THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(FAMILY DIVISION)
CIVIL APPEAL NO. 22 OF 2017

(Arising from Civil Appeal No. 003 of 2016 holden at the Chief magistrates Court of Mengo at Mengo, arising from Mengo Family &Children Court Misc. Appn. No. 129 of 2016 and arising from Family Cause No. 009 of 2015)

SELAMAWIT HAILE TSCGY
FEVEN HABTE AKOLOM :: APPELLANT

VERSUS

1. **AMANUILE YEMANE**
2. **SENAIT YEMANE:: RESPONDENT**

BEFORE: HON. LADY JUSTICE KETRAH KITARIISIBWA KATUNGUKA

JUDGMENT

1. Introduction

This is an Appeal from the Judgment and Orders of Her Worship Nansambu Esther Rebecca, Chief Magistrate at Mengo, delivered on the 18th day of January 2017 in Civil Appeal No. 003 of 2016 itself having been an appeal against the Judgment and orders of Her Worship Nambatya Irene Magistrate Grade 1 ,in the Family and Children Court of Mengo in Miscellaneous Application No. 129 of 2016; for orders that the Appeal be allowed; the judgment and decree entered for the Respondent against the Appellant by the Chief Magistrates Court of Mengo be set aside; custody of the children be granted to the Appellant/ mother of the children and the 1st Respondent be granted access/ visitation rights to the children at a convenient and reasonable time and place; the Judgment and Orders of Her Worship Nambatya Irene in the Family and Children Court of Mengo in Miscellaneous Application No. 129 of 2016 be validated and enforced; and that the Respondents pay costs of this appeal and in the courts below.

2. Background

The Appellant and the 1st Respondent **are divorced with** two issues namely **Delina Amanuiel Yemane** (now aged **6 years)** and **Natnael Amanuiel Yemane** (now aged **2 years).** On **10/09/15;** while the Appellant was out of the country, the 1st Respondent and his sister (the 2nd Respondent) were granted custody of the two children vide **Family Cause No. 9 of 2015.** Upon the Appellant's return she applied for revocation of the custody order and for custody of the children on **26/03/16** vide Miscellaneous Application No. 129 of 2006 which was granted with access and visitation rights to the 1st Respondent. The Respondents appealed against the decision vide **Civil Appeal No. 003 of 2016** in the **Chief Magistrates Court of Kampala at Mengo** which was allowed by the Chief Magistrate, Her Worship Nansambu Esther who restored the custody order in favour of the Respondents.

Being dissatisfied with the said judgment, the Appellant filed this appeal.

3. Grounds of the Appeal

i) The Learned Chief Magistrate erred in law by failing to subject all the evidence on record to a thorough scrutiny thereby arriving at a wrong conclusion.

ii) The Learned Chief Magistrate erred in law in holding that the Appellant is not domiciled in Uganda and thus cannot take care of the children based on hypothetical presumptions, speculations and conjecture which the trial court could not have believed to be true when there was abundant evidence to the contrary.

iii) The Learned Chief Magistrate erred in law in making findings that the Appellant is not financially capable of providing for the children based on speculations rather than the evidence on record.

iv) The Learned Chief Magistrate erred in law in making findings that the Appellant is of unpredictable character based on speculations rather than the evidence on record.

4. Representation

The Appellant is represented by Counsel Okong Innocent from Kob Advocates & Solicitors while the Respondents are represented by Counsel Muchake Musa of Muchake& Byereete Advocates. Both filed written submissions.

5. Resolution

I shall address each of the grounds as listed and on the order followed by counsel.

5.1. Ground 1

The Learned Chief Magistrate erred in law by failing to subject all the evidence on record to thorough scrutiny, thereby arriving at a wrong conclusion.

a) The law on the powers of a second appellate court to re-evaluate evidence has been handled and resolved in **Pandya vs. R [1952] EA 336, Ruwala vs. R 1957 EA 570, Moses Bogere vs. Uganda Cr. App. No.1/1997(SC), Kifamunte Henry vs. Uganda, Cr. App. No.10/97, Baguma Fred vs. Uganda Cr. Case No.7 of 2004** and **Father Nesbensio Begumisa and 3 Others vs. Eris Tibegaga, SCCA 17/2002**; and recently in the case of **Nangobi v Sophatia (CIVIL APPEAL NO.0097 OF 2011) [2014] UGCA 7 (25 February 2014)**

b) The 1st appellate court's failure to properly re-evaluate evidence on the first appeal is an error justifying the second appellate court to re-evaluate the evidence and reach its own decision.

c) It is only where the 1st appellate court has failed to re-evaluate evidence that it becomes incumbent on this court as a second appellate court to evaluate the evidence. (Also see the case of **Ndimwibo &3**

others vs. Ampaire Civil Appeal No. 65 of 2011 cited by counsel for the Appellant).

d) The issue now is; ***whether the first Appellate court failed to properly reevaluate evidence warranting this court being the second appellate court to evaluate evidence and arrive at its own conclusion.***

e) Evidence is evaluated by outlining the known/ given facts of a case, extracting issues therefrom and resolving such issues in relation, firstly, to the given facts and evidence on the file, and secondly to the position of the law. Thereafter, a clear conclusion must be drawn regarding each issue.

f) The Learned Justices of the Supreme Court in the case of **Kifamunte Henry vs. Uganda (Criminal Appeal No. 10 of 1997) [198] UGSC 20 (15 May 1998);** noted that an appellate court has a duty to review the evidence of the case and to reconsider materials and make up its own mind: *disregarding the judgment appealed from but carefully weighing and considering it*, (*emphasis mine*).

g) Appeal is hinged on error and failure to re-evaluate evidence is an error which would form a ground for appeal. (See the cases of **Muluta Joseph vs. Silvano Katama Supreme Court Civil Appeal No. 11 of 1999,** and **Bogere Moses vs. Uganda, Supreme Court Criminal Case No. 1 of 1997**).

h) It was submitted for the appellant that if the learned chief Magistrate had subjected the evidence to a thorough scrutiny she would have found that the appellant mother of the children resident of Bakuli in Rubaga Division was gainfully employed and so eligible to have custody of the children who are minors. To support this, he cited the case of **Samwiri Massa vs. Rose Acen [1978] HCB 297;** and that conversely the Respondent is a truck driver who is always away and cannot effectively

look after the children yet the second respondent did not express any commitment to look after the children.

i) For the Respondent it was argued that the Custody order was wrongly revoked by the trial court and for this he relied on **Section 73(2) of the Children Act, Cap.59** and further argued that the Appellant had not shown justifiable cause.

With all due respect counsel for the Respondent did not address the ground of appeal but instead went into technicalities which had been put to rest where the 1st appellate court had rightly considered and agreed with the trial court under section 3 of the Children Act, the 1st schedule thereof and **Article 126(2) of the Constitution of the Republic of Uganda**.

j) I have considered the submissions of both counsel for the two parties and studied the judgment and the evidence on record. I have specifically noted that the role of the appellant as a mother, her place of abode, the ages of the children, the occupation of the 1st respondent and the alternative care for the children in the absence of both parents and finally the report of the Probation and Welfare Officer are all glaringly missing from the analysis of the evidence. I also take note that Her Worship Nansambu Esther Rebecca, Chief Magistrate upheld most of the decisions of the trial court except on the issues of **domicile, financial stability and best interest.** (See: Page 3 Paragraph 6 from the top of the Judgment)

k) I am of the view that if the evidence on record had been properly re-evaluated, a different decision would have been reached by the first appellate Court.

l) The first ground therefore succeeds. I now proceed to re-evaluate the evidence on record.

I shall address my mind to the 3 issues which led Her Worship to reach the decision she did.

5.2. Ground 2

The Learned Chief Magistrate erred in law in holding that the Appellant is not domiciled in Uganda and thus cannot take care of the children based on hypothetical presumptions, speculations and conjecture which the trial court could not have believed to be true when there was abundant evidence to the contrary.

a) It was submitted for the Respondent and the appellate court found that the Appellant could not manage to look after the children in Uganda because she is a British citizen whose domicile is in the United Kingdom and that she has not shown any intention to stay in Uganda permanently yet the custody order requires her never to take the children out of the country. It was argued that the Appellant got her domicile in Uganda through her marriage and lost it when she divorced, that the Respondent on the other hand has a permanent place of abode in Bugolobi, Kampala, Uganda and since the children depend on the Respondent as their father, they too have a domicile of dependence in Uganda and as such ought to remain in his custody. For this, Counsel for the Respondent relied on the case of **Joy Kiggundu vs. Horace Awori, Divorce Cause No.8 of 1998**, where it was held that by law a dependant has the domicile of the person on whom he /she depends.

b) **Resolution of Ground 2:**

Domicile has been defined as *'the country that a person treats as their permanent home, or lives in and has substantial connection with.'* **(Cambridge Advanced Learners Dictionary).** It is not a mere question of citizenship or current residence; but rather, one's fixed and permanent place of abode with an intention not to leave. *(See:* ***Robinah Kagaya***

Kiyingi vs. Dr. Aggrey Kiyingi High Court Civil Appeal No. 41 of 2004).

c) The Appellant before marriage, already as an Eritrean citizen, had chosen to be domiciled in Uganda. While there is evidence that the Appellant has a travel document issued by The United Kingdom of Great Britain on 9/4/2013 with an expiry date of 9/4/2023 there is no evidence that the Appellant is domiciled in the United Kingdom or that she has British nationality. In fact the travel document indicates that the Appellant's nationality is Eritrean.

d) The Appellant states that she has secured a job in Kampala and is willing to stay with and raise her children. This intention to permanently reside in Kampala confirms domicile by choice. (See the Case of ***Robinah Kiyingi vs. Dr. Aggrey Kiyingi***, *supra*).

e) The attached documents include receipts for rent issued by one Kiyemba Eriasi and a sworn affidavit showing that the Appellant currently resides at Bakuli in Lubaga Division, Kampala; there is also a letter from Ericom Import & Export Co. Uganda Ltd confirming the Appellant's appointment as an Office Administrator in the company.

f) The Learned Magistrate therefore erred when she based the evaluation of domicile squarely on the Appellant's citizenship which itself is not based on evidence, and ignored the rest of the evidence on the file that might have informed Court of the Appellant's domicile by choice.

Ground 2 therefore succeeds.

5.3. **Ground 3:**

The Learned Chief Magistrate erred in law in finding that the Appellant is not financially capable of providing for the children based on speculations rather than the evidence on record.

a) It was submitted for the Appellant that; much as the Respondent is gainfully employed, the Appellant also has a job and that no evidence was led to show that she was not financially capable of taking care of the children. The Respondent contended that the evidence of the Appellant having a job was smuggled in by attaching it to her affidavit in rejoinder and that it did not even indicate how much she earns and that the said letter should not be considered because it was not signed.

Resolution of Ground 3:

b) On Page 4, under paragraph 2, the Learned Chief Magistrate states that the father of the children, being gainfully employed can maintain the children adequately. The Learned Chief Magistrate did not make any statements regarding the Appellant's financial status or draw any comparison thereto.

c) For any evaluation based on comparison, both sides of the coin must be thoroughly evaluated to arrive at a decision that one is better than the other. If financial capability was going to be a basis for the decision as to whether custody should be given to either of the parents, the capabilities of both should have been evaluated. I have perused the judgment but I do not see any finding by the Learned Chief Magistrate to the effect that the Appellant is not financially capable of providing for the children.

d) The above notwithstanding, Courts have held that financial capability is not the key issue in custody matters. Parents hold the primary right to

custody of their children; and if the mother is both willing and able to look after the child, she should not be deprived of this right based on her financial status. (*See the case of* ***Rwabuhemba Tim Musinguzi vs. Harriet Kamakume (Civil Application No. 142 of 2009) [2009] UGCA 34)*.**

e) In my opinion the welfare principle governing decisions concerning children would demand that financially capable parents must cater for the needs of their children irrespective of where the children are, and depending on the circumstances of each case. Indeed in all matters relating to children, welfare is the paramount principle. (See**: In the matter of Deborah Joyce Alitubeera (Civil Appeal No. 70 of 2011) [2012] UGCA 4**). All other considerations fall back to the position of mere guidelines compared to what will ultimately preserve and uphold the children's welfare.

f) The Learned Magistrate therefore erred in ranking financial capability as a principal element in her decision, because the Respondent, who has been providing financial support, would not be barred from doing so even if the children were not in his custody.

Ground 3 therefore succeeds.

5.4. <u>Ground 4:</u>

The Learned Chief Magistrate erred in law in making findings that the Appellant is of unpredictable character based on speculations rather than on the evidence on record.

a) On page 3 (paragraph 7) of the Judgment by the Learned Chief Magistrate, she states;

From the time the parties have appeared in court, the erratic and unpredictable character leaves a lot wanting and the fact that children

are at an impressionable age, they should not constantly witness such outburst."

b) It was submitted for the Appellant that the character of the Appellant was never an issue both at the trial court and on first appeal.

Resolution of Ground 4:

c) I have carefully studied the record of proceedings and I have not been able to see where there was reference to the Appellant's outbursts and where such evidence was analysed. The character of the Respondent, though pleaded was never supported by evidence and no analysis was made.

d) The scope of consideration of an appellate court does not wander so far out as to permit or consider fresh evidence, except in very extraordinary circumstances; for instance where the evidence to be adduced was not available at the trial, but the same is credible and relevant.

e) The evidence of the Appellant's conduct in court was not part of the evidence the Learned chief Magistrate ought to have considered; In the case of **Non Performing Assets Recovery Trust vs. SSR Nkabula & Sons LTD CA No. 34 of 2005**, it was held, among other things, that the appellate court must make allowance for the fact that it did not have the advantage of the trial judge of hearing and seeing the witness testify. On a case touching on credibility of a witness, the impression made by the trial judge should be respected by the appellate court unless there are circumstances to justify departure. The Trial Magistrate did not address issues of temperament. All the 1st Appellate court was called to do was to evaluate **evidence** (*emphasis supplied*) and arrive at its own conclusion.

f) In this case, commenting and deriving her basis for overturning the judgment on account of temperament which was not part of the evidence, amounts to error on the part of the learned Chief Magistrate.

Ground 4 therefore succeeds.

6. In conclusion, the Appeal succeeds.

It is ordered that;

i) The appeal be allowed;

ii) The Judgment and Decree entered for the Respondent against the Appellant by the Learned Chief Magistrate in Civil Appeal No. 003 of 2016 be set aside;

iii) The Judgment and Orders of Her Worship Nambatya Irene in the Family and Children Court of Mengo in Miscellaneous Application No. 129 of 2016 be validated and restored;

iv) Custody of the children **Delina Amanuiel Yemane** now aged (**6 years)** and **Natnael Amanuiel Yemane** (now aged **2 years)** reverts to the Appellant Selamawit Haile Tscgy Feven Habte Akolom;

v) The Respondent shall together with the Appellant provide for the needs of the children;

vi) Each party shall bear their own costs.

Ketrah Kitariisibwa Katunguka

Judge

31/5/2018