



**Kundu v Muyekho (Suing as the Mother and Next Friend of Benjamin Walumoli,  
Bill Muyekho, Milicent Anyesi & Beline Toto Clare Minors) (Civil Appeal  
E094 of 2023) [2024] KEHC 16306 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 16306 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E094 OF 2023  
REA OUGO, J  
OCTOBER 30, 2024**

**BETWEEN**

**AMOS NANDASABA KUNDU ..... APPELLANT**

**AND**

**ROSEMARY NEKESA MUYEKHO ..... RESPONDENT**

**SUING AS THE MOTHER AND NEXT FRIEND OF BENJAMIN WALUMOLI,  
BILL MUYEKHO, MILICENT ANYESI & BELINE TOTO CLARE MINORS**

*(Being an appeal against the judgment of Hon TM Olando delivered  
on 9/8/2023 in Bungoma Children's Court Case No E009 of 2023)*

**JUDGMENT**

1. The appeal filed before this court is on the following grounds:
  - i. That the learned trial magistrate erred in law and in fact when he delivered a ruling that (sic) unconstitutional to the extent that it gave parental responsibility to the appellant instead of sharing it equally.
  - ii. That the learned trial magistrate erred in law and illegally (sic) ordering the appellant to maintain children who were adults without their knowledge, consent, participation, extension of parental responsibility and/or as required by law.
  - iii. That the learned trial magistrate erred in law and in ordering the appellant to pay for maintenance that was exorbitant, excessive, unnecessary and beyond the appellant's means without first requiring and considering affidavits of means of both parties.
  - iv. That the learned trial magistrate erred in law and when he directed to pay rent yet the respondent occupies the appellant residential house where she does not pay rent.



- v. That the learned trial magistrate erred in law and (sic) well he delivered a judgment in a defended suit devoid of a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision as required under the civil procedure rules.
  - vi. That the learned trial magistrate erred in law and when he failed to (sic) purportedly analysis, evaluate and/or determine the evidence adduced and thereby arrived at an erroneous verdict.
  - vii. That the learned trial magistrate erred in law and when he delivered a judgment that demonstrate bias against the appellant and occasioned a miscarriage of justice.
2. The respondent at the subordinate court filed a suit seeking urgent payment of school fees and all academic requirements for the children and monthly contributions on the maintenance of the children for the following: food Kshs 50,000/-; clothing Kshs 10,000/-; medical Kshs 20,000/-; shelter Kshs 50,000/- and Misc of Kshs 20,000/-. The respondent alleged that she had 4 children with the appellant, two of the children were in college, the third child was in Form Four and the last child was in grade 7.
  3. The appellant filed his defence, arguing that three of the children were over 18 and that only their last child was under 18. The appellant sought to have the suit dismissed claiming the respondent had misled the court that he had not been paying school fees and catering for the medical and maintenance expenses of the children. The appellant also accused the respondent of defaming his character.

### **Determination**

4. Both parties have filed their written submissions on the appeal. However, from the lower court proceedings, I note that no hearing was conducted at the subordinate court. Before the matter was set down for hearing, the lower court considered two applications dated 22/3/2023 and 14/4/2023. On the hearing date, 13/7/2023, Mr. Sichangi for the defendant asked that the hearing proceed after the call-over. However, none of the witnesses testified. Therefore, no evidence was given by either party. The court simply directed that the parties file written submissions on the suit. The issues raised in the suit can only be determined after a full trial and evidence is tendered in court.
5. Therefore, under the powers bestowed on this court under section 78 (1) (e) of the *Civil Procedure Act* I order a new trial. The judgment and decree of the Subordinate Court dated 9.8.2023 is set aside. The case shall be placed before the Chief Magistrate ( CM) Bungoma and is to be listed for hearing and determination on the merits on a priority basis. Mention before the CM on 4.11.2024 for directions on the hearing and disposal of the case. There shall be no orders as to costs.

**DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 30<sup>TH</sup> DAY OF OCTOBER 2024.**

**R.E. OUGO**

**JUDGE**

In the presence of:

Amos Nandasaba Kundu /Appellant

Rosemary Nekesa Muyekho Respondent

Wilkister -C/A

