Case Number:	Children Appeal E011 of 2021
Date Delivered:	05 Apr 2022
Case Class:	Civil
Court:	High Court at Nakuru
Case Action:	Judgment
Judge:	Joel Mwaura Ngugi
Citation:	SMM v ANK [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Family
History Magistrates:	-
County:	Nakuru
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

HIGH COURT CHILDREN APPEAL NO. E011 OF 2021

IN THE MATTER OF SCKK & JJWK (MINORS)

SMM..... APPELLANT

-VERSUS-

ANK.....RESPONDENT

JUDGMENT

1. The Appellant and the Respondent herein were married. It is unclear when they got married. They lived the majority of their lives in matrimony in the United States. In 2010, irreconcilable differences tore apart their bonds of matrimony. The two of them mutually agreed to a divorce granted by the Domestic Relations Circuit Court of Jefferson County, Alabama on 20/11/2010. By the time of the divorce, the Appellant and the Respondent had one child – SCKK.

2. SCKK was born in 2007. He was three years old at the time of the divorce. By the terms of the Agreement of the Parties entered into as part of the divorce settlement and which forms part of the divorce decree, the Appellant and the Respondent agreed that primary custody of SCKK would be awarded to the Appellant with the Respondent getting defined visitation privileges.

3. Shortly after the parties finalized their divorce, it would seem that the embers of romantic love flickered once again. The Appellant and the Respondent reconciled well enough that they moved in together again in Alabama. In 2013, that reunion bore them a second child – JJWK. However, the Appellant and the Respondent did not remarry. All the while, father, mother and children lived in the United States. Since both children were born in the US, they are US citizens. By virtue of our constitutional provisions, they are also Kenyan citizens.

4. In 2015, the Respondent, after consultations with the Appellant, decided to relocate back to Kenya. Both the Appellant and the Respondent agree that the original plan was for the Respondent to first relocate to Kenya, settle, get a foothold in the family hotel business and then, later on, have, first the older child, SCKK, and then, the Appellant and the younger child relocate back to Kenya. Further, the plan was to set up a business in Kenya for the Appellant. As conceived, the plan was for the Appellant and Respondent to continue to live together as a couple in Nakuru where they would bring up their two children.

5. In keeping with this plan, both parents planned for SCKK to join the Respondent in Kenya in late 2015. SCKK was enrolled at [Particulars Withheld] Academy in Nakuru. He has been schooling there ever since. He is now in Year 9 in the Cambridge Educational System. He is sitting for Checkpoint tests in mid-April. This is a tool used by the Cambridge International System to make strategic decisions about a learner's trajectory as they enter High School.

6. Meanwhile, the Respondent had settled in Kenya and was active in the family's hotel business. He established a home at [Particulars Withheld] adjacent to his mother's home.

7. As per the plans of the two parents, the Appellant came to Kenya in 2017. She brought JJWK with her. As agreed, this was a "look-see" visit: she was to stay for a while in Kenya as she explored business ideas to see if she was comfortable moving back to the country. The Appellant moved in with the Respondent at his home at [Particulars Withheld]. She remained in the Country for a little less than two years. She left the country again in 2019 to return to the United States when the plans for her to have a sustainable business failed.

8. The parties disagree on what happened when the Appellant was in Kenya between 2017 and 2019: The Respondent insists that he set up a business for the Appellant but that she suddenly and precipitately abandoned the business in 2019 in order to return to the United States, leaving the two children behind for him to take care of. The Appellant, on the other hand, insists that the Respondents' parents had promised them jobs, a house, a car and a business if they relocated back to Kenya but that after she came back the promise was never fulfilled. However, the contestation about what exactly happened is immaterial for the resolution of the case. What is material is that the Appellant voluntarily left both minors in the actual custody and care of the Respondent.

9. Although the Respondent attempted to spin the narrative for the inattentive listener to sloppily conclude that the Appellant abandoned the children in Kenya as she pursued the "American Dream", a keen scrutiny of the evidence and material before the Court belies any such innuendo. Also unproven, in my view, is the allegation by the Appellant that she had a mutual agreement with the Respondent that she would return to America, settle down and then come back for the minors.

10. In any event, the Appellant returned to the United States and settled in Washington State. She returned to Kenya around July, 2021. She confessed that her intention was to renew the American passports for the two children so that she could return with them to the United States. The parties, again, disagreed on whether the Appellant was acting per their earlier agreement or whether she was now acting unilaterally: the Appellant insists, as stated above, that the agreement with the Respondent all along was that she would come for the children once she had settled down in the United States; the Respondent insists that there was no such agreement: that all along, the only subsisting agreement was the one the two parents made back in the United States in 2015: that they would relocate to Kenya and that the children would reside and go to school here in Kenya.

11. All the while, SCKK continued schooling at [Particulars Withheld] Academy (where he has been since 2015) and JJWK continued schooling at [Particulars Withheld] Academy (where he has been since 2017).

12. This, in a nutshell, defines the dispute between the Appellant and the Respondent herein. The upshot is that when the Appellant came back to the country in mid- 2021 and began plans to travel back with the children to the United States, the Respondent panicked. He was distressed that the Appellant would take the children back despite the fact that he thought the children were well settled in Kenya and that the move would severely disorient them. He also feared that since he was no longer a Green Card holder, he would not have free or easy access to the children if they relocated back to the United States. Finally, he says he was worried that the Appellant would not be able to financially take care of the children in the United States.

13. Triggered by these concerns, the Respondent initiated a case in the Children's Court when he became convinced that the Appellant planned to take the children to the United States without his approval. By that time, the Appellant had temporarily taken the children to Nairobi in order to renew the American passport. While the Respondent concedes that he permitted their travel for the appointment at the American Embassy, he says that the extent of his approval was for the renewal of the passports – not for their permanent relocation to the United States. Consequently, when the Appellant failed to return the children to Nakuru as had earlier been mutually agreed, the Respondent panicked and filed suit. That suit was Children's Case No. 5 of 2021.

14. According to the Respondent, he commenced the proceedings after learning that the Appellant intended to take the children to the US and was afraid for their well-being and difficulty in accessing them once they relocated. The Plaint dated 01/09/2021 prayed for judgment against the Appellant for:

a. Legal and actual/physical custody of the minors to be awarded to the Plaintiff.

b. That the Plaintiff is presently shouldering all responsibilities over the minors, and is willing to shoulder the same should the defendant be unwilling to share.

c. That the minors be retained at [Particulars Withheld] School and [Particulars Withheld] School respectively, unless otherwise varied by the Court.

d. – Spent –

e. *Any other relief the Honourable Court deems fit to grant.*

15. The matter at the Lower Court was first presided over by Hon. B. Limo -SRM who gave interim custody to the Respondent and ordered that the minors continue schooling in Kenya.

16. The Appellant was aggrieved by that ruling and preferred an interlocutory appeal against orders issued by the Trial Court. The Appellant also filed an application dated 23/09/2021*(Children Application No. E009 of 2021)* seeking a stay of execution of the Learned Trial Court's orders pending the hearing and determination of the interlocutory appeal. When the matter came before me for directions on 30/09/2021, I urged the parties to try and settle the matter out of Court. On 06/10/2021 the parties reported that they had failed to reach an agreement, prompting a formal hearing of the Application.

17. In my ruling dated 07/10/2021, I remanded the matter back to the Trial Court so that the Trial Court could substantively deal with the question of custody and directed that the matter be heard by another Magistrate. I also made certain interim orders to maintain the *status quo* pending the hearing of the substantive case by the Trial Court.

18. The case was heard on 21/10/2021 when both parties presented *viva voce* evidence. The Respondent called three witnesses. Himself as PW1 and his mother and brother as PW2 and PW3 respectively. The Appellant was the sole witness in her case. The gist of the Respondent's case was that he has been living with the children since 2015 and 2017 since they were 8 years and 4 years respectively. The Respondent primarily sought orders preventing the Appellant from removing the children from Kenya. He wanted to be given actual custody of the children as he believes they should be left in Kenya where they can enjoy good education and where he can continue to give them religious guidance. Conversely, the Appellant's case was that the children have a better chance at life if she went with them to the US.

19. In her Judgment dated 03/11/2021 and after hearing both parties the Learned Trial Magistrate *(Hon. Rose Ombata- SRM)* found in favour of the Respondent and gave the following orders:

a. That the Legal and actual/physical custody of the minors herein be and is hereby awarded to the plaintiff.

b. That the defendant herein shall have unlimited access of the minors when they are not in school.

c. The parties herein to agree on maintenance of the minors and in the event, they fail to agree, parties be at liberty to apply.

d. That the minors herein be released to the Plaintiff with immediate effect for enrolment to their original respective schools to continue with their education.

e. That the passports of the minors which are in the custody of the defendant be handed over to the plaintiff immediately.

f. On Costs, given that this is a family matter, each party to bear his/her own costs.

20. The Appellant is aggrieved by the entire Judgment and Decree of the Trial Court dated 03/11/2021 and has preferred the instant appeal *vide* her Memorandum of Appeal dated 03/11/2021. She has listed 14 grounds of appeal as follows:

1) THAT the Learned Magistrate in her judgment of 3rd November, 2021 erred in Law and fact in granting immediate actual and legal custody of the minors herein to the respondent and especially the 2nd minor who is of tender age with undue regard to the law which provides that custody of a child of tender years ought to be with the mother unless there are special circumstances for directing and/or ordering otherwise and which were not adduced and or proved before the trial court

2) THAT the Learned Magistrate in her judgment of 3rd November, 2021 erred in Law and fact in failing to appreciate that the appellant has been in custody of the minors all through their lives thus granting custody to the respondent was not in the best interest of the minors herein but that of the respondent and his relatives

3) THAT the Leaned Magistrate erred in law and fact in placing more weight on the Respondents' submissions and ignoring the submissions filed by the Appellant and was heavily prejudicial and biased against the Appellant.

4) THAT the learned Magistrate erred in law and fact in failing to appreciate and apply the provisions of the law on custody of the minors herein which favoured the appellant since there were no compelling reasons or evidence adduced by the respondent to prove her unsuitability as their mother.

5) THAT the Learned Magistrate erred in law and fact in finding that the respondent was suitable for custody of the minors in total disregard of the evidence adduced before court challenging his unsuitability.

6) THAT the Learned Magistrate erred in Law and fact by disregarding Article 53(2) on the best interests of the children herein being paramount by holding that the subjects be removed immediately from the custody of the Appellant and be placed under the custody of the Respondent when in fact the minors were prepared and ready to go to United States where they are citizens to attend school where they have obtained admission thus jeopardizing their right to better life and education.

7) THAT the Learned Magistrate erred in Law and fact in failing to find that the Appellant was granted custody of the older child SCKK on 4th November, 2010 in the Circuit Court of Jefferson County, Alabama Domestic Relations Court following a mutual agreement between both the Appellant and the Respondent which order is applicable to Kenya as a common law.

8) THAT the Learned trial Magistrate erred in Law and fact by awarding custody of the younger minor JJWK being a child of tender years to the respondent in contravention to the provisions of the Children's Act and other known principles applicable in such cases.

9) THAT the Learned Magistrate erred in Law and fact in failing to appreciate that the oral evidence adduced by respondent and his witnesses in trial court confirmed suitability of the appellant to be granted custody of the minors herein.

10) THAT the Learned Magistrate erred in Law and fact in upholding the Report of the Children Officer in Nakuru and which report we challenged in our defence and submissions for being biased and discriminative with a clear motive to purge the respondent and also portray the appellant as a bad mother to the minors.

11) THAT the Learned Magistrate erred in Law and fact in placing over reliance on a Children Officer's Report in reaching his decision when in fact the minors best interests and wishes were not captured and put into consideration and which actions of the Children Officer were in express violation of the Children's Act.

12) THAT the Learned magistrate erred in law and fact in finding that the relatives interest are more paramount as compared to the best interest of the minors herein and which is a violation of the children rights.

13) THAT the learned Magistrate erred in law and fact in making outright prejudicial substantive conclusions, applying selective justice and disregarding the evidence tendered by the Appellant.

14) THAT the Learned Trial Magistrate considered extraneous issues which vitiated her judgment thus arriving at an erroneous finding.

21. This is a first appeal. The duty of a first appellate Court was succinctly stated by Wendoh J in ***JWN v MN [2019] eKLR*** in the following words:

It is settled law that the duty of the first appellate court is to re-evaluate the evidence tendered in the subordinate court, both on points of law and facts and come up with its findings and conclusions.

22. This is the standard of review upon which it is incumbent upon the Court to utilize in determining this appeal.

23. I have rehashed the essential facts of the case above. During the hearing, the Respondent expressed angst about the educational, spiritual, physical and social well-being of the minors should custody be given to the Appellant and she relocated with them to the United States as she planned to do. He expressed confidence that he was the best parent for the minors given their developmental stages and the fact that he had been the primary parent for SCKK for the last seven (7) years (since 2015); and for JJWK for close to

5 years (since 2017). He expressed worries about racism and discrimination in the United States and offered the opinion that it would be far better to raise the minors here. Here in Kenya, the Respondent opined, the children would be surrounded by loving uncles and aunts who would continue to guide their moral and social development unlike in the United States where he felt they would be isolated. Finally, the Respondent expressed the fear that his physical access to the children would be severely circumscribed by visa requirements since he is not a US citizen while both the Appellant and the two children are dual US-Kenya citizens. While conceding that the Appellant has infrequently sent some money for the children, the Respondent testified that had generally been solely responsible for the maintenance of the children – from their educational, health, and nutritional needs. The Respondent was of the view that financial uncertainties and questions revolving around the Appellant's primary residence in the United States relative to his own stable social and residential status made him the more appropriate parent while impugning the Appellant's suitability for primary custody of the two minors.

24. The Respondents' two other witnesses were more of character references. His mother, EWK, and his brother, KWK, testified about what can be described as parenting bona fides of the Respondent. They both testified that the Respondent was an involved and caring father who provided all the financial needs for the two children and spent a lot of quality time with them. They both testified about the extended family of uncles, aunts and grandparents who are on hand in Nakuru and in Kenya to help raise the children while expressing anxieties about the social and security situation in the United States of America.

25. The Appellant testified on her own behalf. She sought to allay the apprehension that she was not financial stable by testifying that she worked as a Certified Nursing Assistant at [Particulars Withheld] in Washington State on the outskirts of Seattle. She lives in her own rented apartment which, she said, she can easily afford. Seattle, she further testified, is a cosmopolitan city comprising of people of different races and of diverse national origins. As such, she opined, the expressed fears about racism and security of the children were misplaced and overblown.

26. The Appellant testified that she had been given custody of SCKK in 2010 by the Circuit Court of Alabama and that she had lived with SCKK very well before the planned relocation to Kenya. She stated that since the children were born, she had always helped out financially – paying school fees and paying for their general maintenance.

27. The Appellant impugned the narrative that the children would lack moral and social guidance if they relocated to the United States pointing out that she is a member of [Particulars Withheld] Church in Renton where the minors would continue to attend church. On the question of the Respondent's unlimited access to the children, the Appellant opined that the Respondent could obtain a 5 year visa – a process which, she opined, was not as tedious as the Respondent made out. She offered to help the Respondent to secure a visa and green card if necessary.

28. On the question of parental suitability, the Appellant alleged that sexual indiscretion made the Respondent an unsuitable parent for primary custody of the two children. She claimed that SCKK had called and informed her that he was uncomfortable at the Respondent's house because there was a young lady who spent time with the Respondent at the house. She said that when she came back to Kenya in 2021, she confirmed that the relationship was true. She was of the opinion that it was inappropriate for the Respondent to bring the lady she was dating home especially since, in her opinion, the lady was young and closer to the age of SCKK. Finally, the Appellant repaid the Respondent in kind in impugning his financial stability: the Respondent, she insisted, was not financially stable since he is dependent on his mother for his income.

29. In a carefully written judgment, the Learned Trial Magistrate laid out the parties' respective cases and the constitutional, legal and decisional standards governing the question of contested custody. In particular, the Learned Trial Magistrate began her analysis by parsing Article 53(3) of the Constitution; before paying obeisance to sections 4(2); 3(b); and 83 of the Children's Act. She then cited the leading judicial authorities on the issue namely, ***Githunguri v Githunguri [1981] KLR 598; Wambua v Okumu [1970] EA 578; and JO V SAO (2016) eKLR.***

30. The Learned Magistrate then comprehensively considered the singular question before her, namely, who to be awarded the primary custody of the children in the circumstances of the case. In particular, she analysed ten factors present in the case namely:

i. The (alleged) conduct of the Respondent;

ii. Financial stability of both parents;

iii. The housing/home environment of the children;

iv. The question of schooling for the minors;

v. The social, cultural and religious considerations;

vi. The question of (unlimited) access to the minors by the Respondent if they relocated to the United States;

vii. The wishes of the relatives;

viii. The wishes of the minors as captured in the Children's Department's Reports;

ix. The filed reports by the Children's Department

x. The effect of the agreement between the parties in the Divorce Cause in the Domestic Relations Circuit Court of Jefferson County, Alabama that custody of SCKK be awarded to the Appellant.

31. On each of the factors, the Learned Trial Magistrate found in favour of the Respondent or the factor to be non-dispositive. The Learned Trial Magistrate then concluded thus:

In light of the foregoing and in adherence to the principle of the best interests of the minors herein, I have no doubt in mind that the best interests of the minors herein demand that both actual and legal custody of the minors herein be awarded to the Plaintiff herein.

The decision to grant custody to the Plaintiff herein is informed by several considerations that I have already elaborated above and further buttressed by the fact that in the circumstances, a joint custody order is not realistic.

I have also considered the fact that one of the minors is a child of tender years and that as a rule of thumb, custody of children of tender years is usually awarded to the mother. However, in the present case, there exists exceptional circumstances to deviated from this rule. As mentioned earlier, the exceptional circumstance is mainly that younger minor, in this case JJWK, who is 8 years old, has ever since he was 4 years old been under the care and custody of the Plaintiff herein. It is documented in the Children's Report dated 05/10/2021, that the young minor JJWK, has a very close relationship with his father and would be greatly affected if that relationship is severed suddenly. Again, no adverse evidence has been adduced to show that the young minor has undergone any harm or threat of any nature while in custody of the [Respondent] herein.

32. The appeal was argued by way of written submissions and highlighted orally by Counsel for both parties. The Appellant's submissions are dated 07/12/2021. The Appellant submits that the *prima facie* rule is that the custody of a minor of tender years as defined under Section 2 of the Children act is to be granted to the mother unless there are exceptional circumstances. These exceptional circumstances, the Appellant argues are issues of fact, requiring proof through evidence and for which the burden of proof was on the Respondent. Thus, the Appellant contends the Trial Court deviated from the law by granting the custody of JJWK -a child of tender years to the Respondent without due regard to the evidence and the law. The Appellant relies on two cases in this regard: ***HGG v YP [2017] eKLR*** and ***J.O. v S.A.O. [2016] eKLR.***

33. The Appellant has cited various authorities on what amounts to exceptional circumstances among them, ***Sospeter Ojaamong v Lynette Amondi Otieno, Mehrunnisga v Parves [1981] KLR 547, Karanu v Karanu [1975] E.A. 188, Githunguri v Githunguri [1981] KLR 598.*** She maintains that the Trial Court deviated from the rule despite the evidence on record exonerating her from being an unsuitable mother. Instead, she contends that the Trial Court ignored the evidence that the Respondent had a woman spend nights at the house he was living in with the children.

34. The Appellant argues that the Trial Court failed to consider her financial stability and the Respondent's alleged dependence on his mother, or that she had a three-bedroom apartment in the US in arriving at the conclusion that the Respondent's home was more conducive. Again, the Appellant cites ***HGG v YP*** *(Supra).*

35. On the issue of the Judgment by Domestic Relations Circuit Court of Jefferson County, Alabama granting custody of SCKK to the Appellant, the Appellant submits that it was a parental agreement signed by both parties and which remains in force. The Appellant argues that the Constitution under Article 2(5) allows the application of International Law if the same is consistent with Kenyan Law. She submits that the Foreign Judgment (Reciprocal Enforcement) Act does not apply to judgments or orders concerned with the protection or guardianship of minors and that in the absence of a reciprocal enforcement arrangement, a foreign judgment is enforceable in Kenya as a claim in common law.

36. The Appellant also contends that the Trial Court was not guided by the best interest of the children in arriving at its decisions. She argues that the Trial Court placed the interests of the relatives above those of the children thereby violating their rights, Article 53(2) of Constitution and Section 83 of the Children Act as buttressed in the Australian case of ***U v U [2002-2003] CLR.*** The Appellant places reliance on the case of ***Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others [2014] eKLR .***

37. The Appellant contends further that being that only the Respondent's relatives testified, the same cannot form a basis for the consideration of 'relatives' wishes' and the Court ought to have been instead, guided by the wishes of the parents and minors, specifically, SCKK who can to some extent make his decision known to the Court. The Applicant cites the provisions of Section 76(3) of the Children Act and submits that the Trial Court ought to have interviewed the minors before making a determination. She also cites Section 4(2) and (3) of the Children Act.

38. She contends that the Trial Court erroneously relied on the Children Report which she vehemently challenged for being biased and deceiving. She submits that the Report dated 05/10/2021 did not acknowledge the best interest of the children and it would have been judicious to interview the minors.

39. The Appellant further argues that the best place for the children to be raised would be in the US where they can attend the best schools and in an environment where they feel cared for and protected. The Appellant places reliance on the case of ***M A A v A B S [2018] eKLR*** in which she contends the Court allowed the mother to travel with the subject minor and the case of ***Tyler v Tyler [1989] 2FLR 158.***

40. At the oral highlighting of submissions, Counsel for the Appellant emphasized that evidence ought to have been tendered on why the Respondent was granted custody as well as on the Appellant's unsuitability to receive custody of the children. He also emphasized that PW1, PW2 and PW3 had all exonerated the Appellant yet the Court ignored the Respondent's unsuitability by introducing a new girlfriend in the house. He highlighted the applicability of the best interests of the child and cited the provisions of Article 53 of the Constitution and Section 83 of the Children Act. He reiterated Section 76 of the Children Act and submitted that the children had ascertainable wishes which was to be with the Appellant.

41. The Respondent's submissions are dated 14/12/2021. It is the Respondent's submission that the Trial Magistrate appreciated that exceptional circumstances that existed in the present case to warrant deviation from the rule on custody of children of tender years to wit, that JJWK has been under the care and custody of the Respondent since he was 4 years old and had not been harmed or threatened in any way.

42. It is the Respondent's contention that the Trial Magistrate also relied on the Children's Report dated 05/10/2021 which indicated that JJWK had a very close relationship with him- i.e. the Respondent, and the minor would be greatly affected if the relationship was to be severed immediately. The Respondent equally relies on the case of ***J. O. v S. A.O [2016] eKLR*** but argues that the Respondent having previously taken care of the minor was an exceptional circumstance. The Respondent urges the Court to deviate from the traditional notion that only mothers can take care of children when it is demonstrated in this case that fathers can too. He cites the case of ***DNN v MAM [2018] eKLR*** where exceptional circumstances were found to include the mother being unsettled, having taken a new husband, or is living in quarters that are in a deplorable state and submits that in this case evidence was adduced to the effect that the Appellant was unsettled.

43. The Respondent argues that the Appellant had given contradictory statements on the issue of her relocation, first alleging that she came because they had agreed she would relocate with the children to the US in August and then alleging that the reason for visit was because her son had informed her, that he was uncomfortable.

44. According to the Respondent, there is no evidence that he had behaved dishonourably, and that in fact, the parties were

divorced. He cites the case of ***JKN v HWN [2019] eKLR***. He claims that the Appellant has frequent movements between the US and Kenya and the allegation of housing the minors in a congested apartment was not rebutted by the Appellant. He says that the Appellant is still residing in Kenya pending the determination of the suit without any source of income. This alleged state of unsettlement, the Respondent argues may cause the minors to suffer.

45. The Respondent equally cites the provisions of Article 53 of the Constitution and Section 83 of the Children Act and submits that all the principles under Article 83 were articulated by the Respondent in his case but never adequately addressed by the Appellant.

46. The Respondent insists that the minors herein have been adequately taken care of and that it defies logic for the Appellant to want to transfer the minors from Kenya where they have been schooling for the past 4 years, especially SCKK who is a candidate. The Respondent denies that the minors have a secure admission in the US Schools and contends that the email relating to SCKK indicates that he would be withdrawn from the school if he failed to report. The Respondent has cited the case of ***Re ABO (Child) [2018] eKLR.***

47. To the Respondent, the minors are male children who need their father and there would be great difficulty in him accessing the minors in the US including requiring a visa and a letter of invitation from the Appellant. He argues that from the Appellant's previous conduct, including consistently denying him access to the Minors here in Kenya, it is highly unlikely that she will send a letter of invitation to the Appellant, thereby making access to the minors impossible.

48. The Respondent also relies on the case of ***KKJ v WNK (suing for and on behalf of MKK aged 13 years and GMK aged 4 years) [2021] eKLR*** and submits that the Trial Magistrate acted as required under Section 4(2) and 3(b) of the Children's Act.

49. The Respondent contends that the Appellant is misleading the Court by alleging that she has had custody of the minors throughout, when the evidence points to her having allowed SCKK to join Respondent in Kenya when he was just 8 years old and was only joined by the Appellant after two years. To the Respondent, this is an indication that SCKK had lived with the Respondent for two years when he was still a child of tender years.

50. The Respondent denies that there was any prejudice or bias by the Trial Court against the Appellant and says that Appellant has not adduced any proof of the same. The Respondent cites the case of ***Kaplana H. Rawal v Judicial Service Commission & 2 others [2016] eKLR***

51. He argues that although the mother was not found to be unsuitable, the Trial Court considered that the minors were well-settled in Kenya with a stable home and school environment. He contends that the Appellant's defiance of previous Court Orders also depicts her unsuitability in tending for the minors and her moving with them from house to house just to ensure that she evades court orders.

52. According to the Respondent, it cannot be confirmed whether the information about whether SCKK was uncomfortable at home due to the Respondent dating another woman was relayed by SCKK as alleged and in any case, the parties were divorced. The Respondent reiterates the finding in ***JKN v HWN [2019] eKLR*** where it was held that sexual indiscretion, even if proven was not *per se* proof of parental unfitness. He contends that there is therefore no sufficient reason to deny him custody on the grounds of spousal infidelity.

53. He maintains that he demonstrated at the Trial Court that he was financially stable from running a family business and is able to take care of the minors.

54. On the issue of the Judgment by the Domestic Relations Circuit Court of Jefferson County, Alabama, the Respondent submits that having allowed the Respondent to travel with the minor to Kenya despite the judgment, the Appellant is estopped from enforcing the Judgment by her own conduct and by her own admission that they had stopped relying on the agreement. The Respondent cites the case of ***Carol Construction Engineers Limited & Another v National Bank of Kenya [2020] eKLR*** to the effect that the doctrine of estoppel precludes a person from asserting that which is contrary to what is implied by previous action or statement.

55. The Respondent contends further that all the evidence adduced points to his suitability to have custody of the minors and reiterates that the Trial Court fully considered Article 53 in arriving at its decision. He claims that by seeking to relocate the minors herein, it is the Appellant who is disrupting the minors' education thereby hindering their rights.

56. The Respondent argues that the Appellant was never prevented from calling the minors as witnesses to enable the Court to ascertain their views or calling her relatives as witnesses and cannot therefore purport to blame the Trial Court for failure to adduce requisite evidence. He seeks to distinguish the case of ***MAA v ABS [2018] eKLR*** from the present case and argues that the intended relocation in this case is permanent and the father to the minors in the cited case had shown signs of abuse towards the minor.

57. On the issue of the Children Report, the Respondent contends that the Report was never challenged by the Appellant and that it is the Appellant who strongly opposed the intention by the Respondent to call the Children Officer as a witness stating that the Report was an expert's report which could not be challenged. He contends that no evidence has been adduced to depict any form of bias by the Children Officer.

58. The Respondent submits that the wishes of the Relatives is one of the principles to be considered in making a custody order under Section 83 of the Children Act and, in any case, the Trial Magistrate considered the best interest of the children as the most paramount consideration.

59. At the oral highlighting of the submissions, Counsel for the Respondent reiterated her written submissions. She emphasized that the Appellant had failed to point out what evidence the Trial Court had failed to consider. She argued that both parties were accorded a fair and equal opportunity and no evidence of bias was adduced. She alleged that the Appellant had sneaked into the Record of Appeal documents that did not form part of the Trial Court's Record, specifically those at pages 366 -371 which she prayed be expunged from the record.

60. She also emphasized that the circumstances of this case form exceptional circumstances. Specifically, she submitted that the Appellant has always acted in bad faith and does not take into consideration the best interest of the children by ignoring court orders is unsettled and has filed multiple suits.

61. She argued that by the Courts always giving primacy of taking care of the child to the to the mother, the law has failed to consider the changing times and that custody should only be given to the mother on grounds of gender roles.

62. The second Counsel for the Respondent further argued that the best interest of the child is not categorised as gender sensitive role and that the best interest of the child cannot only be anchored by the mother. He reiterated that the suitability test had been addressed by the 3 witnesses for the Respondent and argued that the mother should not always be presumed to be the more suitable just for being the mother. He sought to distinguish the present case from the ***Ojamoong*** case because there was violence in that case unlike in this case where PW1, PW2 and PW3 proved the Respondent's suitability.

63. After all is said, the single issue for determination remains, who should have the legal, physical, and actual custody of the minors herein. It is an especially poignant issue because the two parents have indicated an intention to live in two different continents going forward: the Appellant wishes to relocate to the United States; the Respondent wishes to remain in Kenya. This is particularly important because of the difficulties in accessing the children the parent who is not awarded physical custody would have.

64. In determining this single issue, I consider it necessary to address three preliminary issues before delving into the substantive factors that go into the determination of the question.

65. The first preliminary issue is a finding that I have made that there is no evidence from either parties that would lead to the conclusion that either of them is an unsuitable parent. Both the Appellant and the Respondent, in their weakest moments, tried to portray each other as unsuitable parents. In their benign and charitable moments, each acknowledged that the other was an excellent parent; indeed, each, at some point, literally stated so. Consequently, this decision will not turn on the unsuitability of either parent to have custody of the children in question. It will turn, instead, on the question of who would be best placed to advance the best interests of the children if awarded custody given the diverging geographical locations of the two parents and the impossibility of joint physical custody.

66. The second but related preliminary issue is a finding, borne by the evidence, that each of the two parents seems quite financially capable of taking care of the educational, housing, nutritional, upkeep, entertainment and medical needs of the two children. In stating this, it is important to point out that custody cases are not duels of who between the two parents is more financially muscled: custody is not a Forbesesque battle for the richer parent to emerge. It is, instead, a delicate exercise aimed at determining, in context, the best interests of the children.

67. The final preliminary issue I need to address is the question of alleged sexual indiscretion as a factor disentitling the Respondent from custody of the children. Both parties cited my decision in ***JKN v HWN*** to advocate for their disparate positions. The ratio in that case is that sexual indiscretion only becomes a factor in custody decisions where it can be demonstrated that the alleged sexual indiscretion has risen to the level of causing actual harm to the children. The Appellant claims that the threshold is reached here; while the Respondent scoffs at the allegation. Suffice it to say that the Appellant's allegations that the Respondent's relationship with an allegedly younger woman has caused psychological harm to SCKK is, at best, unproven. At the worst, it is falsified by available evidence.

68. The Appellant claimed that SCKK called her when she was in the United States with concerns about the relationship and that this prompted her to quickly travel to Kenya to find out what was happening. However, this allegation remains unsupported by available objective evidence. First, the two Children's Reports did not, at all, raise this as an issue. Second, I had occasion to interview both minors during the appellate hearing. In my interactions with both minors, the issue never arose at all despite my tactical prompting of the same. The conclusion is that the issue is a *non-sequitur*. It is probably a factor in the souring relationship between the Appellant and the Respondent; but it is not a factor at all on whether custody being awarded to the Respondent would adversely affect the best interests of the two minors.

69. I will now turn to the two more substantive issues related to the custody decision. These are, first, the applicability of the Child of Tender Years Doctrine and the effect of the Judgment by the Domestic Relations Circuit Court of Jefferson County, Alabama. The Appellant is persuaded that both factors should have been decided in her favour.

70. I will begin with the Child of Tender Years Doctrine. Historically, under Common Law, the custody of children was given to their fathers as part of their property rights. This was until the introduction of the Tender Years Doctrine, which some historians attribute to the specification of the gender roles during the Industrial Revolution.[1] Over time, the doctrine has continued to evolve with many Courts in various jurisdictions moving away from the doctrine to the more inclusive 'best interest of the child' principle.

71. For instance, the Supreme Court of Canada in the earlier case of ***Talsky v. Talsky, [1976] 2 S.C.R. 292*** applied the doctrine as follows:

I am of the opinion that that criticism is not deserved. The learned trial judge did not regard the view that children of tender years should be given to the custody of their mother as any rule of law. As Roach J.A. put it, it is as old as human nature, and as learned counsel for the appellant put it in this Court, it is a principle of common sense. It is simply one of the more important factors which must be considered in the granting of custody. In the view of the learned trial judge in the present appeal, it was such a strong factor as to be well nigh conclusive. In the view of the Court of Appeal, it was outweighed by the other matters to which I have referred. Under all the circumstances in the present case and particularly in view of what I have already outlined as the careful plans of the husband for the care and upbringing of the children in his immediate presence, I am of the opinion that the learned trial judge gave too great a weight to that factor.

72. Later in ***Young v. Young, [1993] 4 S.C.R. 3,*** the Supreme Court of Canada seemed to alter its earlier position and remarked thus:

As has been widely observed by those studying the nature and sources of changes in family institutions, popular notions of parenthood and parenting roles have undergone a profound evolution both in Canada and elsewhere in the world in recent years…One of the central tenets of this new vision is that child care both is no longer and should no longer be exclusively or primarily the preserve of women. Society has largely moved away from the assumptions embodied in the tender years doctrine that women are inherently imbued with characteristics which render them better custodial parents (for a discussion, see D. L. Chambers, "Rethinking the Substantive Rules for Custody Disputes in Divorce" (1984), 83 Mich. L. Rev. 477). Moreover, both economic necessity and the movement toward social and economic equality for women have resulted in an increase in the number of women in the paid workforce. Many people have tended to assume that a natural result of this change would be the concurrent

sharing of household and childcare responsibilities with spouses, companions and, of course, fathers. In addition, the increased emphasis on the participation of fathers in the raising of children and financial support after divorce gave rise to claims by fathers and fathers' rights groups for legislative changes that would entitle them to the benefit of neutral presumptions in custody decisions.

73. Similarly in the United States, most of the State Supreme Courts have now done away with the doctrine and replaced it with the best interest of the Child principle. For example, the Supreme Court of Virginia in ***Burnside v. Burnside 216 Va. 691, 222 S.E.2d 529 (1976)*** affirmed its decision in ***Portewig v. Ryder,*** **208 Va. 791, 794, 160 S.E.2d 789, 792 (1968).** In both cases the Court opined that the Tender Years Doctrine was a flexible rule, not to be applied without regard to the surrounding circumstances.

74. Similarly, the Supreme Court of Alaska in ***Johnson v. Johnson, 564 P.2d 71 (Alaska 1977)*** objected to the non-selective application of the Tender Years Doctrine. The Court stated thus:

*In **Sheridan**, we noted our disapproval of the "mechanistic application" of custody rules and reversed the trial court's award of the children to their mother on the ground that: It appears that the basis for resolution of the custody issue was the tender years' doctrine to the exclusion of any other legal criteria or relevant factual considerations. Seemingly ignored in the decisional process was the paramount criterion of the welfare and best interests of the children which should be determinative.*

75. I must caution myself against reliance on foreign jurisprudence and consider the unique Kenyan circumstances of this case. As the Supreme Court warned itself in ***Jasbir Singh Rai & 3 others -v- Estate of Tarlochan Singh Rai & 4 others (2013) eKLR,*** that while commonwealth and international jurisprudence continues to be pivotal in the development and growth of our jurisprudence the Court needs to avoid mechanistic approaches to precedent, just because they seem to suit the immediate occasion.

76. However, it is apparent that while the Tender Years Doctrine, is persuasive in considering custody of children, it can no longer be considered as an inflexible rule of law. This is not to say that the substance of the rule has dissipated completely; it is to say that its inflexibility has been eroded by the evolving standards of decency reflected in Article 53 of the Constitution. Differently put, the Tender Years Doctrine must now be explicitly subjected to the Best Interests of the Child Principle in determining custody cases. Differently put, the welfare of the children is the primary factor of consideration when deciding custody cases. The judicial rule that a child of tender years belongs with the mother is merely an application of the principle in appropriate cases. The modern rule begins with the principle that the mother and father of a child both have an equal right towards the custody of the child.

77. In the present case, it is important to emphasize that neither the Trial Court nor this Court has reached the conclusion that the Appellant is a “bad mother” or that she would be unsuitable to have custody of the children. However, her suitability must be weighed together with other factors such as the fact that the children have been in the actual custody of the Respondent for at least the last four years; her intention to relocate to the US and the difficulty that would clearly be occasioned to the Respondent, with not only accessing the minors, but also enforcing any orders of this Court once the children are outside the jurisdiction.

78. The upshot of this analysis is that properly calibrated, both the Tender Years Doctrine and the Best Interests of the Child principle would, in the present case, unite to yield the conclusion that custody is best awarded to the Respondent. This is so for at least five reasons:

a. *First*, the children have been with the Respondent for a significant period of time immediately preceding the suit. The period in question is more than 6 years for SCKK and more than four years for JWKK. Their being with the father was not product of subterfuge, conspiracy or abduction. It was by the mutual agreement of the parties. During that period, the two children have been enrolled in school in Kenya. They have adopted to the social-cultural and educational environment. They have fitted into the socio-ecological milieu. They have become accustomed to their life here. More importantly, they have bonded with the Respondent as a primary parent. To yank them out of this environment would no doubt cause psychological trauma.

b. *Second*, the Appellant plans to relocate the children out of the country and jurisdiction. This is an important factor because it removes or at least makes it unreasonably difficult for the Respondent to have access to the children or to participate in their upbringing without unreasonable expenses and inconvenience. It would take the Respondent to subject himself to the US visa process in circumstances in which success is not guaranteed. Moreover, the expenses and inconvenience of the process makes it needlessly costly and impracticable for joint custody arrangements. Additionally, once out of the jurisdiction, it would be difficult for the Court to enforceably review any custody decisions it makes or supervise them.

c. *Third,* not unimportantly, the kin and kith of the children live here in Kenya. If they relocate to the United States, they will not have the network of family support and bonding that is happening in Kenya.

d. *Fourth,* two experts (Children Officers) expressed strong opinions that the two children's best interests would be best served if the children remained with their father here in Kenya. Although the Appellant claims the officers were biased, I have seen no evidence of such bias. Indeed, it must be remembered that the reports of the two Children Officers were filed pursuant to the *suo motto* direction by this Court.

e. *Fifth,* contrary to the claims by the Appellant, the two children are quite comfortable in the custody of the Respondent. Long after the fog of legal duel in the Trial Court calmed, I had occasion to interview the two minors in my chambers in the presence of a Children Officer other than the two who had presented reports to the Court. The children expressed confidence that they were receiving good parenting from the Respondent. Neither had any reservations about any aspect of their upbringing. Indeed, neither child expressed strong desires to be with either parents. SCKK expressed some concern whether the results from his school would translate to easy access to college opportunities in the United States but was unsure to what extent that might be limiting. No concern at all was raised about the kind of parent the Respondent is. Indeed, both minors described how the Respondent is a responsible and involved father: one who provides for their every need; plays basketball and soccer with them over the weekends and discusses all aspects of their lives with them.

79. What this five factors demonstrate is that even if the Court were to do the traditional analysis under the Tender Years Doctrine, exceptional circumstances are present to award custody of JJWK to the Respondent. These factors are also relevant for the custody of SCKK.

80. In the present case, the analysis is complicated by the question of the effect of the decree by the Domestic Relations Circuit Court of Jefferson County, Alabama. It was essentially, a judgment by consent where the parties agreed that the Appellant would have custody of SCKK. The two questions attending to that judgment are whether it is enforceable in Kenya and secondly if it is still in force. The Appellant argues that the Foreign Judgment (Reciprocal Enforcement) Act does not apply to that judgment since it is concerned with the protection or guardianship of minors and that in the absence of a reciprocal enforcement arrangement, that judgment is enforceable in Kenya as a claim in common law. Conversely, the Respondent argues that the same is un-enforceable in the absence of a reciprocal agreement and in any case, the parties already deviated from it.

81. While I agree with the Appellant that the Foreign Judgment (Reciprocal Enforcement) Act is not applicable in proceedings in connection with the custody or guardianship of children, I do not think the decree is any longer enforceable between the parties. This is because the circumstances of the parties have changed significantly. For instance, at the time of the judgment, SCKK was only 3 years old, JJWK was not yet born and both parties were living in the US.

82. In any event, as the Respondent persuasively demonstrated, the Appellant is estopped from relying on the custody decree. This is because ex post, the two parties agreed to vary the decree on the question of custody. They agreed to remove SCKK from the custody of the Appellant and place him in the custody of the Respondent. That was more than six years ago. The effect of that agreement coupled by the passage of time is enough to establish a viable claim for promissory estoppel preventing the Appellant from resiling from her undertaking in a way which would be inimical to the interests of the Respondent who changed his position, to his detriment in reliance on the promises made by the Appellant. See the ***Carol Construction Company Ltd Case (supra)***.

83. The result is that the judgment of the Trial Court was largely on point legally and factually. Its core is correct. There is only one aspect of the decision that this Court would depart from, however. This is the question of legal custody.

84. The Learned Magistrate gave "actual and legal custody" of the minors to the Respondent. In ***J.O. v R.M.M. Nakuru DC No.4/2004(2005) KLR***, Musinga J. stated as follows in regard to actual and legal custody:

Actual custody is defined to mean the actual possession of the person of the child as opposed to legal custody which means as respects a child, so much of the parental rights and duties as relates to the person of the child including the place and manner in which time is spent.

85. In the present case, given that there was no evidence that either parents was unfit or suitable to have custody, it was unnecessary

to grant legal custody to one parent only. Indeed, I find no reason, despite the distance inconvenience (a non-factor in decision-making in the modern day due to technological advances), I find no reason to restrict legal custody to one parent only.

86. From the foregoing, the Judgment of the Lower Court dated 03/11/2021 is varied as follows:

I. That the legal custody of the children will be shared jointly between the Appellant and Respondent. This is to say that both parents have a right to participate and make inputs in the major decisions concerning the children including but not limited to the educational; religious; and medical decisions;

II. That Respondent shall have actual/physical custody of the minors herein. For avoidance of doubt, the minors – SCKK and JJWK – shall reside with the Respondent in Kenya.

III. That the Appellant shall have unlimited access to the minors when she is in Kenya as follows:

i. Unlimited access during school holidays

ii. Unlimited access on Saturdays when school is in session.

IV. That for any period the Appellant is out of the Country, she shall have unimpeded access to the minors through telephone, video calls and email or through some other use of technology.

V. The parties herein to agree on maintenance of the minors and in the event, they fail to agree, parties shall be at liberty to apply.

VI. That the passports of the minors which are in the custody of the Appellant be handed over to the Respondent immediately.

VII. This being a family matter each party to bear their own costs.

DATED AND DELIVERED AT NAKURU THIS 5TH DAY OF APRIL, 2022

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.

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[1] **See, for example, *The Scientific Basis of Child Custody Decisions*, R. M. Galatzer-Levy, L. Kraus, J. Galatzer-Levy P. 418**