THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

HCT-00-FD-CA-0003-2008

(Arising from Civil Appeal No. 0005 of 2008 of the Chief Magistrates Court of Buganda Road before Her Worship: Margaret Tibulya, Chief Magistrate)

KAMUKUNE HARRIET **APPELLANT**

VERSUS

RWABUHENDA TIM MUSINGUZI **RESPONDENT**

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

JUDGMENT

1. This is a second appeal. This case was first tried before the Family and Children Court of Nakawa. The respondent had applied for custody of an infant, Ashely Kijumba, the daughter of the appellant and the respondent's brother. The Family and Children Court granted the application. The appellant appealed to the Court of the Chief Magistrate that ordered a re-trial. The re-trial was carried out by another magistrate. The trial court again awarded custody of the infant to the respondent. The appellant appealed again to the chief magistrate's court. That court confirmed the decision of the trial court. The appellant now comes to this court on appeal.
2. The facts of this case so far as can gathered from the record are that the appellant is the mother of Ashley Kijumba, hereinafter referred to as the child. The father is Ibaale James. Ibaale James is the brother of the respondent. The appellant had a relationship with James Ibaale. They lived together in Bugolobi, Kampala. Out of

that relationship, the child was born. They continued to live together until the child was 2 years old.

3. When the child was 2 years old the appellant left for the United Kingdom to go and pursue further studies. They agreed that the father will look after the child in her absence. The father gave up custody in favour of his brother the respondent, without consulting with the appellant. The respondent was at time living in Lesotho, and now lives in Papua New Guinea. The respondent has been looking after the child since then to date. In 2006 he applied for custody of the child. The mother opposed the application. She lost before the Family and Children Court, and no appeal before the chief Magistrate.
4. The family and children court held that the respondent had abandoned the child in 2002 with its father and that special circumstances existed to deny the mother custody of the child. The trial court stated,

> 'Abandoning a child at 2 years or 2 years and 8 months for studies overseas is questionable in view of a mother. There is no age limit for studies, so why was the hurry? I also find it instructive to refer to the case of Wambwa vs Okumu [1970] EA 578 Held: It is generally accepted rule that in the absence of exceptional circumstances, the custody of the girl child of 4 years should be given to the mother. In the instant application, Ashley is 8 years under the custody of the applicant for 6 years.'

5. The trial court further observed that there was nothing no record to show that the infant's physical and moral welfare has deteriorated as a result of living with the applicant apart from the mother. For the reason it was not in the best interests of the child to have shifted from her current environment. Further the trial court stated,

> 'Finally on the question of who is more fit, respondent told court that she will leave London when she wished. It means that she is still there. She did not tell court whether

> she intends to leave the child in Uganda (House she bought). She has not shown any evidence that she will be able to bring this child to Uganda where both maternal and paternal relatives can easily access her. She has no known income in Uganda. Respondent has not stated where she could have the child in case custody granted to her. Apart from stating in the affidavit where she works having failed to recall the address on cross examination, respondent has not attached any work permit or visa to show that she is working. She only obtained a student visa and according to her affidavit she completed studies. Notwithstanding the fact that the respondent is a young woman who may wish to marry and after that her status has to change hence affecting the child's welfare, depending on whether the new husband would like or not the child's presence in his/their home.'

6. The learned Chief Magistrate on appeal affirmed the decision of the trial court. Though she agreed with the appellant's counsel that the appellant had not abandoned the child she found that the trial court had been right to find that special circumstances existed to disentitle the appellant from having custody of the child.
7. The appellant set forth 5 grounds of appeal. Ground no.5 was against the award of costs in the courts below. This is not contested by the respondent whose counsel has indicated that the respondent is not interested in costs. This ground is therefore conceded.
8. The rest of the 4 grounds can be summarized in two.

> Firstly, that the learned Chief Magistrate erred to have held that there were special circumstances disentitling the mother of the child to custody of the child in favour of an uncle to the child.
>
> Secondly, that the learned Chief Magistrate erred in holding that the welfare of the child referred to material welfare and not natural love and affection

9. On the appeal Mr. Rwakafuzi, learned counsel for the appellant submitted that the learned Chief Magistrate agreed that the mother had not abandoned the child but erred to have held that the trial court was right in finding that special circumstances existed to grant custody to the applicant, now respondent. Mr. Kandeebe for the respondent opposed this appeal, and submitted that the trial court had reached the right decision in the circumstances of this case.
10. Firstly, this application was made to the court of first instance under Section 76 of the children Act. This provision deals with maintenance orders for children. It has nothing to do with custody of children. It was clearly the wrong section of the law on which to bring an application for custody.
11. I shall set it out below.

> **'76. Application for child maintenance order.**
> (1) Any person who has custody of a child and who is –
> (a) the mother of the child;
> (b) the father of the child; or
> (c) the guardian of the child,
> may make an application for a maintenance order against the father or mother of the child, as the case may be.
>
> (2) A child in respect of whom a declaration of parentage has been made may also make an application through a next friend for a maintenance order.
>
> (3) An application for a maintenance order may be made—
> (a) during a subsisting marriage;
> (b) during proceedings for divorce, separation or nullity of marriage;
> (c) during separation;
> (d) during proceedings for declaration of parentage;
> (e) After a declaration of parentage has been made.

(4) The application may be made—
(a) at any time during pregnancy;
(b) before the child attains eighteen years of age.

(5) An application for a maintenance order shall be made by complaint on oath to a family and children court having jurisdiction in the place where the applicant resides, and the summons shall be served on—
(a) the father of the child; or
(b) the mother of the child.

(6) The court shall issue a summons to the father or mother of the child to appear before the court on a day named in the summons.

(7) On the appearance of the person summoned or on proof that the summons was duly served on him or her, seven days or more before the hearing, the court shall hear the evidence of the applicant and shall also hear any evidence tendered by or on behalf of the father or mother; and the court may then, having regard to all the circumstances of the case, proceed to make an order against the father or mother for the payment to the applicant of---
(a) a monthly sum of money as may be determined by the court, having regard to the circumstances of the case and to the financial means of the father or mother, for the maintenance of the child;
(b) the funeral expenses of the child if the child has died before the making of the order; and
(c) the costs incurred in obtaining the order.

(8) Maintenance shall include feeding, clothing, education and the general welfare of the child.

(9) If the court thinks fit, it may, in place of a monthly payment, order that a lump sum determined by the court be paid into court and that the sum shall be expended on the maintenance of the child.'

12. The application further cited rule 19 (2) (h) of the Children (Family and Children Court) Rules. Rule 19 sets out the procedure to be followed when applying for certain orders under the Children Act. It does not relate to substantive law.
13. Both the trial court and first appellate court did not at all address themselves as to which provisions of the Children Act or other law authorized this application for custody, and whether it could be sustained in law at all. Both courts chose to essentially discuss the welfare principle without first establishing the basis in law for the applicant to seek custody. This was clearly an error that led them to engage in a totally wrong analysis.
14. Section 73 of the children Act is one of the provisions that deal with custody. I shall set out the relevant provisions of the same.

> **'73 Custody of Children**
> (1) The court may, in the same proceedings for the declaration of parentage, grant custody of the child to an applicant on such conditions as it may deem fit.
> (2) The court may, at any time, revoke the grant of custody to one person and make the grant to another person, institution or organization.
> (3) In reaching its decision under subsections (1) and (2), the court shall primarily consider the welfare of the child.'

15. Section 73 is under the part (ix) of the Children Act entitled 'Parentage of Children'. To invoke Section 73 in seeking custody, such proceedings would have to be proceedings in relation to the parentage of the child and custody arising as an issue in those proceedings. This is not the case in these proceedings. It is not possible to invoke the same in support of an application for custody.

    The other provisions that deal with custody are Section 80 that provides or appointment of a custodian of a child but this arises in maintenance proceedings.
16. In my mind the application had no basis in law. Section 76 of the children Act was not applicable. No maintenance orders were being sought. I have considered the

possibility that the light of the re numbering of sections of the Act as a result of the law revision that resulted in the publication of the Laws of Uganda 2000 Edition may have given rise to this situation and the applicant was referring to the original Section 76 in Statute no.6 of 1998. I have checked out the original statute. The original Section 76 of the same deals with revocation of the declaration of parentage. It would clearly not be right provision to invoke in seeking custody. The application in the trial court is hanging in the air with no provisions of the law to support it. The application ought to have been dismissed. And the appeal below ought to have succeeded.

17. Unfortunately, no relevant provisions of the law were discussed by counsel in their addresses to court here and below nor were they brought into play by the courts below. In light of the foregoing defects I would allow this appeal, quash the order for custody granted to the respondent.

18. The applicant (in trial court and now respondent) was in custody of the child as a result of the father of the child who had custody of the child giving the applicant custody. The father stated that he was unable to look after the child after it was left with him by the mother, (now the appellant), in these proceedings. In her affidavits in opposing the original application the appellant stated that she wants custody of the child, and that she is able to look after the child. It is not contested that the appellant purchased a flat (Block 17 C.4) on mortgage at Bugolobi, a middle class neighbourhood in Kampala. She is the holder of Bachelor of Arts in Degree in banking with Economic and Law of Leicester University. I have no doubt that she is able to look after her daughter, now that she has completed her studies.

19. Article 31 of the Constitution states in part,

> '(4) It is the right and duty of parents to care for and bring up their children.

> (5) Children may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons, except in accordance with the law.'

20. Parents have a fundamental right to care and bring up their children. This is a constitutional right. Of course it is not considered in isolation. The welfare of the child is a consideration to be taken into account, and at times may be the paramount consideration. A parent can only be denied the right to care for and raise her children when it is clear and has been determined by a competent authority, in accordance with law, that it is in the best interests of the child that the child be separated from the parent. No such proceedings, under Part V of the Children Act, or any other provisions of the Children Act or other law, took place in the instant case.
21. Both parents have similar and equal rights with regard to their child. The father of the child has elected not to look after the child. The mother wants to care for and raise her child. She is entitled to do so in law. The mother's right to raise her child cannot be ousted by a wealthy relative on the basis that the relative is well off and competent to look after the child. Or that the child having initially joined the wealthy relative by consent of one of the parents of the child and the blessings of the clan the other parent is to be denied custody because the wealthy relative's children have gotten used to the company of the child. In effect that was the case put forward by the respondent
22. The appellant is, as of constitutional right, entitled to custody of Ashley Kijumba, and I so order.

    This appeal is allowed with costs her and below.

Signed, dated. Delivered at Kampala this 28th day of November 2008.

FMS Egonda-Ntende

Judge