

had access to the children. Furthermore, sometime in April 2012, the Appellant picked the child (Hammie Yusuf) from the Respondent's home as he normally used to do but later denied the Respondent subsequent access and custody of the child (Hammie Yusuf). The Respondent further deposed that the Appellant's mother, who is supposed to take care of the child, lives in America and that the child was left in the hands of a house help.

In his Affidavit in reply, the Appellant denied the Respondent's depositions and stated that the Respondent had abandoned the children since 2008. At that time, Hammie Yusuf was aged two months old. The Appellant single handedly took care of them with the help of his mother and he also maintained them.

At the conclusion of the hearing, the learned Trial Magistrate entered an Interim Order for the Respondent in respect of which he granted the custody of the infant Hammie Yusuf to the Respondent pending a DNA test and its outcome. Hence, the Appellant being aggrieved by the trial Court's Orders lodged this appeal.

The grounds of Appeal as contained in the Memorandum of Appeal filed on the 02nd day of October 2013 were five (5). They are paraphrased as follows:-
That,

1. The Learned Trial Magistrate erred in law and in fact when he made an Order in favour of the Respondent for the custody of the child, Hammie Yusuf, who was in the custody of the Appellant yet before hearing the Appellant's case, the Respondent abandoned the child at the age of two (2) months leaving the Appellant to struggle with the child from the age of two (2) months up to date.
2. The Learned trial Magistrate erred in law and in fact when he granted custody of the child Hammie Yusuf to the Respondent pending a DNA

test and its outcome yet there was no application for a declaration of parentage to the Court.

3. The Learned Magistrate erred in law and in fact when he failed to apply the guiding principles for considering custody of a child.
4. The trial Magistrate erred in law and in fact when he decided that the Parties had agreed that the child be taken to the Turkish Academy and that other Orders should await a DNA test which was not true.
5. The learned trial Magistrate erred in law and in fact when he granted custody of the child to one parent whilst denying access to the other parent.

During the hearing of the Appeal, the Parties agreed to make written submissions to Court. On behalf of the Appellant, his Counsel, Mr. Bamwite Edward dropped ground 4 of the Appeal and preferred to argue grounds 1 and 3 together; then ground 5 and lastly, 2. For convenience, I will more or less determine each of the grounds in that order except that ground 5 will be considered lastly.

Before I proceed with determination of the grounds of Appeal, I take cognizance of the fact that Counsel for the Respondent raised an objection regarding the competency of this Appeal. He prayed that the Appeal be dismissed. I will determine this issue after dealing with the grounds of Appeal.

Further, prior to the hearing of this Appeal, the Appellant filed Miscellaneous Application No. 496 of 2013, which was withdrawn subsequently by himself. The Appellant went on to file Miscellaneous Application No. 497 of 2013 on the 11th/October/2013 seeking an Interim Order for stay of execution of the Interim Order issued by the Grade 1 Magistrate in Family Cause No. 17 of 2013. The Application was granted in favour of the Applicant (Appellant) by Her Worship Gladys Nakibuule Kisekka. Additionally, during the hearing of

the Appeal, the Parties made a Consent arrangement regarding the custody of the child, Hammie Yusuf, dated 21st day of November 2013 and the same was signed in my presence.

I will now deal with grounds 1 & 3

Ground 1 & 3

Counsel for the Appellant submitted that the Trial Magistrate erred in law and in fact when he granted the Respondent the custody of the child Hammie Yusuf who was living with the Appellant prior to the hearing. He also erred when he failed to apply the guiding principles for considering custody of a child.

In his submissions, the learned Counsel for the Appellant, Mr. Bamwite stated that the lower Court's record clearly showed that the learned trial Magistrate did not conduct a hearing in the matter to determine who should have custody of the child Hammie Yusuf.

Pertaining to ground 1, Counsel for the Respondent submitted that there was no need for the Appellant to be heard on a technical issue. He contended that since the issue of paternity was raised during the hearing of the main suit, it was important for Court to make an interim decision on the issue until the final determination of the paternity issue. Therefore, there was no need for the Appellant to be heard on the same.

I have perused through the record and as earlier noted, the Original Application in Family Cause No. 17 of 2013 filed by the Respondent herein, sought Orders for maintenance and custody of the child, Hammie Yusuf. However, according to the record of proceedings dated 03rd September, 2013 and contrary to what Counsel for the Respondent stated, the issue of paternity of the child was raised by the Respondent. She raised doubts whether the Appellant was the biological father of the child. Furthermore, I note that at the time of these proceedings, the Parties were trying to work

out a consent arrangement regarding the custody and maintenance of the child.

I decipher from the available documentation that the DNA was requested out of the consent arrangement in the spirit of settling the issue of custody of the child. Notwithstanding this fact, the record shows that the learned trial Magistrate, His Worship Imalingat Robert (Magistrate Grade 1), proceeded and made an interim Order dated 03.09.2013 that custody of the child be granted to the mother pending a DNA test. The Court also gave directions to the Police to ensure that the Order is complied with.

I have noted the failure by the Applicant to comply with the Order. The Respondent demonstrated that he had reported back to Court stating that the Appellant had refused to hand over the child. The trial Court issued a warrant of arrest against the Appellant for disobedience of lawful Orders.

I find that the Interim Order made by Court for custody of the child pending the DNA test was entered in error and it was issued against the principles of natural justice relating to the right to a fair hearing and procedural rules. Pursuant to **Article 28(1)** of the Constitution, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law as stipulated under. Under Article 44 (c), the constitutional requirement for a right to a fair hearing is non-derogable. Relating to the same principle of right to a fair hearing is the Supreme Court decision of ***Kamurasi Charles vs. Accord Properties Ltd & Christopher Sekisambu SCCA NO.3 of 1996***. In that case Justice Kanyeihamba JSC, relying on the English case of ***R vs. University of Cambridge (1723) 1 Str 557***, observed that even Adam had been called upon by God to meet the charge of having eaten an apple of the forbidden tree, before suffering expulsion. Therefore, the Appellant before this Court was entitled to be heard on the issue.

As I have already noted the main Application in the Family cause was for custody and maintenance of the child. There is no application on record seeking an Order for determination of paternity of Hammie Yusuf. The issue of paternity only arose subsequently at the hearing of the main application for maintenance. At that time, the Respondent raised doubts as to whether the Appellant is the biological father of the child. In fact, Counsel Musangala for the Respondent (then Applicant) observed that since the issue of paternity had arisen, he proposed that a DNA be conducted, which proposal was accepted to by Counsel Lukungu for the Appellant (Respondent). Further on the trial Magistrate is recorded to have observed that:

‘We seem to lose the track of what we originally agreed upon. However, it is also good for a DNA test to be carried out to settle the question of paternity once and for all. However, owing to the fact that it is agreed that the child should go to the Turkish Academy, I accordingly Order that the child be given to the mother/ Applicant pending the DNA test and in the spirit of the first agreement the custody of the two children be given to the mother since she is the first parent of the children...’

Therefore the learned trial Magistrate had no mandate to proceed and make an interim Order granting the custody of the child to the Respondent pending DNA tests.

On ground three of the Appeal, Counsel for the Appellant relied on Section 3 and paragraph 1(b) of the First Schedule of the Children Act Cap 59 and stated that the learned trial Magistrate defaulted in applying the guidelines set forth in the Act.

The paramount principle in all cases involving children, including issues of custody, is the welfare of the child. Section 3 of the Children’s Act Cap 59 clearly states that the welfare Principles and children’s rights set out in the First Schedule to the Act shall be the guiding principles in making any

decision based on the Act. In determining any question relating to circumstances of the upbringing of a child. Court or any other person handling such a matter is called upon to consider the child's physical, emotional and education needs; the likely effects of any changes in the child's circumstances; the Child's age, sex, back ground and any circumstances relevant and the capacity of child's parent to care for the child.

The issue of welfare of a child has also been considered in a number of judicial decisions. In the case of ***Bishop David Kiganda vs. Hadija Nasejje Kiganda HC Divorce Cause NO.42 of 2011***, where the Petitioner sought custody of Kiganda Joshua Yatulwanira, the only remaining minor child from the marriage, my Learned brother, Judge B. Kainamura observed that the paramount principle in cases of custody is the welfare of the child. The Court found that the child had been in the custody of the Petitioner since 2006 when the couple separated, the Petitioner was allowed to retain custody of the child.

In the case of ***Samwiri Massa vs. Rose Achen [1978] HCB 297***, Justice Ntagoba observed that *"it's trite law that where issues of custody of child is between the father and its mother and taking into account the paramount interest of the child, custody of such child, especially when it's of tender years must be granted to the mother..."*

According to the record, the child Hammie Yusuf was 5 years old at the time the Respondent filed Family cause No. 17 of 2013 for grant of custody and maintenance.

However, in granting custody to the mother, the trial Magistrate, only put into consideration the fact that the Respondent, being the first parent of the child was a competent person to be granted its custody. **Furthermore, the trial Magistrate discussed the issue regarding the welfare, medical, clothing**

and maintenance. Court did not give attention to this sensitive issue. The learned trial Magistrate did not consider other interests of the child in question nor allow parties to adduce evidence thereof.

Therefore, with the above authorities in mind, I concur with the Appellant's Counsel that the trial Magistrate erred in law by hastily jumping to a conclusion and making an order that custody of Hammie Yusuf be granted to the mother.

Notwithstanding the trial Magistrate's decision, I find no prejudice that has been occasioned to the child.

Grounds 1 & 3 are allowed.

Ground 2

The issue for determination is whether the learned trial Magistrate erred in law and in fact when he granted custody of the child Hammie Yusuf to the Respondent pending a DNA test despite the absence of an application for declaration of parentage before Court in respect of the same.

In his submissions, Counsel for the Appellant averred that there was no application to the Court for the Declaration of parentage nor an order issued for the DNA test. He relied on Section 70 of the Children's Act Cap. 59 which lays the burden of proof pertaining to parentage on the person raising the issue. Furthermore, the Appellant has never denied being the child's father. The Appellant's Counsel finally prayed that Court sets aside the Magistrate's Order dated 3rd September 2013 and maintains the status *quo* that was subsisting between the Parties prior to the trial Court Order.

In response, Counsel for the Respondent stated that the interim Order was meant to run only pending the determination of the paternity of Hammie Yusuf. Therefore, it was entered legally. He further stated, that the Appellant could not be allowed to have custody of the minor because the issue of his

paternity had not yet been determined. Additionally, the process would not have taken long if the Appellant had immediately complied with the said Order. If he had obliged, the main Application for custody and maintenance would have been heard on its merits.

It is pertinent to note, just as I observed under resolution of issue 1 that the Respondent's Application in the lower Court filed before the Family and Children's Court of Kajjansi on the 24th of June, 2013, was for grant of Custody, maintenance and costs against Yusuf Amili. This was premised on the fact that the Appellant is the putative father of the child. It is worth noting that there was no such application for declaration of parentage filed in the family cause. It is therefore my observation that, whereas a child's long term interests are better served by knowing the truth about its parentage, it's crucial that the legal proceedings for enforcing such mechanism are adhered to.

In any event, the Court records show no evidence which was produced in Court doubting the Appellant's fatherhood.

Under Rule 20 of SI 59-2 of the Children (Family & Children Court) Rules, an application for Declaration of Parentage shall be lodged through a complaint on oath as specified in Form 2 in the Schedule of these Rules.

Additionally, Rule 22 and 4(1)(b) of the above Rules require that where an application for a Declaration of Parentage is made, the Civil Procedure Rules and general procedures set out in the (Third) Schedule of the Magistrate Courts Act and Civil Procedure Rules apply to matters of a Civil nature in the Court.

I believe that there is a reason why the Legislature considered an application for Declaration of Parentage to undergo such a distinct procedure. In fact, under Section 69(2) SI 59-2 of the Children (Family and Children Court) Rules, the Court is mandated to hear the evidence of the Applicant together

with any other evidence tendered by or on behalf of the alleged father or mother.

In addition, Section 69(4), of the Children Act, Cap 59 requires that in proceedings for a Declaration of Parentage, the Court may, on the application of any party to the proceedings or on its own motion, make an order, upon such terms as may just, requiring any person to give any evidence which may be material to the question, including a blood sample for the purpose of blood tests.

Consequently, Court reserves the power to entertain evidence as to proof of paternity. This power is exercisable during proceedings for Declaration of Parentage. I have already stated that the proceedings were for grant of custody and maintenance and there was no application for Declaration of Parentage. Therefore the interim Order for grant of custody pending DNA test was entered in error.

Therefore, ground 2 succeeds.

Ground 5

The issue for determination is whether the learned trial Magistrate erred in law and in fact when he granted custody of the child to one parent without access to the other parent.

Counsel for the Appellant submitted that the welfare of the child required that both parents be involved in the child's upbringing.

In reply, for the Respondent's Counsel prayed that custody of both minors be granted to his client and the Appellant be allowed visitation rights for both minors at such periods as Court deems fit and proper.

My resolution of Grounds 1 and 2 has shown that the Interim Order for custody of the child pending DNA test was entered in error by the trial Court.

Therefore, in my opinion seeking a Court's decision on this ground will be of no use. However, for the sake of emphasis Ground 5 succeeds.

Therefore, I Order that the Consent agreement entered into by the parties before this Court dated the 21st day of November 2013 be maintained.

Competency of the Appeal

The Respondent disputes the competence of this Appeal on the grounds that the Appellant did not seek leave of Court before filing the same. I will now proceed to handle that issue. He relied on the authority of **Dr. Sheikh Ahmed Mohamed Kisuule vs. Green Land Bank (in liquidation)** Supreme Court Civil Appeal N0. 11 of 2010.

He further submitted that the Trial Court's decision was an Order/ Ruling and not a Judgment and therefore, the Order could not be the final decision because the Respondent's application was that of custody and maintenance of the minors i.e. Sulaiman Yusuf aged 1 year and Hammie Yusuf aged 5 years. In the circumstances, the Trial Court could not have made such a decision leaving out other prayers in the Respondent's Application. He continued that the Trial Magistrate issued an Interim Order to determine paternity of one of the Children i.e. Hammie Yusuf aged because it arose during the preliminary hearing of the main Application.

On the contrary, this Appeal arose from an interim Order/ ruling dated the 03rd day of September 2013 entered His Worship Imalingat Robert (Magistrate Grade 1). It was to the effect that the custody of the child Hammie Yusuf be granted to the mother pending the DNA test and outcome.

The general principle of law is that an appeal is a creature of Statute. (See **AG vs. Shah No. 4 [1971] EA 70**. Under Regulation 33(1), of the Children and Family Court Rules SI 59-2:- *'An Appeal shall be, in a case involving the trial of a child from;*

(c) a family and child Court to the Chief Magistrate Court

(d) a Chief Magistrate Court to High Court’.

Under Regulation 33(2), it is clearly stipulated that, the procedure of appeal to be followed in the Court shall be similar to the procedure followed in the Magistrates’ Court Act and Civil Procedure Rules in civil cases.

Therefore an Appellant has the mandate to show under which law he derives the right to appeal. The Appeal arising from the said decision was not one of right as under Order 44 (1) of the Civil Procedure Rules SI 71-1

According to the Supreme Court decision which was cited to me by Counsel for the Respondent ***Dr. Sheikh Ahmed Mohammed Kisuule vs. Greenland Bank (In Liquidation) (Civil Appeal No.11 of 2010)***, the Learned Justices held that;

“An Appeal under these rules shall not lie from any other order except with leave of the Court making the Order or the Court to which an Appeal would lie if leave were given.”

Indeed, my cursory perusal of Order 44 (1), shows that it lays down Orders from which appeals may be made as of right. Rule 1 (2) of the same Order provides as follows; “that an appeal can only lie from this Order with leave of Court.”

Additionally, in the case of ***Makhangu vs. Kibwana [1995-1998].1 EA 175*** it was emphasized that where leave is required to file an appeal and such leave is not obtained, the appeal filed is incompetent and cannot even be withdrawn as an appeal. The learned Judge went on to state that leave to appeal was not a mere procedural matter but rather an essential step envisaged by Rule 78 of the Kenyan Court of Appeal.

Rule 1(3) of the High Court Rules provides that the Application for leave shall, in the first instance, be made to the Court that made the Order sought to be appealed from. According to the record of appeal, there is no evidence on record that an application for leave to appeal to the High Court was made in the Grade 1 Magistrate Court. I have carefully perused the record of appeal and compared the notes of the Trial Magistrate. I found therein only an affidavit in reply.

I therefore, hold that the Consent agreement of joint custody of the child entered between the Appellant and Respondent before this Honorable Court on the 21st day of November 2013 be maintained. The Child should stay with the Father Mr. Yusuf Amili.

It is worth noting that a Court of law having learnt of an irregularity, has to act and not close its eyes. In the case of ***Bwire Wafula & another vs. John Ndyomugenyi Civil Revision No. 016 Of 2011*** the learned Judge relying on Section 83(c) of the Civil Procedure Act Cap 71 held that:-

“The High Court may call for the record of any case which has been determined under this Act by any Magistrate’s court, and if that court appears to have;

c) acted in the exercise of its jurisdiction illegally or with material irregularity or injustice, the High Court may revise the case and may make such order in it as it thinks fit; ...”

I hold that the Interim Order issued by the Trial Magistrate was issued erroneously and should be cancelled.

This Appeal is incompetent and should be struck out.

I make the following Orders.

1. Appeal is hereby **DISMISSED**.
2. I Order that a trial be held for the final disposition of the main application.
3. Costs are awarded to the Respondent.



Signed:.....

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Hon.
Ibanda Nahamya

J U D G E

06th February 2014

Lady Justice Elizabeth