court had erred by failing to make its own determination. In addition to there being no order by a foreign court in this appeal, the High Court has fully considered the dispute and made its own determination. In the same vein, the appellant's argument founded on the ***Foreign Judgments (Reciprocal Enforcement) Act*** is misconceived because in the first place, that Act does not apply in matters of custody and guardianship. Section 3 (3) (e) thereof provides as follows:

> ***(3) This Act does not apply to a judgment or order—***
>
> ***...***
>
> ***(e) in proceedings in connection with the custody or guardianship of children."***

Even if there were reciprocity between Kenya and Germany for the purposes of the above Act, it would be of no moment because by dint of section 3(3) (e), the Act is not applicable in the type of dispute before us.

In our view nothing turns on the fact that the first appellate court ordered the respondent to be given actual custody of the child, and if need be, to be assisted in that regard by the police at a time when the appellant had already ceded actual custody of the child to the respondent. The appellant was all along complaining of having been denied access to the child and had filed several applications for custody pending the hearing and determination of the appeal. There is no evidence that it was brought to the attention of the court that the respondent already had actual custody of the child. There would have been no reason why the court would consciously issue an order in vain. But as we have already said, nothing turns that order.

Having carefully considered this appeal, we are satisfied that the first appellate court, in making its orders on custody of the child attached due primacy to the interest of the child as demanded by Article 53(2) of the Constitution and Section 4 (2) and (3) of the Children's Act; was fair to both parties by granting the appellant, who has lived with the child most of his life, custody for longer period than the respondent who was granted custody for 75% of the time when the child was on holiday; did not take into account any irrelevant considerations; and on the whole, there is no basis for interfering with the orders made by the High Court. In the event, we find no merit in the appeal, and the same is hereby dismissed. This being a family dispute, each party shall bear its own costs. It is so ordered.

Dated and delivered at Malindi this 30th day of September, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR