



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MUSINGA, GATEMBU, MURGOR JJ, A)**

**CIVIL APPEAL NO. 25 OF 2015**

**BETWEEN**

**D.O.O.....APPELLANT**

**AND**

**J.A.O .....RESPONDENT**

*(Appeal from the Judgment and Decree of the High Court of Kenya at Kisumu Maina, E. N, J.)  
dated 19<sup>th</sup> February 2015*

**in**

**Kisumu H.C.C.A. NO. 47 of 2013)**

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**JUDGMENT OF THE COURT**

In this appeal the appellant seeks the reinstatement of a decision of the trial magistrate's court which awarded him custody of the child, one **S.B.O**, which decision was subsequently overturned by the High Court on appeal, so that custody of the child was instead awarded to the respondent.

Briefly, the facts are that the appellant and the respondent were married under Dholuo customary law in 2006. They were blessed with one child, S.B.O; who was born on 12<sup>th</sup> January 2008.

By way of a plaint filed in the Chief Magistrate's court at Kisumu, the respondent filed for the dissolution of the marriage on grounds of cruelty. She also sought custody of the child, but had conceded visitation rights to the appellant.

The appellant contested the divorce and further, counterclaimed that the marriage be dissolved on grounds of adultery, as since separating from the respondent, the respondent had co habited with two different men. He further contested the divorce on grounds of desertion. It was his further claim that he be awarded custody of the child.

Whilst the divorce petition was pending in court, the respondent filed a Notice of Motion dated 8<sup>th</sup> April, 2013 wherein, she sought, amongst other things, temporary custody of the minor, which application was

dismissed by the trial magistrate.

Being aggrieved by the decision of the trial magistrate, the respondent appealed to the High Court, which reversed the decision of the trial magistrate, and granted custody of the minor to the respondent.

It is this decision that the appellant has appealed against on the following grounds:

- “ 1. The learned judge of the Superior court erred in law and fact and wholly misdirected herself in granting the temporary custody of one S.B.O to the respondent against the weight of evidence and law.*
- 2. The learned judge of the superior court erred in law and fact in holding that the appellant did not prove that the respondent after separating cohabitated with other men.*
- 3. The learned judge of the superior court erred in law and fact, in holding that even if the respondent was remarried after separating with the appellant that in itself would not be sufficient reason to deny the respondent the custody of the child.*
- 4. The learned judge of the superior court misdirected herself in the application of the principle of Res-Judicata.*
- 5. The learned judge of the superior court misdirected and misinterpreted the children Act 2001 thereby arriving at erroneous decision.*
- 6. The learned judge of the superior court erred in law and fact in wholly believing the respondent submission and disregarding the submission of the appellant.*
- 7. The learned judge of the superior court erred in law and fact in proceeding on wrong principle and thereby arriving on a wrong decision.*
- 8. The learned judge of the superior court erred in law and fact in failing to set out point of determination and giving reasons for court decision on each point.”*

When the appeal came before us, learned counsel for the appellant, Mrs. Asunah, argued grounds 1, 2 and 3 together, and the remaining grounds together. Counsel submitted that the High Court was wrong to grant custody of the child to the respondent solely on the averments stated in her affidavit dated 8<sup>th</sup> April, 2013 in support of the aforementioned Notice of Motion, which were that the appellant was mistreating the child, and was living with a girlfriend and that custody of the child had been initially granted to him through trickery. It was counsel's submission that from the appellant's replying affidavit, the converse was the correct position. Counsel submitted that since separation from the respondent, the respondent had cohabited with two different men as evidenced by the letters from the Chief of South Nyakach Location dated 20<sup>th</sup> September 2012 and the Chief of Wagwe South Sub-Location dated 29<sup>th</sup> September 2012. Additionally, in a letter dated 16<sup>th</sup> November 2011, the Child Welfare Society of Kenya had stated that whilst the child was in the respondent's custody, he did not attend school. The District Commissioner, Turkana West District, in a letter dated 23<sup>rd</sup> April 2013, confirmed that the child was living with the father and a house help, and not a girlfriend. There is also a letter from the child's school, which stated that the child was attending school and was engaged in normal learning. Furthermore, that when the child was interviewed, the trial magistrate's court had found that the child was happy with his environment, and as such made a determination that the child should remain where he was in the appellant's custody, given that this would be in the best interest of the child.

On the issue of res judicata, counsel contended that the respondent had filed a multiplicity of suits. For instance, there was a suit filed in **Rongo RMCC Children's Case No. 6 of 2012** for custody where the parties had entered into a consent, and pledged **“...not to raise any other claim”**. There was also another case at Kisii, **Children's Case No 51 of 2011 at Kisii**. That in the light of the consent the respondent

ought not to have filed another suit claiming custody of the child. Counsel concluded by stating that the circumstances of the case called for the reinstatement of the decision of the trial court.

In response **Mr. C. Orieyo**, learned counsel for the respondent, submitted that at the time of the ruling the High Court had taken into account factors necessary to ensure the best interests of the child, which was that the child should be in the custody of his mother, the respondent. That the mother was capable of taking care of the child, being the Area Sales Manager, Busia for Equator Bottlers Limited. Counsel discredited that letters on the respondent's integrity, on the basis that they lacked authenticity.

On the issue of res judicata, counsel countered that, the issue did not arise, as the Rongo case filed in the Children's court, was to address the issue of maintenance and not custody, and that the issue of custody was not heard and determined by the court on its own merits.

Two issues have been placed before us for consideration, firstly, the issue of res judicata, and secondly, whether or not the High Court properly exercised its discretion in awarding custody to the respondent.

On the question of res judicata, the complaint was that the respondent had filed **Children's Case No. 6 of 2012 in Rongo**, which was compromised through a consent dated 10<sup>th</sup> November 2010 entered into between the parties, which stated as follows:

***"1. That the claim in the plaint and the defence herein be marked as settled since the parties have settled their differences for the best interest of the minor S.B.O.***

- 2. The plaintiff and the defendant shall not raise any other claim in respect of the same subject matter.***
- 3. There shall be no order as to costs."***

Thereafter, the respondent filed another suit **in Children's Case No 51 of 2011 at Kisii**, which the trial court declined to hear, for reasons that it was res judicata. This was followed by the suit filed in the **Chief Magistrate's court at Kisumu as Divorce Cause No. 30 of 2013** where together with the prayers for dissolution of the marriage, the respondent also prayed for custody of the child.

Generally, we agree that a consent order can be relied upon by a party to argue that a matter or an issue subsequently raised is res judicata. However, in considering a matter of this nature where the paramount issue relates to the welfare of a child, we entertain considerable doubt whether a party can raise such defence to stop a Court from considering whether there has been any change in circumstances of either of the parents which may necessitate that an earlier order be re-visited and/or varied.

But having said that, it is instructive that the pleadings and proceedings before the Rongo court were not placed before us, and were missing in their entirety from the record. So that, though the dispute between the parties was settled by the consent of 10<sup>th</sup> November 2010 where the parties agreed to settle their "... differences for the best interest of the minor", we are unable to ascertain what issues were in dispute, and which issues were considered settled. As we have not been placed in a position to properly determine this question, the only conclusion that we can reach on the basis of the information before us is that, the issue is unfounded and therefore fails.

The other issue was whether the High Court properly exercised its discretion to award custody to the respondent, having regard to the evidence that was before the court.

In making a determination on this issue, we must bear in mind that as we address the question of custody, there is still the matter of the main divorce petition which is still pending before the trial magistrate's court. We consider that there is a likelihood of the same issues that have been canvassed before us, arising during those proceedings. We must in the circumstances exercise caution in considering the issues before us so as not to preempt the outcome of that decision.

Having said that, in arriving at its determination that the respondent should have custody of the child, the

High Court stated thus;

***“In matters of custody the paramount consideration is the welfare and best interest of the child – see Githunguri V Githunguri, (1981) KLR 598. The courts have also held that the best interest of young children more so girls is to be with their mother. In Githunguri V. Githunguri (1981) KLR 598 for the court of appeal expressed itself thus:-***

***“The rule is that the mother should normally have custody of the children of tender years and where the court gives it the father, it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule.”***

***In KA V. KB (2008)/KLR G&F the same court held that faulted a judge for not referring to the presumption that young children should be with the mother. So are there exceptional circumstances in this case that would warrant this court to depart from this presumption. Both the Courts in Rongo and in Kisumu found that the appellant was not suitable because of her character in that she had after separating from the respondent cohabited with two other men. The allegations against her were however not proven by cogent evidence as the authors of the letters did not testify. In any event even were she to remarry that in itself would not be sufficient reason to deny her the custody of the child”.***

The High Court’s main reason for reversing the trial Magistrate’s decision was that, no grave circumstances had arisen to warrant the award of custody to the appellant, particularly as, the question of the respondent having cohabited with two other men was not proved, since the authors of the letters were not called to testify.

**Section 4 (2) of the Children Act No. 8 of 2001 reads:-**

***“In all actions concerning children, whether undertaken by public, or private, social welfare institutions, courts of law, administrative authorities, or legislative authorities, the best interests of the child shall be a primary consideration”.***

In Karanu-vs Karanu (1975) E.A. 18 this Court had this to say,

***“The substantial question in this case was whether or not the Judge was right in giving custody of the children to the father. At the time the application was made the daughter of the parties was just over seven years of age, and the son was six years old. The judge correctly directed himself, that in cases of this nature, the paramount consideration was the welfare of the children, but he did not specifically refer to the generally accepted rule that, in the absence of exceptional circumstances, the custody of young children should be with the mother”***

In Mehrunissa vs Pravez [1982- 88] 1 KAR 18 this Court stated thus,

***“The general principle of law is that custody of such children shall be awarded to the mother unless special or peculiar circumstances exist to disqualify her from being awarded custody.”***

In this case, there is no doubt that in arriving at the decision to award custody of the child to the appellant, the trial court was focused on the welfare of the child, and in so doing it stated thus;

***“ The court took judicial notice of the fact that whereas the applicant disputed the authenticity of the letters from the Chief and Sub Chief; she did not dispute the letter from Child Welfare Society of Kenya, alleging that she had taken the minor herein to live in a stranger’s house in Manyatta, Kisumu. She also did not defend herself on allegations of willingly removing the minor from his school in Rongo; and taking the***

***same minor to her sister's house in Rabuor, thus rendering it impossible for the minor to attend school."***

On its part, instead of considering whether the circumstances enumerated by the trial court were exceptional so as to warrant an award of custody to the appellant, the High Court awarded custody to the respondent for the sole reason that the chiefs' letters lacked authenticity, because the authors were not called to testify. The High Court ought to have recognized, that the trial court did not in effect rely on the impugned letters, but on other considerations to grant custody of the child, to the appellant. It was these other considerations that ought to have been taken into account by the High Court, to determine whether or not the exercise of discretion was warranted, which was not the case here.

As a further consideration, counsel for both parties informed us from the bar that the child is still in the appellant's custody and we also observe that the divorce petition is still pending before the trial court. Having regard to the circumstances of this case, it is our considered view that upholding the order of the High Court will only result in the needless shuttling of the child between parents which is not only disruptive, but extremely unsettling for the child.

We consider that it would be in the child's best interest to remain in the custody of the appellant during the pendency of the divorce petition in the trial court, and until it is heard and determined with finality. We direct the trial court to proceed with haste to dispose of ***Divorce Cause No. 30 of 2012*** in the Chief Magistrate's Court at Kisumu.

Accordingly, we find we must interfere with the decision of the High Court, and allow the appeal to the extent stated above. The High Court judgment of 19<sup>th</sup> February 2015, is set aside, and the decision of the trial magistrate of 19<sup>th</sup> June 2013 is reinstated with costs to the appellant.

***Dated and delivered at Kisumu this 23<sup>RD</sup> day of JULY 2015.***

**D. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**