REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 53 OF 2011

N R Y N O.....APPELLANT

VERSUS

J H O.....RESPONDENT

RULING

1. The application before the court is the notice of motion dated 8th May 2012. It seeks several orders relating to the custody of a female child namely, H N O. It was made by N R Y N O (**the applicant**), wife of J H O who is **the respondent** in the said notice of motion which was made in civil appeal No.53 of 2011 filed by applicant against the ruling of Hon. A. K. Mwicigi, Resident Magistrate, delivered in the Children's Court in Case No.6 of 2010 on 19th August 2011.

2. The applicant, and the respondent, got married in England on 27th July 2002. The couple returned to Kenya and settled in Nairobi in 2008. They have one issue of the said marriage, H N O whose education upbringing and welfare has become the subject of litigation by the couple who separated in late 2009, differences having arisen between them.

3. The applicant filed suit in the Children's Court on 7th January 2010 against the respondent seeking a declaration that he is entitled to full custody of the child then in his care at the matrimonial home from which the respondent is alleged to have withdrawn. He also prayed for an order to compel the respondent to return to him the child's birth certificate and other vital documents including medical documents and to hand over the custody of the child to him until the child attains majority age. Fearing that the respondent might cause the child to be taken out of the Court's jurisdiction as the latter's mother had come into the country from overseas, the applicant also sought an injunctive order to restrain the respondent from removing the child from the jurisdiction of the court. The applicant also applied on 7th November 2011 to the children's court for orders that the child be allowed to join ***[particulars withheld]*** School from September 2011 to which the child had been admitted. The child attended ***[particulars withheld]*** School and graduated from primary school on 29th July 2011.

4. The applicant is a teacher at ***[particulars withheld]*** Estate school which is said to teach a British curriculum. She is also exempt from payment of full school fees of the child. She is required to pay only

15% of the school fees. Alive that the guiding principle in deciding the issue of the child's education was what is in the best interest of the child, the children's court dismissed on 19th August 2011 the application by the applicant reasoning that:

"[particulars withheld] School, albeit a good choice will shut out the plaintiff from the contact he has had with the minor while she was at [particulars withheld] and consequently breed suspicion among the parties which will eventually be relayed to the child consequently the application fails and it is the order and direction of this court that parties seek a neutral school where the minor will be enrolled for the aforestated reasons..."

5. In effect, the children's court threw back to the warring parents the responsibility of deciding a suitable school for the child.

6. It is against that decision by the children's court that the child's mother, N R Y N O appealed in the civil appeal herein contending, inter alia, that the learned trial magistrate erred by failing to appreciate that the applicant and the respondent were unable to agree on the school the child should attend, hence the application by the mother of the child which the children's court dismissed on 19th August 2011.

7. The learned trial magistrate referred in the first paragraph of his ruling dated 19th August 2011 to the applicant's application as being "dated 7.11.2011" which is wrong and to the applicant as "the defendants" which is an error. This confusion seems to have been caused by the heading of the ruling in which J H O is shown as the "plaintiff/applicant" and "N R" as the "defendant/respondent". It is always wise to ensure that the names of the parties are properly described to avoid such mishaps. The evidence on record indicates that after the ruling was delivered on 19th August 2011 the child was taken to ***[particulars withheld]*** School on intervention of this Court.

8. What is clear is that the child has a right to live with and to be cared for by her parents and is entitled to education the provision of which is the responsibility of the parents and the government (see section 7(1) of the Children Act, 2001). As a married couple, the applicant and the respondent have parental responsibility for the child and neither the applicant as the mother nor the respondent as the father has superior right or claim against the other in the exercise of parental responsibility (see Section 24(1) of the Children Act, 2001). Parental responsibility is defined by Section 23 of the Children Act 2001 to include, inter alia, the duty to maintain the child and in particular to provide her with adequate diet, shelter, clothing, medical care and education and guidance. In determining the school in which the child should be placed and who should have her custody, the overriding consideration is the welfare of the child. First, the parents must place the child in a school they can afford, and as they have shown that they could afford ***[particulars withheld]*** School for the child, if the child must be placed in a school other than ***[particulars withheld]*** School, then it must be a school of the same standard. Courts cannot micro-manage parents with regard to issues of upbringing of children. Courts have neither the inclination nor the wish or the resources to do so. The role of the Court is an oversight one to ensure that the legal rights and guarantees to which the child is entitled are not only respected by the parents and guardian/s of the child but are also enjoyed by the child. I realize that it would be impossible for the court to keep track of every detail to ensure that every child's welfare in that come to court is safeguarded. But the

oversight role must never be abdicated and there can be no excuse. The court must ensure that the provisions of the Children Act 2001 are not a dead letter. They are organic. They are designed to ensure the child enjoys all the rights and privileges in the Act. The international instruments dealing with the welfare of the child must be had regard to not least because **Article 2(5)** of the Constitution clearly stipulates that

"the general rules of international law shall form part of the law of Kenya."

9. In the instant case the learned trial magistrate whose impugned decision is now subject of this appeal reasoned that:-

"it is my considered view therefore that parties seek neutral school to eliminate suspicion. A school that will ensure both parents participate in the education of the child without feeling short-changed or that one parent has privileges that the other does not have and one that will engage both parents and the child. To my understanding that will serve the minor's best interest and welfare."

10. On 9th September 2011, the Hon. Lady Justice Mary Ang'awa ordered that the child do attend ***[particulars withheld]*** Estate School with immediate effect. That decision is the subject of the intended appeal by the child's father who is the respondent herein as is exemplified by his notice of appeal filed in Court on 20th September 2011.

11. The notice of motion dated 8th May 2012 by the child's father seeks an order that the appeal filed on 24th August 2011 by the child's mother against the ruling of the Children's Court by Hon. A. K. Mwicigi be struck out and the order by the Hon. Lady Justice Angawa dated 9th September 2011 be vacated because the child's father's counsel was not given an opportunity to be heard.

12. The record of appeal in Civil Appeal No.53 of 2011 against the decision of the Children's Court was filed by Messrs Judy Thongori & Co. Advocates on 5th June 2012 and is now in place. It is desirable that the appeal be determined on merit. It is the duty of counsel for both parties to set the appeal down for hearing.

13. Meanwhile, Messrs J. Harrison Kinyanjui & Co, the advocates for the child's father, having given notice of their intention to appeal against the decision of the Hon. Lady Justice Mary Ang'awa dated 9th September 2011 do not appear to have taken steps to file the record of appeal. It would be propitious to hear the together intended appeal and the appeal No.53 of 2011 which is already in place as both involve the same parties and deal with issues relating to the welfare of the same child. Hopefully, as the parents through their counsel continue with their legal wrangles, the child's education is not interrupted or undermined.

14. I decline the invitation to strike out the appeal herein (i.e. Civil Appeal No.53 of 2011) as it is not in the best interest of justice to do so.

I also decline to vacate the order dated 9th September 2011 made by the Hon. Lady Justice Mary Ang'awa. In effect, the notice of motion dated 8th May 2012 by is unsuccessful and is dismissed with no order as to costs.

G.B.M. KARIUKI, SC

JUDGE

Delivered at Milimani Law Courts, Nairobi, on this 6th day of February 2015 by the Honourable Justice W. Musyoka on behalf of Justice G.B.M. Kariuki SC.

JUDGE

COUNSEL APPEARING

Ms Elizabeth Gicheru advocate, of J. Thongori & Co. Advocates for the applicant

Mr. Harrison Kinyanjui advocate, of H. Kinyanjui & Co. Advocates for the respondent Court clerk – Mr. Wahinya Kugwa