IN THE COURT OF APPEAL

AT KISUMU

CORAM: MARAGA, MUSINGA & GATEMBU, JJA.)

CIVIL APPEAL (APPLICATION) NO. 43 OF 2015

BETWEEN

J.O ……...…… APPLICANT/APPELLANT

AND

S.A.O …….....…….. RESPONDENT

(An application for adducing of fresh evidence obtained by the Applicant which did not form part of proceedings at the Lower Court)

in

H.C.C.A NO. 87 OF 2015

Formerly

KISUMU H.C.C.A. NO. 32 OF 2015)

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RULING OF THE COURT

1. This application by **J.O,** the applicant/appellant, is brought under **rule 29** of the **Court of Appeal Rules.** The application seeks one order:

   "That this Honourable Court be pleased to allow fresh evidence obtained by the applicant which originally did not form part of proceedings at the lower court."

2. The application is premised on the grounds that the evidence sought to be adduced was not available when the matter that gave rise to this appeal was before the Children's Court and the High Court, and that the evidence goes to the root of the Children's welfare and would therefore assist the court in arriving at a just conclusion.

3. The genesis of the appeal and the application now before this Court is a dispute as to custody of two minor children, **J.B.O.** and **A.T.O.** that is pitting their mother, **S.A.O,** the respondent herein and the Children's father the applicant/appellant.

4. By consent recorded in the Principal Magistrate's Court at Rongo, Children's Cause No. 2 of

2013, on 24th February, 2015, custody of the said children was given to the respondent. The applicant was granted right of access to the children during school holidays and two weekends every month during school days, at day time only. The applicant was also enjoined to pay to the respondent a monthly maintenance sum of Kshs.20,000/= before the 10th day of every month.

5. Inspite of that consent order, the applicant returned to the Children's Court on 10th March, 2015 seeking orders of custody and for various reasons sought to set aside the orders. The learned magistrate declined to set aside the consent orders. That ruling precipitated the appellants appeal to the High Court. Having commenced the appeal, the appellant sought before the High Court an order to stay execution of the orders issued by the Children's Court. The High Court, (Majanja, J.) dismissed the appellant's application and ordered him to return the children to the respondent, having taken their custody contrary to the consent order.

6. Being aggrieved by that decision, the appellant moved to this Court on appeal. The appellant also filed an application under **rule 5 (2) (b)** of this Court's rules seeking interim custody of the children and stay of the High Court ruling requiring him to return the children to the respondent, although he had already done so in the meantime. This Court declined to grant the orders sought. The appellant now wants this Court to allow him to adduce further evidence during the hearing of his appeal against the decision of Majanja, J.

7. The evidence that is sought to be introduced is touching on:

a. **alleged refusal to allow the appellant access to the children, necessitating an application to the High Court.**

b. **alleged harshness of one of the children's teachers at [Particular Withheld] Academy which has adversely affected the children's growth and development.**

c. **alleged irresponsibility in terms of the children's moral upbringing, general care and hygiene.**

8. **Mr. Amondi,** the appellant's learned counsel, made brief submissions on his application and drew the court's attention to several authorities that he had filed. We shall advert to some of the authorities later.

9. **Mr. Kisera,** the respondent's learned counsel, opposed the application. He filed grounds of opposition, stating that this being a second appeal, **rule 29** of the **Court of Appeal Rules** cannot be invoked in support of the application. Mr. Kisera further submitted that in a matter relating to children's custody, the trial court could be moved by any party to the dispute if there was any change in circumstances.

10. **Rule 29 (1)** states as follows:

"On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the court shall have power -

a. **To re-appraise the evidence and to draw inferences of fact; and**

b. **In its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a Commissioner."**

11. There is no dispute that this is a second appeal. It is not an appeal from the High Court's original jurisdiction. Three of the authorities cited to us by Mr. Amondi, that is,

JAMES GITAHI V SIMBA COLT MOTORS LTD [2015], eKLR, **JAMES MWANGI**

NGANGA V KENYATTA UNIVERSITY COUNCIL & 4 OTHERS [2009] eKLR and **ELIZABETH CHEPKOECH SALAT V JOSEPHINE CHESANG CHEPKWONY SALAT** [2014] eKLR, where similar applications were made under **rule 29,** were all appeals from the High Court's original jurisdiction. However, the applications were all declined.

12. In **DANIEL KIPNGETICH SANG V REPUBLIC** [2011] eKLR, the appellant had been convicted by Kericho Senior Resident Magistrate for the offence of rape and sentenced to life imprisonment. His appeal to the High Court against both conviction and sentence was dismissed. The appellant filed a second appeal to this Court and filed an application under **Article 159 (2) (d)** of the **Constitution, section 3A** of the **Appellate Jurisdiction Act** and **rule 290** of the **Court** of **Appeal Rules** seeking to adduce a birth certificate to show that he was born on 8th October, 1988. He wanted to demonstrate that he was aged 14 years when he was sentenced to life imprisonment. The application was not opposed by the state and the court granted it.

13. Although the Court held that **section 3A** of the **Appellate Jurisdiction Act** was irrelevant as it applies to Civil Litigation and **Article 159 (2) (d)** of the Constitution was of no assistance because the application before it did not amount to procedural technicalities but to substantive matters of evidence.

14. It appears to us that the application, having been uncontested, the court's attention was not drawn to the fact that the appeal before it was not from a superior court in its original jurisdiction. We are satisfied that the wording of **rule 29** is quite clear that it can only be invoked where an applicant wishes to introduce fresh evidence in a first appeal but not otherwise. This Court has no jurisdiction to consider the appellant's application and must therefore down its tools.

15. But even if it were not so, the appellant is not without a remedy. In a matter involving custody of children, if indeed there is a change in circumstances which may impact on the welfare of children, an appropriate application can be made before the trial court, in this case the Children's Court, to consider whether to vary the orders regarding custody of the children.

16. As this Court lacks jurisdiction to consider the application, it is struck out. Each party shall bear its own costs of the application.

DATED and delivered at Kisumu this 17th day of November, 2015.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

……..……..

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

……..……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR