REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram; Ibrahim, Wanjala, Njoki, Lenaola & Ouko SCJJ)

PETITION NO. 2 (E003) OF 2022

—BETWEEN—

MUTHEU AGATHA KHIMULU..... APPELLANT

-VERSUS-

RAHEEM MEHDI AZIZ AZAD .....1ST RESPONDENT

THE CABINET SECRETARY,

MINISTRY OF FOREIGN AFFAIRS &

INTERNATIONAL TRADE.....2ND RESPONDENT

CABINET SECRETARY,

MINISTRY OF INTERIOR &

COORDINATION OF NATIONAL GOVERNMENT.....3RD RESPONDENT

THE INSPECTOR GENERAL,

NATIONAL POLICE SERVICE.....4TH RESPONDENT

HON. ATTORNEY GENERAL.....5TH RESPONDENT

(*Being an Appeal from the Judgment of the Court of Appeal at Nairobi* ***(Kiage, Sichale and J.Mohammed, JJ.A.)*** *dated* ***4th June 2021*** *in Civil Appeal No. E445 of 2020*)

Representation:

Mr. Willis Otieno for the Appellant
(*Otieno Ogola & Company Advocates)*

Ms. Rubeena Dar for the 1st Respondent
(Rubeena Dar Advocate)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This appeal raises fundamental legal issues pertaining to parental access of a child, custody of a child, best interest of the child, parental rights after a child has attained the age of eighteen (18), and the application of foreign judgments in our jurisdiction. This case also involves the protracted dispute between the appellant and the 1st respondent over the custody, upbringing, and welfare of their child.

[2] The appeal challenges the decision of the Court of Appeal *(Kiage, Sichale, and J. Mohammed JJ.A.)* delivered on 4th June 2021 which affirmed the decision of the High Court *(Muchelule, J)*. Both courts dismissed the Appellants case for child custody and access.

B. BACKGROUND

[3] The appellant and the 1st respondent got married on 2nd August 2002 under the African Christian Marriage and Divorce Act Cap 151 (repealed) and were blessed with a son, FKA (the child), born on 12th February 2004. The marriage between the appellant and 1st respondent broke down and the appellant petitioned for its dissolution in Milimani Chief Magistrate's Divorce Cause No. 75 of 2008 The marriage was dissolved on 9th October 2008.

[4] Prior to the dissolution, the parties had entered into a Parental Responsibility Agreement (PRA) on 15th May 2008 before the Milimani Children's Court in Misc. Case No. 36 of 2008. The terms of the PRA were that:

a) *Both parents were to have joint legal custody of the child;*
b) *The appellant was to have actual custody of the child, with the 1st respondent having unlimited access rights to the child with notice, and such access not being unreasonably denied;*
c) *The 1st respondent was to secure the schooling needs of the child and be responsible for the child's school fees and all school-related expenses, and the decision as to which school the child would attend was to be agreed upon after mutual consultation;*
d) *The 1st respondent was to provide the child with a medical cover with a reputable medical provider for both in-patient and out-patient, and was to further deposit Kshs.300,000/=being security to cover any medical and emergency and incidental case, and such money was to be in the petitioner's account;*
e) *The 1st respondent was to pay Kshs.115,000/= monthly for maintenance, beginning 1st July 2008;*
f) *The 1st respondent was to cause the transfer of a Flat at Zenith Gardens, Brookside LR No. [particulars withheld] into the appellant's name and complete the payment by the remaining installments of the loan on the said property to Central Bank of Kenya; and*
g) *The parties agreed to abide by the terms of the agreement and act in the best interests of the child.*

[5] In the year 2014, the appellant, who was living with the minor in Kenya, moved to York in the United Kingdom to pursue a Masters degree in Law. The 1st respondent gave the appellant his consent for her to be accompanied by the child

to the United Kingdom. The situation turned murky at this point because the parties turned on one another. It was the appellant's case that the 1st respondent, who comes from an allegedly influential family which is highly revered and respected, used his influence in London and falsely accused her of having intentions to injure the child with the aim of having her arrested.

[6] On the other hand, in his sworn testimony, the 1st respondent deposed that, as a consequence of complaints made to him by the child, he contacted the National Society of Prevention of Cruelty to Children in the United Kingdom and they sent social services to speak to the minor. During all these incidents, the appellant averred that she succumbed to illness causing her to relocate back to Kenya.

[7] What is clear from the record is that the appellant applied for a Child's Arrangement Order, in the United Kingdom, dated 22nd December 2014 for the child to live with her. The 1st respondent cross applied for a Child Arrangement Order that the child would live with him. He also applied for a prohibited steps order to prohibit the appellant from removing the child from the jurisdiction of England and Wales.

[8] On 7th August 2015, the Family Court in United Kingdom High Court of Justice Family Division 2017 EWHC 2048 (Fam) Family Court Cause No. YO14P00779 at York determined that it had jurisdiction to determine these applications. *Heaton QC* made several declarations key among them that: *the minor was habitually resident in England and Wales, the minor was not habitually resident in any other jurisdiction, whilst the child continued to be habitually resident in England and Wales, the English Courts retained jurisdiction to determine any issue in respect of parental responsibility, and any application for the enforcement, clarification or in respect of contact between the child and the mother was to be made to the English Court and in particular HHJ Heaton QC or to the High Court Judge sitting in the Family Court*.

[9] The English Court also recorded that the appellant had on at least one occasion hit her son causing him physical harm; the minor had made allegations that the appellant repeatedly hit him; the appellant had been charged with the criminal offence of child cruelty and a criminal trial was pending; the appellant had failed to attend two hearings in respect of the criminal charges and a warrant had been issued for her arrest.

[10] The record reveals that, meanwhile, the appellant filed Nairobi High Court Misc. Suit No. 124 of 2015 seeking for the PRA to be adopted as an Order of the Court with the High Court (Muigai, J) granting the order on 17th December, 2015. At this point, the 1st respondent had moved from the United Kingdom and was now residing in Tanzania, but the child was still in boarding school in the United Kingdom.

[11] Armed with the Order from the High Court adopting the PRA, the appellant went to the High Court at Dar-es-Salaam in Tanzania in Civil Application No. 494 of 2016 seeking to have the order dated 17th December 2015 enforced under the Reciprocal Enforcement of Foreign Judgments Act (Cap 8, R.E 2002). The appellant obtained an *ex parte* Order on 3rd August 2016 to register the Order for purposes of enforcing the order against the 1st respondent, who was living in Tanzania at the time. The 1st respondent made an application in the High Court of Tanzania being Civil Application No. 516 of 2016 asking the court to set aside this *ex parte* Order.

[12] We note that, at some point during the pendency of the Tanzanian proceedings, the appellant instituted proceedings at the Kenyan High Court.

[13] The High Court of Tanzania meanwhile concluded the case before it and rendered its decision on 22nd July 2017. It held that for a foreign judgment to be

enforced in Tanzania under Section 3(1) of the Reciprocal Enforcement of Foreign Judgments Act (Cap 8) of the Laws of Tanzania as read with Order 2 of the Reciprocal Enforcement of Foreign Judgments (Extension of Part II) Order, G.N. No. 9 of 1936, the country from which the said judgment originated must be a country which is listed in the first column of the schedule of the Order as one of the countries which have an agreement of enforcing their judgments with Tanzania and that Kenya did not have such an agreement with Tanzania. The Court also found that, under Section 2 of the Judgment Extension Act (Cap 7, R.E 2002), decrees from Kenya that can be executed in Tanzania are only those that relate to debts, damages or costs and that the parental responsibility agreement did not fall in either of those categories.

i. Proceedings in the High Court of Kenya

[14] The appellant instituted proceedings at the High Court's Constitutional and Human Rights Division by way of a Constitutional Petition HCCC NO. 1 of 2016. In her cause, the appellant invoked Articles 27, 28, 29, 43, 45, and 53 of the Constitution. The Petition dated 11th April 2016 was also filed pursuant to the Children Act and the Convention on the Rights of the Child (CRC).

[15] We pause to note that the record shows that proceedings in the English Family Court were still ongoing. Judgments made on 11th May 2017 in United Kingdom High Court of Justice Family Division 2017 EWHC 2048 (Fam) Family Court Cause No. FD16P00592 by Mrs. Justice Parker are to the effect that the 1st respondent had made an application for wardship and the appellant made an application seeking adjournment for the hearing. The appellant did not appear and she was unrepresented. Her application for adjournment was refused. The child was maintained as a ward of the Court and the prior orders of Judge Heaton QC affirmed. After the wardship order, the High Court of Justice directed that no important steps in the minor's life, including travel, consent to medical treatment

or education, would be taken without permission being granted by the court until he attained the age of eighteen (18) years. The English Court pointed out that the PRA dated 15th August, 2008 was no longer reflective of the minor's legal or factual position. In addition, the appellant was prohibited from directly contacting the minor without the 1st respondent's consent.

[16] Back in Kenya, the appellant amended her High Court petition on 18th December 2019. The amended petition was supported by an affidavit sworn on 18th December 2019. The appellant sought to join State agencies, the 2nd to 4th respondents, to the suit seeking orders for diplomatic intervention with the United Kingdom to ensure that the child's rights were protected and to enable her to access the minor.

[17] The appellant contended that the 1st respondent had violated the child's rights to compulsory basic education, basic nutrition, shelter, healthcare, protection from abuse and inhuman treatment, parental care and protection as guaranteed by Article 53 of the Constitution. The appellant prayed for the court to make a declaration that the child's social and economic rights had been violated by the 1st respondent. She also prayed for declarations seeking to protect both her rights and that of her child to; have their inherent dignity protected; her right to freedom and security and not to be subjected to torture whether physical or psychological by the 1st respondent as guaranteed in Articles 28 and 29 of the Constitution; and she and the minor had a right to be treated equally before the law and not to be discriminated as guaranteed by Article 27 of the Constitution. She also sought legal and actual custody of the minor and following the numerous violations of rights, she applied for an order that the 1st respondent should no longer have legal custody or unlimited access to the child.

[18] The 1st respondent opposed the petitioner's case through a replying affidavit sworn on 8th September 2016 and a further replying affidavit and an answer to

petition filed on 4th February 2020. The 1st respondent averred that the appellant's petition contained blatant lies, contradictions, fabrications and material non-disclosure aimed at misleading the court. The 1st respondent averred that the appellant was cruel and excessively abusive towards the minor resulting in child cruelty charges being leveled against her in York, United Kingdom. He asserted that the criminal hearing did not proceed and that a warrant of arrest was issued against the appellant. The 1st respondent produced the proceedings and orders issued by the Family Court in the United Kingdom where the court had noted that criminal charges of child cruelty by the appellant had been lodged.

[19] The 1st respondent averred that a court adviser at a family court in the United Kingdom interviewed the child and prepared a report on 20th December 2016 that showed the minor was happy and in a safe environment. The 1st respondent averred that he regularly visited the child and provided for his education and medical needs.

[20] *Muchelule, J. (*as he then was) delivered his judgment on 27th July 2020. In resolving the dispute, the learned judge held that the main issue for determination related to custody, upbringing and welfare of the child under Article 53(2) of the Constitution as read with Sections 4(3) and 4(4) of the Children Act, 2001 (now repealed). In making his findings, the learned judge relied on the proceedings, orders and judgment delivered by the Family Court in the United Kingdom (English court). He held that the appellant had physically and emotionally abused the minor and that the 1st respondent was aware of the said abuse and therefore persuaded the English Court that the appellant was not a fit parent to bring up the minor. The learned judge also found that the appellant had lost the right to actual custody provided for in the parental agreement when she assaulted the child. The learned Judge for those reasons dismissed the petition and made a finding that the 1st respondent had not infringed or violated any of the appellant's fundamental rights and freedoms.

ii. Proceedings in the Court of Appeal

[21] Dissatisfied with the judgment of the High Court, the appellant filed Civil Appeal E445 of 2020 praying for the court to set aside the judgment with costs. The grounds of appeal were that the learned judge erred in law and fact by:

i. *Concluding that the parental responsibility agreement that had been adopted as an Order of the High Court of Kenya was not applicable and he sat on appeal against an Order issued by a judge of equal status.*
ii. *Concluding that the appellant had physically assaulted the minor and that there was a warrant of arrest in the United Kingdom when there was no evidence to support such a conclusion.*
iii. *Failing to appreciate that parental rights of a parent are innate and inextinguishable and cannot be taken away in the manner that he purported to hold.*
iv. *Failing to appreciate the full import of the disclosed facts and provisions of the Constitution that had been violated or threatened with violation by the 1st respondent.*
v. *Failing to determine what would constitute the best interest of the child having not had occasion to hear from the child and relying on unsupported, unsubstantiated and erroneous information to reach a conclusion as to what constitutes the best interests of the child.*

[22] The Court of Appeal rendered its decision on 4th June 2021. In its determination, the Appellate Court found that the main issue on the appeal turned on whether the PRA between the appellant and 1st respondent was applicable, effective, and binding. The Appellate Court affirmed the High Court's judgment and held that the learned judge arrived at his conclusion based on the evidence

availed. It noted that fundamental changes had occurred in the lives of the parties since the recording of the PRA with the minor no longer residing in Kenya.

[23] On the proceedings before the United Kingdom High Court, the Appellate Court held that the foreign court had found that the assault accusation was true and that such finding was critical in determining the matter. The Appellate Court was also of the view that the PRA was no longer applicable to the parties. Further, the Appellate Court considered the ascertainable wishes of the child and held that the child had made an unequivocal expression that he did not wish to be with the mother. Ultimately, in dismissing the appeal, the Court of Appeal was of the view that in the absence of evidence establishing want of competence or jurisdiction on the part of the foreign court in arriving at its determination of the matter, the learned High Court Judge could not be faulted in his conclusions that the PRA was inapplicable to the parties.

iii. Proceedings before the Supreme Court

[24] The appellant being aggrieved by the decision of the Court of Appeal, filed a Petition of appeal before this Court. However, the appeal was filed out of time. By Notice of Motion dated 24th September, 2021, the appellant filed an application for leave to extend time to file an appeal against the orders and Judgment of the Appellate Court. She sought leave of the Court to file the Appeal out of time, or to deem the Appeal, Supreme Court Petition 014 of 2021, already lodged as duly filed with the Court's leave.

[25] We were satisfied that the application met the threshold set in ***Nicholas Kiptoo Arap Korir Salat v. The Independent Electoral and Boundaries Commission & Others,*** **Supreme Court Application No.16 of 2014, [2014] eKLR** for extension of time the delay not being inordinate and the appellant having sufficiently explained her cause. However, we rejected the

invitation that we deem the appeal herein as duly filed and directed that the parties appear before the Deputy Registrar for further directions as to the filing of the record of appeal and all related matters.

[26] Properly filed, the Petition of Appeal dated 25th February 2022 raises four (4) grounds of appeal. That the Judges of the Court of Appeal erred in law by:

i. *Failing to determine the four grounds of appeal that were before them thereby denying the appellant a right to a fair hearing.*
ii. *Failing to consider the import and effect of Section 26(2) of the Children Act and failing to apply the same in the case before them thereby denying the appellant a right to equal benefit of the law.*
iii. *Arriving at a determination that the appellant was not a proper and fit person to be with the minor and that the minor had expressed a desire not to be with the appellant when no such wish had been expressed by the minor before any court or tribunal.*
iv. *Affirming that the foreign court can overturn a valid and legally competent parental responsibility agreement without hearing the parties to it.*

[27] The reliefs sought by the appellant are for us to allow the appeal, set aside the Court of Appeal judgment, and costs of this appeal and the costs before the Appellate Court be provided for.

C. PARTIES' SUBMISSIONS

i. Appellant's Submissions

[28] The appellant relied on her written submissions dated 24th September 2021 and filed on 25th September 2021. She submits that the Court of Appeal erred in finding that the PRA was no longer applicable by disregarding the provisions of

Section 26(2) of the Children Act on termination of a parental responsibility agreement which requires a court Order or leave of the court to do so. She avers that she was denied the right to equal benefit and enjoyment of the law as provided for under Article 27(1) of the Constitution. Further to this, the appellant argues that the attempt to overturn the High Court decision adopting the PRA while this order was not the subject of proceedings amounted to a violation of the right to a fair hearing.

[29] The appellant contended that the Appellate Court judges erred when they invoked the jurisdiction of the United Kingdom Courts in determining the matter. Further, that the Appellate Court failed to consider that the trial court had erred in disregarding that the PRA was adopted as an Order of the High Court. The appellant relied on the case of ***A.O.G vs S.A.J & Another*** **[2011] eKLR** and ***Republic vs Senior Resident Magistrate Mombasa exparte H L & Another*** **[2016] eKLR** to urge that the PRA could not be overturned by the English Courts or even the High Court without following the provisions set out in Section 26 of the Children's Act.

[30] The appellant further submitted that the Appellate Court prejudiced and infringed on her right to a fair hearing by finding that she was not a fit and proper person to live with the minor despite the evidence in the medical record showing that the appellant never assaulted the minor. The appellant also contended that the trial court prejudiced the appellant's right to fair hearing by finding that there was an international warrant of arrest, whereas no such warrant existed.

[31] The appellant submitted that parental rights of a parent and the rights of a child to parental care are innate and cannot be extinguished. She also urged that the character and the conduct of a parent does not extinguish those rights unless it is proven that the parent has not been desirous of the rights in the best interest of the child. The appellant submitted that the 1st respondent and herself were

entitled to equal rights over the minor at all times and that the 1st respondent should not deny the appellant access to the minor because their marriage was dissolved and relied on the case of ***MA vs ROO*** **[2013] eKLR** in support of this submission.

[32] The appellant submitted that by causing the minor to be admitted as a ward of the English Courts, the 1st respondent infringed on the minor's right to nationality and citizenship. She urged that the minor was born in Kenya and therefore entitled to his full rights, as a Kenyan under the Constitution. The appellant submitted that it is in the best interest of the child to have access to both parents and urged us to be persuaded by the findings in the case of ***ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)*** and the Privy Council's decision in ***Mckee v Mckee*** **(1951) AC 532** in considering what the best interests of the child in this case are.

ii. 1st Respondent's Submissions

[33] The 1st respondent relied on his submissions dated 9th March 2022 and filed on 10th March 2022. It was his case that this Court lacks jurisdiction to hear the matter. He submitted that the appeal neither stated which provisions of the Constitution had been violated nor demonstrated how a matter of general public importance was involved. He urged that the appellant was attempting to invoke the principles of constitutional avoidance which was brought out in this Court's decision in ***Communication Authority of Kenya & others v. Royal Media Services Limited & 5 others*** **[2014] eKLR.**

[34] The 1st respondent submitted that the order issued by the High Court adopting the agreement was invalid and unenforceable and that he did not participate in the proceedings. Without prejudice to the foregoing, he urged that

the PRA was not applicable as it was no longer reflective of the minor's legal or factual situation. He urged that the minor was habitually resident in the United Kingdom and contended that this case was distinguishable from that cited by the appellant; ***A.O.G vs S.A.J & Another*** **[2011] eKLR.** He submitted that it was the appellant who initiated proceedings in the United Kingdom with regard to custody of the minor and therefore subjected herself to its jurisdiction.

[35] It was the 1st respondent's submission that the appellant failed to dispute the allegations that she was an unfit parent to be with the minor. He contended that the English court considered the allegations of abuse against the appellant, which were investigated and substantiated. The 1st respondent urged that the finding by the English courts that the appellant was not fit to have custody of the minor was proper as it was made in the best interest of the child. The 1st respondent further submitted that though the appellant has rights and responsibilities over the minor, such rights do not trump the best interests of the child as provided for under the provisions of Article 9(1) of the CRC. He concluded his submissions by urging that the appellant was lawfully denied custody of the minor to protect the best interests of the child.

D. ISSUES FOR DETERMINATION

[36] Upon hearing the submissions by the parties and upon perusal of the records of appeal, the following issues have crystallized for determination by this Court;

i) *Whether this Court has jurisdiction under Article 163 (4) (a) of the Constitution to hear and determine this appeal?*
ii) *Whether the High Court and Court of Appeal properly applied the decisions issued by the Family Court in the United Kingdom in arriving at their determination?*
iii) *What is the status of the PRA?*

iv) Whether parental rights and responsibilities could be extinguished in this case?

E. ANALYSIS

(i) Whether this Court has jurisdiction under Article 163 (4) (a) of the Constitution to hear and determine this appeal.

[37] The 1st respondent contends that this Court has no jurisdiction to entertain this matter as it neither raises issues of constitutional interpretation or application as provided for under Article 163(4)(a) of the Constitution nor falls under the ambit of a matter of general public importance under Article 163(4)(b) of the Constitution.

[38] This Court's decisions, as to whether the jurisdictional threshold set out under Article 163(4)(a) of the Constitution has been met, are legion. See ***Lawrence Nduttu and 6000 Others v Kenya Breweries Ltd & Anor,* SC Petition No.3 of 2012; [2012] eKLR; *Hassan Ali Joho and Anor v Suleiman Said Shalabal & 2 Others* [2014] eKLR; *Erad Supplies and General Contractors Ltd v. NCPB,* SC Petition No. 5 of 2012, [2012] eKLR and *Aviation and Allied Workers Union of Kenya v. Kenya Airway Ltd & 3 others,* SC Petition No.4 of 2015; [2017] eKLR.**

[39] In particular, in ***Rutongot Farm Ltd v Kenya Forest Service & 3 others,* SC Petition No.2 of 2016; [2018] eKLR** this Court held at paragraph 18:

> ***"[18] As can be deduced from the above quoted cases, in order to evaluate the jurisdictional standing, the test is whether the appeal raises a question of constitutional interpretation or application and whether such a constitutional issue has been canvassed in the superior Courts leading to the present appeal. In order to establish***

that fact, the Court needs to ask itself the following questions:

(i) What was the question in issue at the High Court and the Court of Appeal?

(ii) Did the superior Courts dispose of the matter after interpreting or applying the Constitution?

(iii) Does the instant appeal raise a question of constitutional interpretation or application, which was the subject of judicial determination at the High Court and the Court of Appeal?"

[40] In this context, as outlined in earlier parts of this judgment, in the High Court, the appellant invoked Articles 27, 28, 29, 43, 45, and 53 of the Constitution in alleging that her constitutional rights and freedoms and that of the child had been contravened. She has consistently claimed, in both superior courts, that the 1st respondent caused the child to be admitted as a ward of the United Kingdom Court which infringed on the child's right to Kenyan nationality and citizenship.

[41] However, inasmuch as the learned Judge in the trial Court *'was not satisfied that the amended petition was precisely framed to disclose the facts relied on, and the injury suffered, to support the constitutional provisions alleged by the petitioner as having been violated and infringed',* the learned Judge delved into the issue of the best interests of a child as enshrined in Article 53 (2) of the Constitution. The learned Judge at paragraphs 25 and 26 of his judgment stated:

> *"25. The primary subject of this dispute is a child. The case involves the protracted dispute between the petitioner and the 1st respondent over the custody, upbringing and welfare of their child. Under Article 53(2) of the Constitution and section 4(3) of the Act, this court is commanded to treat the best interests of the child as the first paramount consideration.....*

26. The best interests of the child herein will be served where the court adopts a course of action that safeguards and promotes his rights and welfare. The court will ensure that he has shelter, food, clothing, education and medical care. His best interests will be served where he has parental guidance, and where such guidance is provided by, as much as it is possible, both parents. The child is entitled to be allowed a suitable, conducive and loving environment in which to grow and develop."

[42] On this basis, learned trial judge determined what was in the best interests of the child according to Article 53 of the Constitution but nevertheless concluded that the 1st respondent had not infringed or violated any of the fundamental rights and freedoms pleaded, either against the appellant or against the child. He was also of the view that it had not been shown that any such rights and freedoms were likely to be infringed or violated against the appellant or the child.

[43] On its part, the Appellate Court though primarily focusing on the PRA, spoke on the best interests of the child in the following terms:

"It is certainly not in the best interest of the minor that he should be left in the care of a mother who causes him physical and mental harm……. Moreover, courts are enjoined to consider the ascertainable wishes of a child when deciding on what is in his or her best interest."

[44] It is evident that the running theme in both superior courts was the enforcement of parental rights *vis a vis* children's rights. This is still the case in the matter before us where the issues of parental rights and the child's best interests pursuant to Article 53 of the Constitution are largely in issue. In addition, the appellant claims that her right to a fair hearing has been breached in both superior courts and she has been condemned, as an unfit mother, unheard. All these facts bring this matter within our jurisdiction under Article 163 (4) (a) of the Constitution.

(ii)Whether the High Court and Court of Appeal properly applied the decisions issued by the Family Court in the United Kingdom in arriving at their determination.

[45] The appellant was emphatic that the superior courts deferred to the English Court's judgment when they applied its decision and Orders in the instant matter. She contended that the trial court proceeded on the premise that the English Court is superior to the High Court which, she argues, cannot be. She maintained that the High Court was bound by its determination and Orders on parental responsibility. She urged that the superior courts could not abandon their responsibility to another foreign court. The 1st respondent on the other hand argued that the minor was residing in the United Kingdom all along thus it was proper for the English Courts to make its judgment which was the basis of the trial court finding that the parental agreement was no longer reflective of the child's legal or factual position.

[46] The question that arises is whether the superior courts deferred to the English Court by disregarding Kenyan Law as well as a High Court Order that was in force while determining the matter that was before them. In other words, were the superior courts bound by the English Court judgment?

[47] At the High Court, the learned judge delivered himself as follows:

> ***"[34] I reiterate that the child was heard by the Family Court in London. He was categorical that he had been physically and emotionally abused by the petitioner, and did not want any contact with her. I find that in particular circumstances of this case, the best interests of the child will be served by the parties obeying the orders that were granted by the Family Court in London in the United Kingdom on 11th May 2017. These orders, I find, were in line with the protection afforded to a Kenyan child under***

the Constitution, the Children Act and the international instruments that Kenya is party to."

[48] The learned judges of the Court of Appeal in determining the appeal before them held as follows;

> ***"We further observe that based on the Cafcass Family Court report, the United Kingdom High Court made the minor a ward of the court, "until his 18th birthday or until further order to the contrary". The court further held that the parental responsibility agreement was not reflective of the child's current legal and factual position. The court directed that the appellant should not have direct contact with the minor. <u>And it is these findings that largely informed the learned Judge's conclusions that the appellant's petition was unmeritorious.</u>***
>
> ***With respect, we concur with and affirm the learned Judge's conclusions as being based on the evidence availed and reflective of a proper exercise of discretion. It is noteworthy that fundamental changes have occurred in the lives of the parties and the minor since the recording of the parental responsibility agreement dated 2008, including the fact that the parties and the minor are no longer resident in Kenya. The assault accusation made by the appellant, an which the United Kingdom High Court found true, is especially critical in this matter and not one to be taken lightly.' (emphasis ours)"***

[49] It is evident that the determinations made by the learned judges of the superior courts relied on the findings by the English Court. However, the English Court did not consider the significance of the PRA and the consequences of its violation.

[50] We have also considered the provisions of the Evidence Act, Chapter 80, Laws of Kenya on matters which the court can take judicial notice of and judgments from foreign courts do not fall within the purview of the issues for consideration on judicial notice.

[51] We are therefore constrained to fault the learned judges of the Court of Appeal in placing credence on the findings of the family court in English Court which largely disregarded the PRA; an agreement that could not be violated without consequence. In addition, the PRA, a binding agreement between both the appellant and the 1st respondent could only be terminated by the High Court.

iii) What is the status of the PRA?

[52] The English Court (Mrs. Justice Parks in Family Court Cause No. FD16P00592) on 11th May 2017, stated as follows at paragraph 30 of her judgment:

> ***"I shall make a declaration as to habitual residence in terms of paras. 1, 2 and 3 of the initial declarations. I shall record that the Kenyan Parental Responsibility agreement reached by the parties in 2008 is no longer reflective of the child's legal or factual position and was not at the time when the mother issued her application in the Kenyan High Court for registration of that agreement on 1 September 2015, in that the child was no longer in the care of the mother."***

[53] Both superior courts adopted this finding on the PRA. It is curious that although the trial Judge, in his judgment, referred to how PRA's are vacated, he ended up deferring to the English Court's declaration that the PRA was no longer reflective of the child's legal or factual position.

[54] The Children Act, 2001 (No. 8 of 2001) (repealed) provided in Section 26 as follows:

> **"26. Parental responsibility agreement, etc.**

(1) A parental responsibility agreement shall have effect for the purposes of this Act if it is made substantially in the form prescribed by the Chief Justice.

(2) A parental responsibility agreement may only be brought to an end by an order of the court made on application by—

(a) any person who has parental responsibility for the child; or

(b) the child himself with the leave of the court.

(3) The Court may only grant leave under subsection (2)(b) if it is satisfied that the child has sufficient understanding to make the proposed application." (emphasis ours)

[55] While it is clear that there were express provisions on the procedure to follow to vacate a PRA, the PRA undoubtedly attained more force when it was adopted as an order of the court by Mungai, J in Misc Suit No. 124 of 2015 on 17th December 2015. The 1st respondent argues that the order issued by Mungai, J was invalid and unenforceable because it was done without his knowledge.

[56] However, a thorough perusal of the record does not reveal this to be so. This notwithstanding, we note that the PRA was entered into voluntarily by both the appellant and the 1st respondent and neither of them has ever made any steps towards vacating it. A perusal of the record shows that the English Court alluded to the PRA and dismissed it ever so casually, without taking into account the Kenyan legal regime surrounding the PRA. Specifically, it ignored our very progressive Constitution's Article 53 of the rights of Children, the Children Act and case law with regard to PRA's. Most importantly, it overlooked the fact that there was a legally binding court order on the PRA. These liberties, however, could not be taken by our superior courts.

[57] We are of the view that the English Court made orders on the PRA that disregarded the sovereignty of the Kenyan legal system over its own nationals.

Since there was a binding decision of the Kenyan High Court pertaining to the parties on similar issues on which it was called to adjudicate upon, the English Court ought to have given more prominence to the PRA, the Kenyan Constitution which provides for the Rights of Children under Article 53, the Convention on the Rights of a Child which the United Kingdom is a party to, and the African Charter on the Rights of a Child. It ought to have deferred to the High Court's order already in place; an order of a competent court of law. We find it quite strange that the English Court overturned a valid and legally competent PRA without hearing the parties to it. This, in our view, negates the expectation of a fair trial and is contrary to our constitutional prescriptions of the non-derogable right to a fair trial.

[58] The Superior Courts ought not to have succumbed to the same temptation. They should have paid mind to Section 26 of the Children Act (repealed). It was imperative for them to interrogate the status of the PRA seeing that Mungai, J had adopted it as an order of the court. Once adopted as an order of the court, it could not be violated without consequences. In other words, if one parent violated the agreement, then they were liable to legal proceedings. Not being vacated, we are of the view that the PRA remained a binding order of the High Court until the Child attained eighteen years of age.

[59] The superior courts therefore erred by accepting and relying on the English Court's decision on the PRA. The error of their finding on this issue was compounded by the fact that the Children's Act had specific provisions on how a PRA is vacated. Indeed, in ***NSA & another v Cabinet Secretary for, Ministry of Interior and Coordination of National Government & another,*** **HC Petition No. 17 of 2014 [2019] eKLR**, Njagi, J observed at paragraph 49:

> ***49. Section 26 provides for parental responsibility agreements which agreements I find can only be vitiated like any other contract. I see nothing wrong in having parental responsibility agreements in so far as they are***

not in conflict with the constitution and relevant statutes.

[60] We reiterate that it was improper for the Superior Courts to rely on the English's Court determination which made no reference to our laws, the CRC, and the African Charter on the Rights and Welfare of the Child. This is the legal regime by which the PRA ought to have been considered. At the very least, the trial Court ought to have heard the parties to the PRA before invalidating it. For the avoidance of doubt, the English Court Orders of 7th August 2015 does not supersede the PRA.

(iv)Whether parental rights and responsibilities could be extinguished in this case.

[61] It was the appellant's contention that the rights of a child to parental care are innate and cannot be extinguished. She urged that the character and conduct of a parent are immaterial and do not extinguish parental rights unless the parent has been proven not desirous of acting in the best interest of the child. The 1st respondent on his part urged us to find that the Appellate Court assessed the evidence before it and made a finding that it would not be in the best interest of the minor to be left in the care of a parent who causes him physical and mental harm. The Constitution guides us on the rights of children.

[62] Article 53 of the Constitution provides that:

> ***53. Children***
>
> ***1) Every child has the right—***
>
> ***(a) to a name and nationality from birth;***
>
> ***(b) to free and compulsory basic education;***
>
> ***(c) to basic nutrition, shelter and health care;***
>
> ***(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman***

treatment and punishment, and hazardous or exploitative labour;

(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and

(f) not to be detained, except as a measure of last resort, and when detained, to be held—

(i) for the shortest appropriate period of time; and

(ii) separate from adults and in conditions that take account of the child's sex and age.

***(2) A child's best interests are of paramount* importance in every matter concerning the child.**

[63] This Constitutional provision has been thoroughly elucidated by the superior courts. For instance, in ***FSL v FNK*, Civil Appeal no. E060 of 2021 [2022] eKLR** *Thande, J* observed:

> ***"12. In the present matter which relates to a child of the parties, the interests of the child supersede those of the parties and must at all times be upheld. In this regard, the Court is guided by the provisions of the Constitution of Kenya, 2010 and of the Children Act which require the Court to give paramount importance to the best interests of the child. Article 53(2) of the Constitution provides:***

"A child's best interests are of paramount importance in every matter concerning the child.

The Children Act on the other hand provides at Section 4(3) that:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

[64] The Children Act (repealed) provided for parental responsibility in section 23 as:

23. Definition of parental responsibility

(1) In this Act, "parental responsibility" means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.

[65] Section 23 (c) of the repealed Act enumerated these rights as follows:

(c) the right to—

(i) give parental guidance in religious, moral, social, cultural and other values;

(ii) determine the name of the child;

(iii) appoint a guardian in respect of the child;

(iv) receive, recover, administer and otherwise deal with the property of the child for the benefit and in the best interests of the child;

(v) arrange or restrict the emigration of the child from Kenya;

(vi) upon the death of the child, to arrange for the burial or cremation of the child.

[66] The children's rights legal regime (***the Constitution, Children Act (repealed), CRC, and the African Charter on the Rights and Welfare of the Child)*** emphasizes the centrality of the best interest of the child. The best interest of the child is determined by the circumstances of the case as they specifically relate to the child. This comprises the principles that prime the child's right to survival, protection, participation, and development above other considerations and includes the rights contemplated under Article 53 (1) of the Constitution. As such, the focus must be on the child and what is best for him/her.

[67] In addition, there is no hierarchy in the children's rights provided for under the Constitution. In other words, all the rights provided under Article 53 are in the child's best interest. The 'best interests' concept is further strengthened by being the *'paramount'* consideration. This means that the best interests of the child are to be the determining factor when making a decision on the child. It is against this aspect that parental rights ought to be balanced. This is also taking into consideration that no right should be compromised by a negative interpretation of a child's best interest.

[68] In this context, the record does not provide any cogent evidence of the English Court balancing between parental rights and the best interest of the Child. It is evident from the record that the 1st respondent lived in Tanzania while the child lived in York, in boarding school. The child visited the 1st respondent in Tanzania for short periods of time. The English Court (Justice Heaton) recorded that the appellant accepted that she had at least on one occasion hit her son causing him physical harm, and the child made allegations that the appellant repeatedly hit him. It was recorded that a warrant of arrest was issued for her arrest.

[69] It is also on record that neither the English Court nor the parties considered it necessary to determine each of the allegations made by the child or the 1st respondent the Court being satisfied that the mother had physically harmed the child. This led to the finding that the Appellant was an unfit mother. However, this leaves us in the dark because we cannot tell which legal standards were applied to arrive at this conclusion particularly because the superior courts did not test this evidence and no warrant of arrest is in the record, as evidence.

[70] In addition, Mrs. Justice Parker in her judgment on 11th May 2017, at paragraph 19 stated:

> ***"he has suffered harm from the unstable relationship which he has had with his mother. I am unable to form a view precisely what happened between them to lead to the intervention of the police and social services, but I do know that the mother has given different accounts as to physical chastisement of F and I also know that his relationship with his mother has completely broken down."***

She noted that the appellant objected to the minor being a ward of the court but nonetheless the English court maintained the minor as its ward. Furthermore, the English Court ordered that the child would not have any direct contact with the appellant unless agreed by the father in writing or ordered by the Court. It also ordered that the child would only have indirect contact with the appellant via social media initiated by the child and not the mother and by way of letters, cards, or gifts sent to the child via her maternal aunt. These were the findings relied on wholly by our superior courts.

[71] We note from the record that the appellant produced as part of her testimony two medical reports on the child which revealed that there was no indication of any form of abuse against the child. One of these is dated 28th November 2014 by a pediatrician in Kenya who had attended to the child's medical needs since the year 2013. The other is dated 18th November 2014 by a pediatrician in the United

Kingdom. Both reports stated that there was no evidence of physical abuse on the child.

[72] Although the English Courts did not find it necessary to determine each of the allegations made by the child, the superior courts erred by not considering and testing the evidence tendered before them by the appellant on the allegations of abuse. We are unconvinced that the appellant received a fair hearing. Nothing on the record indicates whether the appellant was heard at all on this issue. Further, nothing is indicative of whether the English or our Courts considered the belt-beating discipline: excessive or otherwise. It remained unproven whether the appellant posed a continuous danger to the child.

[73] We also note from the record that there is an email dated 21st July 2013 from the 1st respondent expressing gratitude to the appellant for her wonderful mothering skills in the following terms:

> ***"thank you for being a great mom to him and all the hard work you put is clear for all to see, he is bright, caring, responsible and a loving child and credit goes to you."***

[74] Accordingly, we do not find sufficient cogent evidence on record to lead to the finding that the appellant is an unfit mother liable to zero direct contact with the child. As such, the Appellate Court erred in endorsing the High Court decision which purported to extinguish the appellant's parental rights and responsibilities.

[75] We cannot endorse, therefore, with a clean conscience the decisions of the superior courts which embraced the decisions of the English Courts because we are of the view that the judges did not consider the totality of the circumstances of this case in the following ways. Firstly, the English Courts declared that the child was habitually resident in England and Wales while ignoring that he was first and foremost a Kenyan National with attendant rights. In other words, he was deprived of a country of his own and of its protection and support socially and culturally. Furthermore, the minor was made a ward of an alien court when he is a Kenyan

national. In adopting these findings, the Appellate Court did not consider that this was in contravention of the rights enshrined in Article 53(1) (a) as outlined in earlier parts of this judgment and the CRC. The CRC provides in Articles 7 & 8:

> ***"Article 7***
>
> 1. ***The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.***
>
> ***Article 8***
>
> 1. ***States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."***

[76] We cannot help but find that the child's constitutional rights to nationality, parental care, and responsibility which includes equal responsibility of the mother and father to provide for the child whether they are married to each other or not have been infringed. This finding is also in light of the English Court's orders that the 1st respondent had care and control of the Child. This court also ordered that the mother was to have no direct contact with the child. This in effect meant that the father could determine every aspect of the child's life: where he went to school, lived, or holidayed.

[77] The same Courts determined that child could ably articulate himself '*on the degree of integration in a social and family environment*' in other words, how he saw his connections, social relationships, and support system. It is ironic because it goes without saying, that his perspective would largely be in the lens of the 1st respondent. He had been deprived of direct contact with his other parent, so even though his views and desires were heard, he could not have had a balanced assessment of the situation.

[78] At this juncture, we must point out that the preamble to the CRC states that the family is the fundamental unit of society and the natural environment for the growth and well-being of its members, particularly children. Article 9 of the Convention further stipulates that:

> ***"1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.***
>
> ***2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.***
>
> ***3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."***

[79] The Children Act (repealed) invoked during the time of this dispute provided in Section 6 (1) in mandatory terms that a child has a right to live with and to be cared for by his parents. Section 6(2) provided:

> ***"Subject to subsection (1), where the court or the Director determines in accordance with the law that it is in the best***

interests of the child to separate him from his parent, the best alternative care available shall be provided for the child."

[80] The Act also provided in Section 24 (1) that:

> ***(1) Where a child's father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility***

[81] Section 24(5) on parental responsibility stated "***a person who has parental responsibility for a child at any time shall not cease to have that responsibility for the child."*** This means parental responsibility is a mandatory ongoing obligation. Parental responsibility attaches to the right of the child as it is the parent who has the responsibility to ensure that the needs of the child are catered for.

[82] In addition, it is not in the interest of justice to deny the child access to his mother. We are cognizant of **Article 19 of The African Charter on The Rights and Welfare of The Child** which stipulates that: *"every child is entitled to parental care and protection and shall wherever possible reside with his or her parents."*

[83] It is evident from the foregoing provisions that the child has a right to parental care and it is in the best interest of the child that he is brought up and cared for by his or her parent. This right can only be denied if it is proved with cogent evidence and valid grounds that a parent is not suitable or is incapable of taking care of the child. Ultimately, therefore, a child needs both of their parents which is their right, especially where a parent's incapacity has not been proven as we have found in this case.

[84] It is a known fact that the society in which children grow up shapes who they are. Having both a mother and father involved in a child's life can provide significant social, psychological, and health benefits. In addition, the stability of having a relationship with both parents can provide security and greater opportunities for children to find their own paths to success. Accordingly, even if circumstances may warrant limited access to a parent, a Court should order supervised access. This court has the constitutional obligation to ensure that the child has access to parental care and protection as enshrined in the Constitution.

[85] *The Committee on the CRC [General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*] has observed at clause 11 that ***'the best interests of the child is a dynamic concept that encompasses various issues which are continuously evolving.'*** Thus, the concept of the child's best interest is flexible and adaptable. It should be adapted and defined on an individual basis, according to the specific situation of the child concerned considering their personal context, situation and needs.

[86] The 1st respondent contended that parental rights do not trump the best interests of the child. That is correct. However, parental rights cannot be ignored if they are in the best interests of the child. This is because the concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the children's rights recognized in the Constitution, the Children Act, the CRC, and the African Charter on The Rights and Welfare of The Child. These are all geared towards the holistic development of the child.

[87] Courts, therefore, while making a decision that will impact the child are mandated to consider all circumstances affecting the child. As such, we are of the view that the following guidelines are necessary and ought to be considered when balancing a child's best interests and parental rights and responsibility:

1. ***The existence of a PRA between the parties.***
2. ***The past performance of each parent.***

3. ***Each parent's presence including his or her ability to guide the child and provide for the child's overall well-being.***
4. ***The ascertainable wishes of a child who is capable of giving /expressing his /her opinion.***
5. ***The financial status of each parent.***
6. ***The individual needs of each child.***
7. ***The quality of the available home environment.***
8. ***Need to preserve personal relations and direct contact with the child by both parents unless it is not in the best interests of the child in which case supervised access to the child must be granted.***
9. ***Need to ensure that children are not placed in alternative care unnecessarily.***
10. ***The mental health of the parents and***
11. ***The totality of the circumstances.***

[88] We need to emphasize that it is never in the best interest of a child when the parents are engaged in a protracted court battle. Court battles relating to children are more often than not very selfish in nature and it is easy to overlook the psychological and mental harm done to the child in the process. In the instant matter, we note that the appellant has not had direct contact with the minor since Justice Heaton's Orders of 7th August 2015. In the circumstances of this case, as already demonstrated, this is in contravention of our legal regime on the rights of the child. However, we are also alive to the fact that the child turned eighteen (18) on 12th February 2022. As such, the Child is at liberty to choose whom to live with and whether or not he wants the see the appellant.

F. Orders

i. *The appeal is hereby allowed.*
ii. *The Judgment of the Court of Appeal dated 4th June 2021 is hereby set aside.*

iii. Each party shall bear its own costs.

DATED and **DELIVERED** at **NAIROBI** this **24th** day of **February 2023.**

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....	**.....**
S.C WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	**.....**
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

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SUPREME COURT OF KENYA