

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT – 00 – CV – CA – NO. 003 OF 2016

(Arising from FPT – 00 – CV – FCC – 019 of 2016)

**IN THE MATTER OF NDAMUSIMANTA GEORGIA AND MUGISA GEORGE
WILLIAM (CHILDREN)**

AND

**IN THE MATTER OF AN APPLICATION FOR SHELTER, CUSTODY, AND
MAINTENANCE OF THE ABOVE MENTIONED CHILDREN**

BAGUMA GEORGE WILLIAM.....APPELLANT

VERSUS

MBABAZI MARIA GORRETI.....RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE

Judgment

This is an appeal against the decision of His Worship Ngamije Mbale Faishal, Magistrate Grade 1 at Fort Portal delivered on 3/3/2016.

Background

The two parties had a misunderstanding which led to the arrest of the Respondent. Whereof the Appellant evicted the above children and took them to the Respondent’s relative. The Respondent was later released but could not go back to her original residence because the Appellant had abandoned the same and had locked up the place.

The Respondent then instituted a matter by a Complaint on Oath for custody, shelter, and maintenance, of the above children. The lower Court granted custody to the Respondent for 4 years and 9 months and to be looked after in the house which the Appellant resided with his other children. The Court ordered for eviction of the Appellant and his other children from the house within 10 days from the date of judgment.

The Appellant being aggrieved with the above decision lodged the instant appeal whose grounds are;

1. That the decision, judgment and orders given by the learned trial Magistrate Grade1 are null and void in as far as they are a result of procedure entirely unknown by the

law in so far as the learned trial Magistrate Grade 1 proceeded to write and deliver a judgment without hearing any evidence by and from the parties or their witnesses or even allowing Counsel for either party to test the alleged testimony he relied on in reaching his decision.

2. That the learned trial Magistrate Grade 1 erred in law in granting custody of Ndamusimanta Georgia and Mugisa George William to the Respondent.
3. That the learned trial Magistrate Grade 1 erred in law and in fact in ordering that the Respondent exercises custody over the children in the house now occupied by the Appellant and his said three children to vacate their residential house within ten days from the date of judgment or be evicted therefrom.

Counsel Kateeba Cosma appeared for the Appellant and Counsel Musinguzi Bernard for the Respondent. By consent both parties agreed to file written submissions.

It is the duty of the first Appellate Court to appreciate the evidence adduced in the trial court and the power to do so is as wide as that of the trial court. Where the trial court had resorted to perverse application of the principles of evidence or show lack of appreciation of the principles of evidence, the Appellate Court may re-appreciate the evidence and reach its own conclusion. **(See: Pandya versus Republic [1957] EA 336, Kifamunte Henry versus Uganda Criminal Appeal No.10 of 1997 Page 5(Supreme Court).**

Resolution of Grounds

Ground 1: That the decision, judgment and orders given by the learned trial Magistrate Grade 1 are null and void in as far as they are a result of procedure entirely unknown by the law in so far as the learned trial Magistrate Grade 1 proceeded to write and deliver a judgment without hearing any evidence by and from the parties or their witnesses or even allowing Counsel for either party to test the alleged testimony he relied on in reaching his decision.

Counsel for the Appellant submitted that in the instant case there was no opportunity offered for Counsel to cross-examine the witnesses that testified and these witnesses were for the Respondent.

That it is trite law that every party to a suit is entitled to cross-examine the other party's witnesses and in instant case this right was violated.

In the case of **Triloknath Bhandari & Another versus S. R Gautama [1964] 1 E.A 606**, it was held that; denial of the right of the Appellant's Counsel to cross-examine the Respondent on vital issues rendered the trial unsatisfactory. The Court also quoted with approval Halsbury's Laws of England, 3rd Edition Volume 15 Page 443-444 thus,

“Any party is entitled to cross-examine any other party who gives evidence or his witnesses, and no evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination... A witness, once sworn, is liable to be cross-examined, even though he has not given evidence or been asked any question in

chief, unless he has been called by mistake and not examined in consequence of the mistake being discovered.”

Counsel for the Appellant further noted that failure to cross-examine the Respondent’s witnesses was a violation of **Articles 28(1)** and **44(c)** of the Constitution of the Republic of Uganda, 1995 on the right to a fair hearing and natural justice. And that the action of the trial Magistrate tantamounted to usurping the Appellant’s right to legal representation. Thus, the trial was a nullity and occasioned a miscarriage of justice to the Appellant and what was done by the trial Magistrate was a mere mediation and neither were the persons’ who spoke during this matter ever sworn nor cross examined.

Furthermore, that during mediation an agreement is reached and signed by the parties, therefore there was no need for the trial Magistrate to make a judgement but rather an agreement which was not the case in the instant matter.

Counsel for the Respondent on the other hand submitted that there was evidence received in Court through the complaint on oath, the affidavits in support of the complaint, affidavit in reply by the Appellant and the affidavit in rejoinder. That it is only the District probation Officer, the Appellant’s sister and Cousin who gave evidence in Court.

Further, that the Appellant at all times did appear in Court with his Counsel. That during submissions the Appellant replied in person and his Counsel did not raise any objections nor did he apply to cross-examine any of the witnesses. That why would Counsel now bring up this issue on appeal.

Secondly that the procedure in the family Court and in the instant case is that provided for in the Children’s Act which is informal rather than adversarial. That in the instant case Court followed both the formal and informal procedure and the parties and their witnesses were adequately heard. Thus, no party was denied a right to be heard.

In my opinion, it is true that the procedure in the family Court is supposed to be as informal as possible and I believe that is what happened in the instant case.

As regards the issue of cross-examining witnesses, Counsel for the Appellant was present during all the hearings, why did he not apply to cross-examine these witnesses in Court but rather chose to bring this up on appeal. If Counsel for the Appellant wished to cross-examine any of the witnesses that appeared in Court he should have prayed do so during the hearing of the matter.

I therefore find that there was no error committed by the trial Magistrate during the hearing of this matter and no injustice was occasioned to the Appellant. No right to a fearing hearing or natural justice was ever denied to the Appellant.

This ground fails.

Ground 2 and 3:

2. That the learned trial Magistrate Grade 1 erred in law in granting custody of Ndamusimanta Georgia and Mugisa George William to the Respondent.

3. That the learned trial Magistrate Grade 1 erred in law and in fact in ordering that the Respondent exercises custody over the children in the house now occupied by the Appellant and his said three children to vacate their residential house within ten days from the date of judgment or be evicted therefrom.

Counsel for the Appellant noted that the manner in which the matter was handled was not proper. That the trial Magistrate was not alive to the principles governing custody of children as provided in **Section 3** of the Children's (Amendment) Act 2016 and **Rules 1 & 3** of the first schedule of the Children's Act. And only considered the party who had the interim custody, work of the Appellant and his marital status.

Section 3 and the first schedule of the Children Act provide that the welfare principle shall be of paramount consideration when making decisions concerning children. The court shall in particular have regard to the ascertainable wishes and feelings of the child concerned considered in light of his/her age and understanding; the child's physical, emotional and educational needs; the likely effect of any changes in the child's circumstances; the child's age, sex, background and any other circumstances relevant in the matter; any harm that the child has suffered or is at the risk of suffering; and where relevant, the capacity of the child's parents, guardians or others involved in the care of the child in meeting his/her needs.

In the case of **Anne Musisi versus Herbert Musisi [2008] KALR 594** it was held that the principle of welfare of children is paramount and supersedes considerations such as who of the parents has a superior right to the children. The welfare of the children is served better where both parents are involved in the upbringing of the children.

Further, that the trial Magistrate did not put into consideration the wishes of the children, their needs and the capacity of the parents. Thus, the separation of the two children from their parents was a gross interference of their right to family provided in **Article 31(4) and (5)** of the Constitution.

Secondly, that the trial Magistrate grossly misdirected himself when he installed the Respondent and the two children in the family home and ordered the Appellant and his other children to vacate their family home within 10 days. That this decision was unconstitutional since it interfered with the Appellant's and his other children's right to shelter under **Article 26** of the Constitution of the Republic of Uganda, 1995. That the trial Magistrate also had no jurisdiction to adjudge land and house to any of the parties before him in the matter for shelter, custody and maintenance as was held in **Nekesa Edisa versus Wogongoba William & Another, HCT – 04 – CV – CR – 0013 of 2012.**

Counsel for the Appellant prayed that this Court finds that the above order was a nullity and of no legal consequence since the trial Magistrate lacked the jurisdiction to grant land/house to the Respondent in a matter to do with custody, shelter and maintenance. In the circumstances this was an illegality that Court should not pay a blind eye to.

Thirdly, that the Probation and Welfare Officer's Report though she was not cross examined over it clearly stated that the Appellant's residence was unfit for the two children. That why would the trial Magistrate then go ahead and order that the children be brought in an unfit environment yet they were leaving in a better environment and the Appellant could look after them from there.

Counsel for the Appellant accordingly prayed that the decision of the lower Court be set aside and custody of the children be granted to the Appellant and the Respondent be ordered to contribute to the maintenance of the said children until they reach 18 years or complete school whichever come later.

Counsel for the Respondent on the other hand submitted that the trial Magistrate was right in ordering the Respondent and the children back to the house since the Appellant had no legal right to evict the children who had no fault and therefore it was illegal. That, in the circumstances the children are entitled to return to their home with their mother since they were illegally evicted and their home locked out by the Appellant.

Counsel for the Respondent noted that all the evidence that was given in Court was pointing to the fact that the Respondent was the suitable person to look after the children. The Appellant even threatened the children before Court which was noted by the trial Magistrate in his judgment.

Finally, that the best place for the children to be looked after is the home they grew up in and the Respondent is the suitable person to look after the children. The Appellant had left the family home and was residing with his sister as per his affidavit, implying that he has alternative accommodation.

Counsel for the Respondent prayed the terms can be varied after 4 years as per the prayer of the Respondent and she be granted custody and the Appellant contributes to their education and maintenance until the situation is reviewed after 4 years.

In my opinion, I find no fault in what the trial Magistrate did, and the welfare of the children was taken care of. The trial Magistrate was mindful of the fact that the children's needs and in his judgment he did mention that when the children were asked whom they wished to stay with, they expressly stated that their preference was with the Respondent.

In the case of **Samwiri Massa versus 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..."

I also note that the conduct of the Appellant is wanting for someone who can threaten his own children before Court and then has the audacity to ask for their custody. The same Appellant evicted his children from his family home and abandoned the same when the

Respondent was in prison. I am inclined to concur with the submissions of Counsel for the Respondent and I find that the Respondent is the fit person to have custody of the children.

I therefore, uphold the decision of the lower Court and this appeal is dismissed without costs for purposes of harmony.

In the case of **Prince J. D. C Mpuga Rukidi versus Prince Solomon Kioro and Others, Civil Appeal No. 15 of 1994 (S.C)**, it was held that;

“That however, where Court is of the view that owing to the nature of the suit, the promotion of harmony and reconciliation is necessary, it may order each party to bear his/her own costs.”

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

23/03/2017

Further orders:

1. The Appellant is granted visiting rights over the weekends and during holidays if he so wishes and this should be done with prior notice to the Respondent.

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OYUKO. ANTHONY OJOK

JUDGE

23/03/2017

Judgment read and delivered in open Court in the presence of;

1. Counsel Cosma Kateeba for the Appellant.
2. Counsel Musinguzi Bernard for the Respondent.

3. James – Court Clerk.
4. The Respondent.

In the absence of the Appellant.

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OYUKO. ANTHONY OJOK

JUDGE

23/03/2017