



REPUBLIC OF KENYA



KENYA LAW
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**JMK v EW (Civil Appeal E319 of 2023)
[2024] KEHC 11322 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11322 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E319 OF 2023
H NAMISI, J
SEPTEMBER 26, 2024
(FORMERLY KIAMBU CIVIL APPEAL NO. E089 OF 2023)**

BETWEEN

JMK APPELLANT

AND

EW RESPONDENT

*(Being an Appeal from Ruling of Hon. J. A Agonda, Senior Principal Magistrate
in Ruiru Children Case No. E 063 of 2022 delivered on 14th March 2023)*

JUDGMENT

1. This appeal arises from a Ruling delivered by the Magistrate Court in Ruiru in respect of Notice of Motion dated 10th January 2023. The Appellant filed the application seeking the following orders:
 - i. Spent
 - ii. That pending the hearing and determination of the suit, the Applicant be granted regular unsupervised access to the subject minors at a place agreed between the Applicant and the Respondent;
 - iii. That pending the hearing and determination of the suit, the Applicant be granted unlimited access to the subject children while at school;
 - iv. That pending hearing and determination of the main suit, the Applicant be allowed to access the children during half of the school and public holidays;
 - v. That the Plaintiff/Applicant be at liberty to apply for such further or other orders and/or directions as this Honourable Court may deem fit and just to grant.



2. The Application was supported by the Affidavit sworn by the Appellant on 10th January 2023 and based on the following grounds:
 - i. That the best interest, welfare, psychological wellbeing and education of the children, SWMM. and SWM, is of paramount concern to the Applicant;
 - ii. That the order of access through phone calls granted by the Honourable Court on 5th December 2022 is not sufficient as the children have frequently indicated to the Applicant that they miss him;
 - iii. That the children are currently on school holidays and will resume school in the course of the month without bonding with their father, to the detriment of the children;
 - iv. That the Applicant has never been a threat to the children or caused any emotional and/or physical harm to the children as alluded by the Respondent;
 - v. That the Applicant does not intend to cause any harm to the children;
 - vi. That the children are being denied their right to parental care from their father who is the Applicant;
 - vii. That the children have a right to freely interact with their father who has been in their lives since birth;
 - viii. That denying the Applicant access to the children is limiting the capacity of the children to bond with their biological father, which is detrimental to the children;
 - ix. That the children who are 16 and 12 years, respectively, do not require supervision to interact with their father;
 - x. That it is in the best interest of the children that they have unlimited access to both parents;
 - xi. It is in the best interests of the minors that the orders sought are granted.
3. In response thereto, the Respondent filed her Replying Affidavit sworn on 16th January 2023. The Appellant filed a Further Affidavit sworn on 24th January 2023. The application was canvassed by way of written submissions.
4. Ruling was delivered on 24th March 2023 with orders as follows:
 - i. The Respondent shall have actual custody, care and control of the children pending the hearing and determination of the suit;
 - ii. The Applicant shall have limited and supervised access to the children on alternate Saturdays from 12pm to 6pm during school holidays. The picking and dropping at Garden City.
 - iii. The Applicant is restrained from threatening, harassing, intimidating the Respondent and children.
 - iv. The Applicant shall pay school fees and meet school-related expenses for the children. The school fees be paid directly to the school they are currently enrolled in and send the school fees receipts to the Respondent for record purposes.
 - v. The Applicant shall take out a medical cover to take care of the medical needs of the children as and when they arise;



- vi. The Applicant to give vacant possession to the Respondent and the children one of the matrimonial houses either in Ruiru or Syokimau and Applicant restrained from visiting the Respondent and the children without consent of the Respondent;
 - vii. The Respondent shall provide food, clothing, good grooming, entertainment and other miscellaneous expenses for the children;
 - viii. The Applicant shall pay a sum of Kshs 125,000/- every month as contribution to the other needs of the children and the respondent's sustenance. The money shall be paid to the respondent by fifth day of every month with effect from April 2023, through mobile money transfer;
 - ix. This being a family matter, each party shall bear its own costs.
5. Being aggrieved by the Ruling of the trial court, the Appellant filed Memorandum of Appeal dated 12th February 2024 containing 23 grounds. Parties canvassed the appeal by way of written submissions. The Appellant's submissions are dated 22nd April 2024, while the Respondent's submissions are dated 5 June 2024
6. In his submissions, the Appellant has summarised the issues for determination as follows:
- i. Whether the trial magistrate misdirected herself by ruling on the issues that did not arise in the Application dated 10th January 2023;
 - ii. Whether the trial magistrate has the power to issue an order for the sustenance of the Respondent and the extraneous monthly maintenance of Kshs 125,000/=;
7. I will summarise the issues further to interim access and maintenance, since these are the two main issues in the application dated 10th January 2023.

Analysis and Determination

8. Article 45 (2) of *The Constitution* of Kenya provides as follows:
- ‘A child’s best interests are of paramount importance in every matter concerning the child.’
9. The *Children Act*, Cap 141 of the Laws of Kenya elaborates further at Section 8 (1)(a) 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 interest of the child shall be of primary consideration.
10. One of the grounds of appeal raised by the Appellant is that the trial magistrate erred in law and in fact in failing to appreciate that the prayers sought by the Appellant in the Application dated 10th January 2023 were for access of the children pending hearing and determination of the suit and not for actual custody. The Appellant is also aggrieved by the fact that the trial court granted interim supervised access to the children.
11. The Appellant’s application was for regular unsupervised access to the children. It is his contention that the children, aged 16 and 12 years, are old enough and supervised access is unnecessary. The Appellant submitted that the trial Magistrate misdirected herself on the facts/issues by dealing with an Application that had not been canvassed by the parties, therefore reaching a decision that was erroneous and to the disadvantage of the Appellant. The Respondent did not submit on this issue.



12. In its Ruling, the Court observed that the Appellant has not interacted with the children since December 2022, when the Respondent left their matrimonial home with the children. The Court further noted that there is evidence that the Appellant may subject the children to physical harm or emotional torture, thus necessitating the order for supervised access.
13. With regard to custody and access, section 108 of the Act gives the court the power to make interim orders, as well as the power to review, suspend or vary such orders. The definition of actual custody is clearly stated in section 2 of the Act. It would be remiss for the court to address the issue of access without addressing the issue of which party shall have actual custody of the minors. Besides, it is not in dispute that the children herein reside with their mother, the Respondent.
14. In the Supreme Court case of *MAK v RMAA & 4 others* (Petition 2 (E003) of 2022) [2023] KESC 21 (KLR) (Civ) (2 March 2023), the Court opined thus:

“ 14. The society in which children grew up shaped who they were. Having both a mother and father involved in a child’s life could provide significant social, psychological, and health benefits. The stability of having a relationship with both parents could provide security and greater opportunities for children to find their own paths to success. Even if circumstances may warrant limited access to a parent, a court should order supervised access...

...

17. Courts while making a decision that would impact the child were mandated to consider all circumstances affecting the child. The following guidelines ought to be considered when balancing a child’s best interests and parental rights and responsibilities:
 - a. the existence of a PRA between the parties.
 - b. The past performance of each parent.
 - c. Each parent’s presence including his or her ability to guide the child and provide for the child’s overall well-being.
 - d. The ascertainable wishes of a child who was capable of giving/expressing his/her opinion.
 - e. The financial status of each parent.
 - f. The individual needs of each child.
 - g. The quality of the available home environment.
 - h. Need to preserve personal relations and direct contact with the child by both parents unless it was not in the best interests of the child in which case supervised access to the child was to be granted.
 - i. Need to ensure that children were not placed in alternative care unnecessarily.
 - j. The mental health of the parents.



k. The totality of the circumstances.” (emphasis mine)

15. Although this court has a duty to re-evaluate the application by the Appellant filed in the trial court and come to its own independent conclusion, it is important to note that this court does not have the advantage of seeing and hearing the parties as they canvassed their application. This court’s analysis is limited to the documents placed before it. With this in mind, noting the sentiments of the trial court about the wellbeing of the children, I find no need to interfere with the interim orders regarding actual custody and access to the children.
16. On the issue of maintenance, section 111(1) of the Act provides as follows:

A parent, guardian or custodian of a child, or an authorised officer, may apply to the Court to determine any matter relating to the maintenance of the child and to make a maintenance order: Provided that on the making, varying, or discharging of a residence, guardianship or custody order, the Court may make a maintenance order for a child notwithstanding the fact that no application has been made to the Court in that regard.
17. Based on the foregoing and pursuant to the provisions of section 117 of the Act, the trial court was well within its scope and powers to make an order for maintenance of the children, despite the fact that the Application did not seek such prayers. The question before this Court is whether or not the said interim maintenance orders were appropriate or unreasonable under the circumstances.
18. The Appellant submitted that parental responsibility is a joint responsibility. He argued that while he does not deny that he should contribute towards the upkeep and maintenance of the children, that the Respondent should contribute equally.
19. It is a right enshrined in *the Constitution* that every child is entitled to care and protection by both parents. Both the Appellant and Respondent are responsible for caring, nurturing and raising their children, in the best way possible and bearing in mind their financial capabilities. With this in mind, I find no reason to interfere with orders (iv), (v) and (vii) on maintenance.
20. However, looking at the Application by the Appellant in the trial court and the response thereto, I see no basis upon which the trial court made an additional order of Kshs 125,000/= per month for sustenance and how it arrived at this particular figure. I note that no Affidavits of Means were filed by the parties to determine their financial capabilities.
21. With regard to the matrimonial home, the jurisdiction of the Children’s court is clearly spelt out in the *Children Act*. The Court is limited to addressing matters touching on the children, and ought not to delve into the arena of adjudicating matrimonial or other disputes between the parties. I find that in this particular instance, the trial court misdirected itself by issuing an order for possession of the matrimonial home, simply based on an averment in the Respondent’s Replying Affidavit.
22. The upshot is that the Appeal partly succeeds. I hereby set aside orders (vi) and (viii) of the trial court. The rest of the orders of the Ruling shall remain in force pending the hearing and determination of the suit.

DATED AND DELIVERED AT THIKA THIS 26 DAY OF SEP 2024.

HELENE R. NAMISI

JUDGE

Delivered on virtual platform in the presence of:



Ms. Ndichu h/b Machua..... for the Appellant

.Ms. Muhanda..... for the Respondent

