



**AOG v SAJ & another (Civil Appeal 188 of 2009)  
[2011] KECA 398 (KLR) (10 June 2011) (Judgment)**

*A.O.G. v S.A.J. & another [2011] eKLR*

Neutral citation: [2011] KECA 398 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 188 OF 2009  
EO O'KUBASU, PN WAKI & DKS.AGANYANYA, JJA**

**JUNE 10, 2011**

**BETWEEN**

**AOG ..... APPELLANT**

**AND**

**SAJ ..... 1<sup>ST</sup> RESPONDENT**

**HONOURABLE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

*(An Appeal from the judgment and order of the High Court of Kenya at Nairobi (Rawal, J.) Delivered on 17th March, 2009 and dated 18th March, 2009 in H.C.MISC. CIVIL APPL. NO. 15 OF 2009)*

**Whether the High Court could issue an order enforcing a judgment of a foreign court directing a child to be taken to that court's jurisdiction where there was a pending case concerning the child's custody in a Kenyan court**

*The appellant and the 1st respondent got married in Nairobi, Kenya then relocated to the United Kingdom where they got a child. Due to marital problems the appellant returned to Kenya with the child and filed a suit seeking custody of the child. The 1st respondent moved High Court of Justice Family Division in England and obtained inter-alia, orders that the child be returned under its jurisdiction. The High Court of Kenya held that the English Court was best suited to determine the custody and welfare of the child and ordered that the child should be returned to the UK. The instant court held that where there were no clear rules on how a person who alleged that the rights and welfare of a child had been or was likely to be contravened such a person had an avenue of approaching the High Court in any form of procedure of which the High Court could exercise its powers. The instant court noted that the High Court ignored the existence and pendency of previous cases between the same parties in respect of the child wherein an order not to remove the child from the court's jurisdiction had been issued. The court held that there was no basis to have disregarded the existing valid orders of the Kenyan court and deferred to orders of a foreign court.*



Reported by Kakai Toili

**Jurisdiction** – *jurisdiction of the High Court – jurisdiction in the enforcement of foreign judgments - whether the High Court could issue an order enforcing a judgment of a foreign court directing a child to be taken to that court’s jurisdiction where there was a pending case concerning the child’s custody in a Kenyan court.*

**Civil Practice and Procedure** – *pleadings – pleadings in children matters – where there were claims of contravention or likely contravention of the rights and welfare of a child - what avenue could a party in such a situation use to approach a court where there were no clear rules - Children’s Act, 2001, section 22(1).*

**Constitutional Law** – *application of the Constitution – retrospective application - whether the Constitution of Kenya, 2010 could be applied retrospectively.*

### **Brief facts**

The appellant was a Kenyan citizen while the 1<sup>st</sup> respondent was a citizen of the United Kingdom (UK). They got married in Nairobi then relocated to the UK where they got a child. According to the appellant, due to marital problems she returned to Kenya with the child. While in Kenya the appellant brought a suit against the 1<sup>st</sup> respondent before the Children’s Court in Nairobi seeking custody of the child. She also sought for a permanent injunction restraining the 1<sup>st</sup> respondent from removing the child from the jurisdiction of the court. The Appellant concurrently filed a petition for divorce in the High Court citing various grounds of cruelty.

During the pendency of the two cases, the 1<sup>st</sup> respondent brought an *ex-parte* application in the Children’s Court in Kiambu seeking custody of the child. The court granted him the orders pending inter-parties hearing. However, when he attempted to use the *ex-parte* order, he was restrained by an order from the Children’s Court in Nairobi from taking the child out of the jurisdiction of the court.

Before the 1<sup>st</sup> respondent withdrew the Kiambu case and despite the pendency of the children’s case at Nairobi and the divorce case in the High Court, the 1<sup>st</sup> respondent went before the High Court of Justice Family Division in England and obtained *inter-alia*, orders that the child be returned under the jurisdiction of the English Court. On the strength of that order the 1<sup>st</sup> respondent filed an application in the High Court of Kenya seeking enforcement of the orders on the grounds that the child had been abducted from his habitual place of residence. The court held that the English Court was best suited to determine the custody and welfare of the child and further ordered that the child should be returned to the UK. It was upon that decision that the appellant filed the instant appeal before the Court of Appeal.

### **Issues**

- i. Whether the High Court could issue an order enforcing a judgment of a foreign court directing a child to be taken to that court’s jurisdiction where there was a pending case concerning the child’s custody in a Kenyan court
- ii. What avenue could a party alleging that the rights and welfare of a child had been or was likely to be contravened use to approach a court where there were no clear rules?
- iii. Whether the Constitution of Kenya, 2010 could be applied retrospectively.

### **Held**

1. Where there were no clear rules on how a person who alleged that the rights and welfare of a child had been or was likely to be contravened in terms of section 22(1) of the Children Act, 2001, such a person had an avenue of approaching the High Court in any form of procedure of which the High Court could exercise its powers.
2. The Constitution came into effect in August, 2010 long after the petition was filed and it had no retrospective application. That was not to say that Kenya had not considered the provisions of international instruments and customary international law even under the repealed Constitution. Both international customary law and treaty law could be applied where there was no conflict with existing state law or for purposes of removing ambiguity or uncertainty in the Kenyan laws.



3. The relevant Act in the matter was the Children Act, 2001. It had given effect to the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child which Conventions had been ratified by Kenya. The written law on children was therefore codified in that Act and was for application under the Judicature Act, unless it did not accord with the provisions of the Constitution. It said nothing about the Hague Convention.
4. It was incumbent on the High Court in the course of exercising its discretion to have considered the best interests of the child which was a duty imposed on the court under section 4(3) of the Children's Act, 2001, but the court made no attempt to do so.
5. The High Court ignored the existence and pendency of previous cases between the same parties in respect of the child which were brought to its attention, particularly the Children's Court case in Nairobi which was pending before a competent court wherein an order not to remove the child from the court's jurisdiction had been issued.
6. Section 6 of the Civil Procedure Act (cap 21) provided that no court had to proceed with the trial of any suit or proceeding in which the matter in issue was also directly and substantially in issue in a previously instituted suit or proceeding between the same parties. Therefore, the subsequent suits which were substantially similar ought to have been stayed until the hearing and determination of the earlier suit. The Children's Court, like all other courts, was bound by the provisions of the section in exercising of its jurisdiction under the Act. As such it was as competent as any other court to have issued orders in respect of the child, the UK Court's orders notwithstanding.
7. The Foreign Judgments (Reciprocal Enforcement) Act (cap 43) did not apply in the matter. There was no basis therefore to have disregarded the existing valid orders of the Kenyan Court and deferred to orders of a foreign court.

*Appeal allowed; order of the High Court quashed; pending case before the Children's Court was set for hearing.*

#### **Citations**

##### ***East Africa***

1. *Rono v Rono & another* [2005] 1 KLR 538

#### **Statutes**

##### ***East Africa***

2. Children Act, 2001 (Act No 8 of 2001) sections 4(3); 5; 9;13(1); 22(3); 29; 76
3. Civil Procedure Act (cap 21) section 6
4. Constitution of Kenya article 2(5)(6)
5. Domicil Act (cap 37) section 8(3)
6. Foreign Judgment (Reciprocal Enforcement) Act (cap 43) section 3(3)(e)
7. Judicature Act (cap 9) section 3

#### **International Instruments & Conventions**

1. African Charter on the Rights and Welfare of the Child (ACRWC), 1990
2. Convention on the Civil Aspects of International Child Abduction, 1980
3. United Nations Convention on the Rights of the Child (UNCRC), 1989

## **JUDGMENT**

1. The appeal before us raises fundamental issues of law on the rights and welfare of the child, and more specifically the efficacy of the [Children Act 2001](#) and the applicability of international conventions, particularly the [United Nations Convention on the Rights of Children](#), [African Charter on the Rights](#)



and Welfare of the Child (ACRW) and the Civil Aspects of International Child Abduction, more popularly known as “the Hague Convention, 1980”.

2. The appellant before us is AOG (A1) whose advocates on record, are M/S Archer & Wilcock Advocates who took over from the advocates on record in the superior court M/S Kounah & Company Advocates.
3. The first respondent is SAJ (A2) who was represented before us, as he was in the superior court, by M/S J Harrison Kinyanjui & Co Advocates.
4. The Attorney General is the 2<sup>nd</sup> respondent representing the Republic and Government of Kenya and he appeared before us through Mr CN Menge Principal Litigation Counsel.
5. The mother of A1, ZOG was enjoined in the superior court in collateral proceedings in the main dispute between the parties and appeared as an affected party and therefore, the 3<sup>rd</sup> respondent before us represented by Mrs W Wambugu, Advocate.
6. It is common ground that A1 and A2 are first cousins and profess the Sunni Muslim religion. A1 is a Kenya citizen and her parents reside in Nairobi, while A2's parents reside in Bolton, Lancashire where he was born and is therefore a citizen of the United Kingdom (UK). On the April 26, 2003, the two were married under Muslim law in Bilal Mosque in Nairobi and thereafter moved to the United Kingdom where they resided with A2's parents in Bolton.
7. It is also common ground that on May 5, 2005, the two were blessed with the birth of their son ZAJ . The following year A1, with A2's knowledge twice visited her parents in Nairobi with the child and on each occasion returned to England.
8. On November 30, 2007, A1 left Bolton with the child who was aged about 2 ^ years and came to Kenya. The circumstances surrounding that trip are hotly contested on both sides as A2 asserts that A1 suddenly left the matrimonial home with the child without his knowledge or consent, while A1 swears that A2 knew about the travel arrangements and indeed helped in packing the luggage and escorted them to the airport. Between February and April, 2008, A2 came to Kenya and stayed at A1's parents' home in Riverside, Nairobi. He was unsuccessful in persuading A1 to return to England with the child or at all as she made it clear to him that she had no intention of returning. She said their marriage was irretrievably broken down citing among other numerous complaints incidents of A2's brutality against her, and neglect to maintain her and the child of the marriage, thus causing her economic and emotional hardship. A2 denied all those allegations. He returned to England when it became apparent that their parents could not reconcile them. A1 for her part obtained permanent employment at managerial level in a private Kenyan company in May, 2008 and enrolled the child, ZAJ, in an up-market day care school in Westlands. She also obtained a dependant's pass for him from Kenyan authorities since the child is a UK citizen and has a UK passport.
9. On July 9, 2008, A1 moved to the Children's Court, in Nairobi and sued A2 in Children Case No 439 of 2008 (the Nairobi case) seeking custody of ZAJ on the ground that the best interests of the child lay with the mother at that stage of his development. She also sought a permanent injunction to restrain A2 from taking custody of the child or removing him from the jurisdiction of the court. Thereafter she moved to the Family Division of the High Court on October 8, 2008 and filed a divorce petition No 127 of 2008 citing several grounds of cruelty.
10. Those two cases were pending hearing and determination when A2 instructed a firm of advocates in Nairobi M/S JM Waiganjo & Co; who filed proceedings in Kiambu Children's Court Case No 34 of 2008 (the Kiambu case) on July 12, 2008, seeking custody of the child on the basis that A1 was a habitual deserter of the matrimonial home and had gone to the United Kingdom leaving the



custody, care and control of the child with A2 in Kenya, but A1 was threatening to take the child. Those pleadings were obviously erroneous as was the affidavit in support thereof. In that affidavit, A2 swore on November 1, 2008, *inter alia*, that he was ordinarily resident in Kiambu, Kenya; that A1 deserted the matrimonial home in Kenya and went to live permanently in UK; that A1 and her relatives were threatening and intending to remove the child from his custody and take him to the UK; that the child was attending school in Kenya and his education would be interrupted; and that by deserting her matrimonial home and child for no reasons whatsoever, A1 had proved to be an unfit mother. There was also a verifying affidavit on the correctness of the averments in the pleadings. On the strength of the affidavit and pleadings, an *ex parte* order was issued by the Kiambu Court on November 12, 2008 stating: -

“2. That the defendant/respondent by herself and or her agents be and are hereby restrained from interfering with the plaintiff/applicant custody, care and control of the issue herein pending inter-parties hearing of this application and or suit and or until further orders as the court may direct.”

11. A2 attempted to use the *ex parte* order to take custody of the child but he was stopped in his tracks by an order issued by the Senior Resident Magistrate in the Nairobi case on November 25, 2008, restraining him from removing the child from the jurisdiction of the court. The Kiambu Court was also informed about the false information used to obtain the order and it issued a warrant of arrest for A2 to appear in court to explain why he perjured himself. It would appear that the warrant was not executed and A2 filed a notice of withdrawal of the Kiambu case on March 3, 2009, through M/s Harrison Kinyanjui & Company. The new advocates chided M/s JM Waiganjo & Co for being negligent and misrepresenting A2's case to the Kiambu Court but M/s Waiganjo & Co insisted that the instructions they executed came from A2.
12. Even before the withdrawal of the Kiambu case, and despite the pendency of the Nairobi case and divorce cause No 127 of 2008, A2 went before the Family Division of the High Court of Justice in England on January 15, 2009 in Case No FD08PO2541 (the UK case) and obtained the following orders: -

- “1. The child ZASAJ be a ward of this court during his minority or until further order of this court.
2. The defendant mother AOG, shall cause the return of the child forthwith to England and Wales and following his return shall not remove him from the jurisdiction without the permission of this court.
3. Liberty to the defendant to apply to vary or discharge paragraph 1 and 2 above on 48 hours notice to the plaintiff's solicitors.
4. Permission to serve this order by facsimile transmission.
5. Permission to serve the orders herein, the originating summons and affidavits out of the jurisdiction.
6. A penal notice be attached to paragraph 2 of this order.
7. Costs reserved.”

The orders were served on A1 but it is not clear whether she took any action thereafter to challenge them.



13. On the strength of those orders A2 approached the High Court on March 4, 2009 and filed a “petition” in Miscellaneous Civil application No 15 of 2009. The main thrust of the petition was to seek return of ZAJ to the UK on the basis that he had been abducted from his habitual place of residence. But the petition also sought to enforce the ward ship order issued by the UK High Court, and it invoked several provisions of the law, including:

“(sections 4(1), (2), (3); 6(1), & (3); 10(1), 5; 11; 13(1); 22; 76, 81, 87(1), 88, 114(F) & (G), & 115 of the Children’s Act, (Act No 8 of 2001); section 63 (c) & (e) of the Civil Procedure Act, & order xxxix, rule 2, 2a(1), (2) of the Civil Procedure Rules, & the inherent power of the court)”

It sought seven orders and declarations as follows: -

1. This petition be certified as extremely urgent and be initially heard *ex parte* and expeditiously on account of the danger of the 1st respondent fleeing the present known address above where the minor ZAJ is being unlawfully retained, on the demonstrated urgency, and as by law stipulated.
2. The male minor be forthwith returned to the High Court of Justice, Family Division, England as a ward of the said honourable court, and in any event, not later than within 3 days of the making of this order.
3. The 2<sup>nd</sup> respondent oversees the enforcement of the order number 2 herein above in liaising with the United Kingdom’s central authority to the intent that the minor is placed under the wardship of the High Court of justice, Family Division, England and for the 2<sup>nd</sup> respondent to produce before this court a certificate of compliance.
4. There be a stay of further proceedings and of execution of any order issued or made in Nairobi Children’s case number 439 of 2008.

Declarations sought:

5. A declaration do issue, that the High Court of Justice, Family Division, England, is vested with exclusive jurisdiction, and constitute the convenient for a, (to the exclusion of any other foreign court), to hear and determine any and all custody and ancillary issues between the petitioner and the 1<sup>st</sup> respondent, relating to the care, custody, possession, rights, and welfare of the male minor born in Bolton, United Kingdom, on May 5, 2005, and known as ZAJ, (ZAJ).
6. A declaration do issue that the habitual residence of the male minor born in Bolton, United Kingdom, on May 5, 2005, and known as ZAJ, prior and up to his wrongful removal from Bolton, United Kingdom in November, 2007 is Bolton, United Kingdom.
7. A declaration do issue, that the removal from Bolton, United Kingdom, in November, 2007 of the male minor known as ZAJ, born on May 5, 2005, in Bolton, United Kingdom, was wrongful and in breach of the petitioner’s custody rights as his biological father and in breach of the minor’s right to parental love and affection from the petitioner.”

Thepetition is still pending in court as it has not been heard.



14. Instead of setting the petition down for hearing, A2 took out interlocutory proceedings on the same day the petition was filed, and sought 12 *ex parte* orders through a notice of motion as follows: -

- “ 1. This motion be certified as urgent, and heard *ex parte* in the first instance, owing to its extreme urgency.
2. Pending the hearing and determination of this motion, an injunction do issue, restraining the 1<sup>st</sup> respondent, by herself, her servants, agents, relatives, or otherwise howsoever, from removing the minor subject of these proceedings, ZAJ, from the location he is presently held by the 1<sup>st</sup> respondent, to wit, Flat No 5 Bock “A”, Taj Park, Riverside, Westlands, Nairobi, until further court orders.
3. These proceedings be determined within the shortest reasonable period, owing to the circumstances arising.
4. The 1<sup>st</sup> respondent, AOG do produce before this honourable court the male minor ZAJ, on the date and at the time appointed for the hearing of this motion, and in default of her compliance with this order, she be forthwith arrested by the Parklands Police Station OCS, pursuant to section 115 of the *Children’s Act*, and thereupon to be brought with expedition before the High Court, Family Division honourable judge dealing with this matter, and dealt with as shall be expedient.
5. For purposes of securing the best interests of the male minor known as ZAJ, and such orders as may be made herein touching on the minor’s travel, the minor’s United Kingdom passport presently in the custody of the 1<sup>st</sup> respondent forthwith delivered and deposited with this honourable court, by the 1<sup>st</sup> respondent, and not later than 24 hours of the service of this order upon her.
6. Pending the hearing and determination of this motion, there be a stay of proceedings and of execution of any and all orders issued in the Nairobi Children’s Case Number 439 of 2008 until further court orders.
7. In protection of the minor’s welfare and identity, leave be granted to the applicant to have these proceedings henceforth cited and listed by the initial of the parties hereto, and the reporting of these proceedings in the press be barred, save with the leave of the court.
8. The male minor known as ZAJ, be forthwith returned to the High Court of Justice, Family Division, England as a ward of the said honourable court, and in any event, not later than 3 days of the making of this order, at the expense and hand of the petitioner, and upon the making of this order, the 1<sup>st</sup> respondent, do forthwith release and cause to be released to the petitioner all such documents as relate to ZAJ, that are in her possession, into the wardship of the High Court of Justice, Family Division, England.
9. The 2<sup>nd</sup> respondent do oversee the enforcement of the order number 8 herein above liaising with the United Kingdom’s Central authority to the intent that the minor ZAJ, is placed under the wardship of the High court of Justice



Family Division, England, and within 7 days of the implementation of the said order, the 2<sup>nd</sup> respondent do file a report confirming compliance.

10. Pending the hearing and determination of the petition, there be a stay of proceedings and of execution of any and all orders issued in the Nairobi Children's Case Number 439 of 2008 (sic).
  11. The petitioner's petition be heard expeditiously, and on priority basis.
  12. Costs of this motion be to the petitioner in any event."
15. The motion was certified urgent and two orders were issued ex parte forthwith: that A1 be restrained from removing the child out of the jurisdiction of the court, and that the child's passport be deposited with the court. A further order was made that the motion be served on A1 and be heard inter partes on March 12, 2009.
16. A1 responded to the motion in a 60 paragraph affidavit with several annexures thereto filed on March 11, 2009 and both parties were given time to file written submissions which they did. They were also briefly heard in oral submissions by the superior court (Rawal J) before it made the following order: -
- " Court - The parties agree that the court is not expected to give freely reasoned judgment at the first instance. I shall endeavor to give a preliminary judgment on March 17, 2009."
17. We are told by both counsel that the court delivered "judgment" on the notice of motion on March 17, 2009 although it is dated March 18, 2009. In passing we may observe that it ought to have been a "ruling" as it arose from interlocutory proceedings. In her "judgment", the learned Judge noted the undisputed facts on the matter. She also made passing observations on existing litigation between the parties: that there was no order for dissolution of their marriage and therefore they were still married; that the Kiambu case had been withdrawn and therefore there was no enforceable order under it; and that the Nairobi case was pending and no order had been made regarding the child. No mention was made about the injunction made by that court on November 25, 2008 restraining Ali from taking ZAJ outside the jurisdiction of that court. Referring to the UK case and the order made thereunder, the learned Judge stated: -
- " Thus, the present notice of motion was filed by the applicant to enforce the said order under section 4(1), (2) and (3); 6(1) and (3); 10(1) and 95); 13(1); 22; 76; 81; 87(1), 114(f) and (g) and 115 of the *Children Act* and under several provisions of the *Civil Procedure Act* and inherent powers of the court.
- The applicant seeks thus the return of the child to the jurisdiction of Family Division of the High Court of England and Wales which court has pronounced the child Z as its ward pending further orders; amongst other prayers."
18. There were thus two issues for determination arising from the learned judge's appreciation of the facts and material on record which she framed thus: -
1. Whether the 1<sup>st</sup> respondent abducted the child from the UK and has unlawfully continued to retain the child in Kenya.
  2. Whether the child should be returned to the wardship of the UK High Court of Justice, Family Division and whether that order is in the best interest of the child."



19. In answering the two issues the learned Judge made findings inter alia that Kenya was not a signatory to and has not ratified the Hague Convention 1980; that the domicile of ZAJ was Ali's domicile which was UK, in terms of section 8 of the Domicil Act (cap 37 Laws of Kenya); that the UK court had the jurisdiction to make orders relating to ZAJ who was a UK citizen; that the removal of ZAJ from UK was wrong as found by the UK Court which order was not challenged by A1; that a non-signatory country under the Hague Convention was also bound to respect orders made by a convention country; that the UK Court had made ZAJ award of the court and there was no similar order from a Kenyan Court; that the UK Court had not determined the custody of ZAJ and it was more justified and best placed to determine that issue as well as the welfare of the child; that section 13 (1) of the Children Act was applicable and provides protection from exploitation and abduction by any person; that ZAJ had not acquired habitual residency in Kenya between November, 2007 when he was brought in and March, 2009 when the application was filed; that although section 3(3)(e) of the Foreign Judgment (Reciprocal Enforcement) Act (cap 43) was not applicable to the case, the application was not about enforcement of a foreign judgment but deference to an order of a competent court of law which deference she gave to the UK court unreservedly; that the High Court in Kenya would be hampered in deciding the issue of welfare of the child since the allegations of A2's criminal cases and conviction and his financial incapacity would have to be proved; and that returning ZAJ to the UK would not cause prejudice to A1 as she would have to accompany the child.
20. In the end the superior court made the following orders on the notice of motion after taking "the liberty (with acquiescence of both counsel)(which is disputed) to contact the relevant british authorities which expressed their willingness to assist the court in due compliance with its orders" -
- “ 1. The minor known as ZAJ, be forthwith returned to the High Court of Justice, Family Division, England as a ward of the said honourable court.
  3. Order number 1 above be effected not later than 3 days from today.
  4. The child ZAJ be accompanied by the 1<sup>st</sup> respondent A O G, and the Applicant shall bear the costs of travel.
  5. The passport of the child ZAJ in the custody of this court be released to a representative of the 2<sup>nd</sup> respondent, the Kenyan Attorney General, jointly with a representative of the British High Commission in Nairobi, Kenya.
  6. An officer of Foreign or Home Office from the United Kingdom Home Office shall receive the child and the 1<sup>st</sup> respondent at the London Airport and produce them before the High Court of Justice, Family Division, England, within 24 hours of their arrival.
  7. The applicant, SAJ, shall provideadequate family living for the 1<sup>st</sup> respondent and the child.
  8. No order as to costs.
  9. Thehonourable court of justice, family division, to hear and determine with utmost urgency theissues of custody of the child.
  10. The order for the return of the child to the High Court of Justice, Family Division, be complied with, within 72 hours of today.”



21. A1 was aggrieved by those findings and the orders made by the superior court. Through her counsel on record she preferred an appeal to this court on August 19, 2009. In the intervening period there was a flurry of miscellaneous applications before the superior court, the Children's Court and before this court, some of which do not appear to have been heard and determined. The bottom line is that the orders of the superior court have not been executed. The memorandum of appeal laid out 17 grounds as follows: -

- “ 1. The learned judge erred in law in enforcing the English Court's judgment and ordering the return of the minor to the United Kingdom which was in direct contravention of the Children's Act, 2007.
2. The learned judge erred in law by granting the orders when she had no jurisdiction to grant the said orders.
3. The learned judge erred in law by granting an order namely the applicant in the superior court should provide adequate living facility to the first respondent in the superior court in the United Kingdom when the said order was not capable of being enforced.
4. The learned judge erred in her duties as judge and abdicated and abrogated her responsibility as such by failing to make a substantial decision relating to the matter at hand.
5. The learned judge erred in law by ordering that the appellant leave with the minor which was in breach of the appellant's constitutional rights and in effect deporting her from her own country.
6. The learned judge erred in law and in fact by misunderstanding and misapprehending the provisions of the Domicil Act, Chapter 37, Laws of Kenya.
7. The learned judge erred in law and in fact by making findings of fact and final orders on affidavit evidence and without the same being subject to a full hearing to test the veracity of the allegations therein and in breach of the rules of natural justice.
8. The learned judge erred in law by making final declaratory orders at an interlocutory stage.
9. The learned judge erred in law by giving “deference” to an English Court and yet Kenya is a sovereign country with an independent judicial system.
10. The learned judge erred in law by failing to protect the sanctity and integrity of the Kenyan Judicial system and Kenya as a sovereign country.
11. The learned judge erred in law and in fact by taking irrelevant facts into account when making her orders and failing to take due account of all the evidence on record thereby coming to the wrong conclusion and in particular with regard to the best interests of the child.
12. The learned judge erred in law and in fact by failing to take into account the fact that the appellant had already filed proceedings in the Children's Court at



Nairobi being Children's Case No 439 of 2008 which suit was pending at the time the application was filed in the superior court.

13. The learned judge erred in law and in fact by failing to take into account that the first respondent (the applicant in the superior court) had initially filed a suit at Kiambu being Chief Magistrates Court, Children's Case No 34 of 2008 which was still pending when the matter was filed in the English Court.
  14. The learned judge erred in law and in fact by making a finding that the United Kingdom Court was better placed to decide on the welfare of the child and thereby abrogating her responsibility as a judge.
  15. The learned judge erred in law in failing to take into account that the suit was commenced irregularly and not pursuant to the provisions of the Children's Act, 2007 and should have dismissed in limine.
  16. The learned judge erred in law by misapprehending the Children's Act, 2007 and thereby coming to the wrong conclusion.
  17. The learned judge erred in law by granting the orders of the "return proceedings" when such a procedure is not within the ambit of the Kenyan law."
22. In urging those grounds, learned counsel for A1, Ms Janmohamed who addressed us at length combined some of the grounds and argued them together. On grounds 1 and 2, Ms Janmohamed contended that the superior court purported to enforce a foreign judgment in this country when there was no basis in law to do so. She referred to the two substantive orders issued in the UK case on wardship and return of ZAJ which were enforced by ordering the return of ZAJ to the UK within 72 hours. The superior court issued that order despite acknowledging that the *Foreign Judgments (Reciprocal Enforcement) Act* was not applicable by dint of section 3(3)(e) of the Act, but went round that provision by stating that the court was merely deferring to a competent court. In Ms Janmohamed's submission, that distinction was without a difference as it amounted to enforcement of the foreign court's order. She further submitted that the only relevant provision in law for international reciprocity was under section 145 of the *Children Act* which is subject to an agreement signed between the two governments with the approval of the National Assembly, but there was no evidence of any agreement between Kenya and the UK in that respect. It was her view that the learned judge misdirected herself in considering the domicile of ZAJ as the overriding factor when section 5 of the *Children Act, 2001* makes provision for "non discrimination" and has no reference to domicile or citizenship. It states: -
- "5. No child shall be subjected to discrimination on the ground of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection."
- In her submission, the Superior Court abdicated its duty to consider the rights and welfare of the child, which is a function conferred under section 22 of the Act, under the pretext of deferring to a foreign court. The issue of wardship and custody of the child were also within the jurisdiction of the Children's Court under part vii and "section 114 orders" of the Act, and there was already a matter pending in court on those matters. In sum, she concluded, there was complete dereliction of duty and contravention of Kenyan Law by the superior court.
23. On ground 3, 5 and 6 Ms Janmohamed, submitted that the superior court made some orders in vain as they were incapable of enforcement and were contrary to the *Constitution of Kenya*, by ordering:



that A2 shall “provide adequate family living” for A1 and ZAJ; that the UK Court shall hear the dispute urgently; and that A1, who is a Kenyan citizen must leave Kenya within 72 hours which was tantamount to deporting her. She further submitted that the superior court ignored section 8(3) of the *Law of Domicil Act* (cap 37) which makes domicil a question of fact not assumption, and failed to appreciate that A1 had chosen Kenya as her independent domicil of choice under that section. Consequently there may well be a change of domicil of the child under section 9 of the Act when the custody issue is determined by the Children’s Court, but there was no appreciation of those provisions of the law.

24. Grounds 4, 7, 8 and 11 relate to the failure by the superior court to hear both parties on the seriously disputed facts and allegations on record and yet making final determination on those issues contrary to the rules of natural justice. The allegations made by A1 against A2’s character and financial incapacity and her contention that she travelled with the child with the knowledge and consent of A2, for example, were not tested in order to determine the best interests of the child. Instead the superior court simply washed off its hands by stating, without any basis, that it was hampered in considering such evidence. Ms Janmohamed submitted that the superior court made the declarations sought in the main “petition” at the interlocutory stage of hearing the notice of motion to the prejudice of the appellant in the petition which was still pending hearing and determination.
25. On grounds 9, 10 and 14, Ms Janmohamed attacked the constant reference in the “Judgment” of the superior court to “deference” to the UK Court and submitted that the Court failed in its duty to protect the sanctity and integrity of Kenyan Courts and the sovereignty of the country. In her view, the superior court considered the UK Court to be superior to Kenyan Courts, thus deserving deference without question, which was not the case. There was no basis for stating that the UK Court was better placed to decide on the welfare of the child.
26. The submissions on grounds 12 and 13 relate to the Nairobi case and the Kiambu case both of which were filed first in time in relation to the UK case and the petition. Ms Janmohamed submitted that the Children’s Court was properly seized of the jurisdiction to hear and determine the issue of custody of ZAJ, but the superior court thought, erroneously, that the UK Court’s order had ousted that jurisdiction. By sending away the child, the superior court was ousting that jurisdiction contrary to the law. Ms Janmohamed referred to the prayers made in the notice of motion for an order of stay of proceedings in the Nairobi case, which prayer the Superior court neither considered nor granted. The Nairobi case was simply ignored. So too the Kiambu case, she submitted, which was still existing to the knowledge of A2 before he went to file the UK case. The notice of withdrawal of that suit was filed on 3rd March, 2009, long after orders had been issued in favour of A2 under the suit and he attempted to execute them. In her submission, the superior court was in error in glossing over the existence of those earlier cases and misconstruing their impact on the matter before it.
27. Finally, Ms Janmohamed attacked the procedure adopted by A2 in filing “return proceedings” when no such procedure existed in Kenya’s jurisdiction. In her view, the relevant procedure was available under the *Children Act* but was not invoked and therefore the motion ought to have been dismissed in limine. At all events, even if it was necessary to invoke the rules under the *Constitution* on account of lack of the rules expected from the Chief Justice under section 23(3) of the *Children Act*, it was necessary to obtain directions which were not sought or given. Furthermore, she concluded, Legal Notice Nos 74 to 77 of 2008 contained rules of procedure before the Children’s Court but they were not invoked. Those arguments were in respect of grounds 15, 16 and 17 of the Memorandum of Appeal.
28. In response to those submissions, learned counsel for A2, Mr Kinyanjui, took the view that this court ought not to consider the whole matter before it as a normal suit, but must appreciate on the outset that it was an international child abduction case which has peculiar aspects. He invited us to find that



under article 2 (5) & (6), of the new Constitution, the general rules of International Law as well as treaties and conventions ratified by Kenya were part of the law of this country and that even before the promulgation of the new Constitution in August, 2010, the courts recognized the competence of other jurisdictions in certain matters. He observed that the Children Act in its preamble adopts the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Indeed section 13 of the Children Act protects the child from trafficking or abduction by any person including parents. There was no impediment, therefore, in calling in aid, in these proceedings, the Hague Convention, 1980 and filing “return proceedings” which is the procedure applicable internationally in such matters. A fortiori, he submitted, there were no rules made by the Chief Justice under section 22(3) of the Children Act which a party may invoke and the Appellant did not raise any objection on the procedure adopted in the superior court. It was an afterthought.

29. Mr Kinyanjui conceded that Kenya was not a party to the Hague Convention and has not ratified it despite pressure being brought to bear on it, upto now. He submitted, however, that Kenyan courts were obligated to apply the spirit and principles enunciated so far under the Hague Convention 1980. There was a wealth of authorities, which he laid before us, to explain the operations of the Hague Convention in countries which are signatory to the Convention, referred to as “Hague countries”. Under those principles, he submitted, expedition and prompt return of the child was paramount; competing claims of custody were irrelevant; the welfare of the child is not the paramount consideration; peculiar jurisdictions of the High Court or the Children Court are circumscribed; other available avenues like seeking the intervention of ministers are not a bar; the law of Domicil is relevant; the country of habitual residence of the child takes precedence, and all that was required was discretion of the court which the superior court properly exercised in this case and gave directions which it considered appropriate in protecting the child.
30. Emphasizing that the child was a UK citizen and was entitled to respect of that nationality as provided for in section 11 of the Children Act and the African Charter, Mr Kinyanjui submitted that A1’s decision to stay on in Kenya under the pretext that she had obtained a permanent job, did not detract from the fact that she had abducted ZAJ who was not Kenyan. As at the time the notice of motion was filed, A1 had not obtained any order for custody of ZAJ and in any event A2 had sought orders for stay of the Nairobi case proceedings. The best court to deal with the welfare and custody of its national was therefore the UK Court, and no criticism should lie against the superior court in ceding that authority and deferring to the UK Court.
31. As for the imagined deportation of A1, Mr Kinyanjui drew our attention to an application made to substitute the mother of A1, 3<sup>rd</sup> respondent, to accompany the child without objections from A1. That ground of appeal was therefore an afterthought.
32. Finally Mr Kinyanjui referred to several decisions emanating from the Canadian jurisdiction to support the submission that the child may be returned without the mother if she has created the psychological situation and relies on that situation to say the child should not be taken away.
33. Responding for the Attorney General, Mr Menge categorically stated that Kenya was not a signatory to the Hague Convention, has not ratified it and did not send any representatives to any of its meetings. As such the provisions of that convention were not applicable to Kenya nor would foreign decisions which are of persuasive value only. Kenya, in his submission, has sufficient laws to cover the rights of all children irrespective of their nationality, including protection against abductions and trafficking. The best interests of the child must always guide the Courts and in his view, the best interests of ZAJ at this stage of his development lay with the mother. He supported the allowing of the appeal.



34. So did learned counsel for the 3<sup>rd</sup> respondent, Mrs Wambugu. In her view the *Children Act* was a complete code on matters of child abduction and if Parliament wanted to import the principles of the Hague Convention in the *Children Act*, it would have done so as it did the African Charter and the UN Convention on the rights of the child. At all events, she submitted, there was no finding by the superior court or the UK Court that the child was abducted; it was also expressly pleaded by A2 that the Hague Convention did not apply to his case; there was a finding by the superior court that the Hague Convention did not apply; there was a further finding that the *Foreign Judgments (reciprocal enforcement) Act* did not apply; and in all those circumstances there would be no basis for issuing orders for return of the child from a country which was not a contracting party to the Hague Convention.
35. Mrs Wambugu noted a catalogue of misdirections made by the superior court including the reference to the domicile of the child which was irrelevant; reference to the marital status of the parties which was irrelevant; reference to proceedings in UK Court when there were valid proceedings before Kenyan Courts; and failure to consider the welfare and best interests of the child when it was necessary to do so.
36. In her closing remarks, Ms Janmohamed submitted that there was no issue of international abduction before the superior court and that Court did not consider it or make findings thereon. The proceedings were for enforcement of a foreign judgment and the superior court merely complied. As for the African Charter and the UN Convention she submitted that the *Children Act* did not import the provisions of those conventions but, as clearly stated in the preamble, merely gave effect to the conventions and enacted specific sections which govern this country's law relating to children.
37. We have anxiously considered this appeal and the submissions of all counsel. We are grateful for their assistance in the matter and for their industry in research. If we do not deal with all the issues raised or cite all the authorities referred to, it will not be out of disrespect for their efforts but out of our satisfaction that the issues we shall consider are sufficient to dispose of the appeal.
38. The starting point is the procedure adopted by A2 in filing the "petition", and the notice of motion thereunder which gave rise to this appeal. The contention by the appellant is that the procedure of "return proceedings" is unknown in Kenya and therefore the motion ought to have been struck out in limine. The appellant, however, and the respondents who supported her, did not point out the rules under the *Children Act*, the *Civil Procedure Act* or other legislation providing for the procedure for seeking return of an abducted child.
39. We have perused, Legal Notices No 74 to 77 published on 20/05/2002 under the *Children Act* and they respectively make provision for rules of procedure under sections 29 (Part III - Parental Responsibility), 112 (Part VIII - Guardianship), 185(1), (Part XIII - Child offenders) and "General Rules and Regulations" which import various provisions of the *Civil Procedure Rules*. The latter provision in the end provides:

“7. Nothing contained in these rules and regulations shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

The inadequacy of Legal Notice No 77/02 which purports to issue "General rules and regulations" is that it does not make any reference to Part II of the Act which sets out elaborate provisions for "Safeguards for the Rights and Welfare of the child". Under that part, the Chief Justice was obligated in section 22(3) to:

“(3) make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it or under this section



including rules with respect to the time within which applications may be brought and reference shall be made to the High Court.”

40. It is common ground that the Chief Justice has not made any specific rules pursuant to that section. How then does a person who, in terms of section 22(1) alleges that the rights and welfare of a child has been, or is being or is likely to be contravened, access the High Court which has the jurisdiction in such matters? In our view, in the absence of any rules, such a person would be entitled to approach the High Court in any form of procedure by which the High Court can exercise its powers. The 1<sup>st</sup> respondent herein invoked a multiplicity of provisions under various parts of the *Children Act*, the *Civil Procedure Act* and the rules thereunder and took out a “petition” for determination of various issues raised therein. The court seized of the petition will consider and determine the substance of that petition in due course. There was also a notice of motion filed thereunder for determination of interlocutory matters. On both counts we do not fault the 1<sup>st</sup> respondent on the procedure adopted and we dismiss the objections made by the appellant in that respect.

41. We must now turn to the substance of the appeal and determine firstly, as we are urged to do by the 1<sup>st</sup> respondent, whether the motion before the superior court and the matter now before us, is an international child abduction case, and if so, whether the Hague Convention 1980 or the spirit and principles thereunder are applicable.

The Hague Convention on the civil aspects of international child abduction was mooted in 1980, through Canadian initiative, by some 30 countries to find an international response to an increase in the number of parentally abducted children taken across borders. It came into effect in 1983 and had 81 members by 2008. The objective was to ensure prompt return of the children to the state of “habitual residence”, and reciprocity for that purpose was established between the signatories to the convention. Elaborate Articles (45 of them) were drawn up to bind the contracting states. Judging from an extensive analysis of court decisions in a paper presented to the Canadian National Judicial Institute in 2004 by the Honourable Justice Kay, of the Court of Appeal, Australia, titled “The Hague Convention - Order or chaos”, it would appear that the implementation of the Conventions between the Hague countries themselves is not without difficulties. There are still interpretational and other issues relating to: cases to which the Convention applies, habitual residence, wrongful removal or retention, one year limitation period, the exceptions to mandatory return, protection of human rights and fundamental freedoms, imposition of conditions in orders for return, amongst others. Nevertheless, the convention is generally accepted to have created some order out of chaos in the Hague Convention countries.

42. But Kenya is not a contracting state and therefore none of the articles of the convention applies to it. This was acknowledged by the 1<sup>st</sup> respondent himself, the superior court so found, and it is common ground in this appeal. The argument is rather that we should apply the spirit of the convention now that the new *Constitution* imports international law and conventions into our jurisprudence. The straight answer to that submission is that the new Constitution came into effect in August, 2010 long after the petition was filed, and it has no retrospective application. That is not to say that this country has not considered the provisions of International Instruments and Customary International Law even under the old *Constitution*. The circumstances under which international law may be applicable was considered in *Rono v Rono & another* CA No 66/02 (UR) where this court stated: -

“Of the two theories on when international law should apply, Kenya subscribes to the Common law view that international law is only part of domestic law where it has been specifically incorporated. In civil law jurisdictions, the adoption theory is that international law is automatically part of domestic law except where it is in conflict with domestic law. However, the current thinking on the common law theory is that both international



customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation. Principle 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms states: -

‘It is within the proper nature of the judicial process and well established functions for national courts to have regard to international obligations which a country undertakes - whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or the common law.’”

43. The *Judicature Act* in section 3 spells out the mode of exercise of jurisdiction of all the Courts in this country. The courts may apply ratified Treaties and International Customary Law where there is no conflict with existing law or for purposes of removing ambiguity or uncertainty in our laws.

The relevant Act in this matter is the *Children Act 2001*. It has given effect to the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, which Conventions have been ratified by Kenya. The written law on children is therefore codified in that Act and is for application under the *Judicature Act* unless it does not accord with the provisions of the *Constitution*. It says nothing about the Hague Convention or the principles there under and it follows therefore that abduction cases, if they arise in the country under section 13(1) of the Act, shall be dealt with on first principles.

44. We reproduced above (paragraph 14) the prayers sought in the notice of motion. Some of those prayers are interlocutory in nature but there is also a prayer for the immediate return of the child which is also one of the main prayers made in the petition. The grant of that prayer at an interlocutory stage would leave nothing for the court considering the petition to hear and determine.

We have also reproduced in paragraph 18 above, the two issues framed by the superior court for determination. We have considered the reasoning and findings made in respect of those issues and we find, with respect, that there was no firm basis for the superior court to proceed in the manner it did.

45. There was no attempt to explore independently whether, as postulated in the first issue, the child was abducted. All that was on record was contested affidavit evidence which was not tested in cross-examination. There was no attempt to explore, as postulated in the second issue, the best interests of the child. The responsibility to answer both issues appears to have been left to the UK Court on the basis that it was best suited to determine the issues as well as the custody and welfare of the child.

In our view, it was incumbent on the superior court, in the course of exercising its discretion, to consider the best interests of the child which is a duty imposed on the court under section 4(3) of the Act, which states: -

- “(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to -
- (a) safeguard and promote the rights and welfare of the child;
  - (b) conserve and promote the welfare of the child;
  - (c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.”



The court made no attempt to do so, and in our view it was in error. We do not know what decision the court would have reached if it explored that issue.

46. More importantly, the superior court ignored the existence and pendency of previous cases between the same parties in respect of the child which were brought to its attention. There was particularly the Nairobi Case (439/08) which was pending before a competent court wherein a valid order had been issued. Section 6 of the *Civil Procedure Act* states as follows: -

“6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanations. - The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such foreign court.”

So that, the child ZAJ was in Kenya under circumstances which were yet to be explored. Like all children, however, he was protected under the laws of Kenya. There was a dispute on his custody and the Appellant had already invoked the jurisdiction of Kenya courts which had made interim orders in respect of the child. In our view, and in compliance with section 6 above, subsequent suits which were substantially similar ought to have been stayed until the hearing and determination of the earlier suit. The Children’s Court, like all other courts, is bound by the provisions of section 4 above in exercise of its jurisdiction under section 76 of the Act. As such it is as competent as any other court to issue orders in respect of the child, the UK court’s orders notwithstanding. The Superior Court held, correctly in our view, that the *Foreign Judgments (Reciprocal Enforcement) Act* did not apply in the matter. There was no basis therefore to disregard existing valid orders of the Kenyan court and defer to orders of a foreign court. We so find.

47. For those reasons we allow this appeal and quash the orders of the superior court made on March 17, 2009 in their entirety. We order that the case pending before the Children’s Court in Nairobi 439/08 shall be set down for hearing and be disposed of expeditiously in accordance with the law. There shall be no order as to costs in the appeal. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> OF JUNE, 2011.**

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**



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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

