



**ALAO v SOO (Civil Appeal E067 of 2023)  
[2024] KEHC 13098 (KLR) (Family) (28 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13098 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPEAL E067 OF 2023  
CJ KENDAGOR, J  
OCTOBER 28, 2024**

**BETWEEN**

**ALAO ..... APPELLANT**

**AND**

**SOO ..... RESPONDENT**

*(Being an appeal from the Ruling delivered on 30th June, 2023 by Hon. E. Muiru,  
Principal Magistrate, in Nairobi Children Court Case No. E1696 of 2022)*

**JUDGMENT**

1. The Appellant, who is the biological mother of JMO, minor, instituted a suit against the Respondent at the Children’s Court seeking the following orders;
  - a. That she be granted physical custody, care and control of the minor until he reaches the age of maturity;
  - b. That she be granted legal custody of the minor;
  - c. That the Children’s Court offers structured access to the minor by the Respondent if desired.
2. The Appellant and the minor currently reside in the United States of America. The Plaintiff dated 7<sup>th</sup> November, 2022, indicates that the Appellant travelled to the USA to further her education and seek employment opportunities.
3. The Respondent entered appearance and filed a Notice of Preliminary Objection dated 25<sup>th</sup> November, 2022. The objection is based on the following grounds;
  - i. That the Appellant and the minor reside in the USA, and the minor is outside the jurisdiction of the Children’s Court;



- ii. That the Children’s Court under Section 91 of the of the Children’s Act, Section 7 of the Magistrate’s Court Act, and Section 15 of the [Civil Procedure Act](#), has territorial jurisdiction over children in the Republic of Kenya;
  - iii. That consequently, any orders that the Children’s Court may make in the matter will be nugatory and of no effect as both the Appellant and the minor are in the USA.
4. The trial Court upheld the preliminary objection and struck out the suit, ordering each party to bear its own costs.
5. The Appellant lodged this appeal against the ruling on the preliminary objection. The Memorandum of Appeal raises the following grounds;
  - I. That the learned trial Magistrate erred in law and fact by failing to consider that all parties to the suit, i.e., the Defendant, the Plaintiff, and the Minor, are citizens of the Republic of Kenya and, therefore, subject to the jurisdiction of the court.
  - II. That the learned trial Magistrate erred in law and fact by failing to consider that the Defendant is resident in Nairobi, Kenya and therefore under the provisions of Section 5 of the [Civil Procedure Act](#), the place to institute the suit is Nairobi, Kenya.
  - III. That the learned trial Magistrate erred in law and fact by failing to consider that Article 2 of [the Constitution](#) of Kenya, 2010, explicitly provides that the general rules of international law shall form part of the law of Kenya. One such general rule is that the plaintiff may bring any suit in the courts of a state in which the defendant is resident.
  - IV. That the learned trial Magistrate erred in law and fact by failing to appreciate the fact that there exist mechanisms for enforcement of judgments and rulings made in Kenya in other jurisdictions. One of the doctrines of private international law is the principle of comity of nations: the courtesy and friendship of nations marked especially by mutual recognition of executive, legislative, and judicial acts. Both Kenya and the USA have adopted and put in place mechanisms for the recognition and enforcement of foreign judgements.
  - V. That the learned trial Magistrate erred in law and fact by failing to appreciate the overriding principle guiding children matters: the best interest of the child.
6. The appeal was canvassed through written submissions, which I have considered alongside the cited authorities. The authorities, while persuasive, addressed cases involving applications for adoption and enforcement of foreign custody and maintenance orders in Kenya. This differs from the current case, where the primary jurisdiction invoked is the Children’s Court in Kenya, initiated by a plaintiff and a minor who reside outside the country.
7. The Appellant highlighted that the Children’s Court has jurisdiction to hear and determine the suit since the minor, born of Kenyan parents, is a citizen of Kenya. Further, that since all parties, i.e., the minor, the plaintiff and the defendant, are citizens of Kenya, they are subject to the Laws of Kenya and the jurisdiction of the Courts in Kenya. The Appellant contends that since the Respondent lives in Nairobi, Kenya, it is the appropriate place to file the suit.
8. The Respondent submitted that the Children’s Court possesses jurisdiction throughout Kenya; however, it does not extend jurisdiction over children residing outside the territorial boundaries of Kenya. According to the Respondent, the doctrine of comity is not applicable in the case. Further, that there are no reciprocal arrangements between Kenya and the USA in matters relating to custody and



guardianship of a child, and therefore, enforcement of orders and ensuring their compliance would be a futile attempt and a non-starter.

9. The issue for determination is whether the Children’s Court has jurisdiction to hear and determine the case involving the minor, JMO, who is residing abroad with his mother, the appellant.
10. The Children’s Courts are designated Courts presided over by Magistrates that the Chief Justice has appointed by notice in the Kenya Gazette. (See Section 90 of the Children’s Act). They exercise civil and criminal jurisdiction in matters involving children.
11. Under Section 91 (1) of the Children’s Act, the Children’s Court have jurisdiction to —
  - a. conduct civil proceedings on matters set out under Parts III, V II, V III, IX, X, XI, XIII, XIV and XV of this Act;
  - b. hear any charge against a child other than a charge of murder;
  - c. hear a charge against any person accused of an offence under this Act;
  - d. hear a charge in any case in which a person is accused of an offence against a child or in which a child is the victim or complainant, and exercise any other jurisdiction conferred by this Act or any other
12. As I consider the matter, I am mindful of the Constitutional and Statutory imperative that the child's best interests are paramount. Article 53 (2) of *the Constitution* of Kenya, 2010 provides:

“ A child’s best interests are of paramount importance in every matter concerning the child”.

Section 4 (2) and (3) of the Children’s Act (“the Act”) provides: -

  - (2) 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.
  - (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.
13. The prayers sought by the Appellant in the Plaint before the Children's Court, as described in paragraph 1 of this judgment, fall under Part IX of the Children’s Act concerning custody and maintenance. The Appellant's claim pertains exclusively to matters of custody - physical and legal custody, with structured access.
14. Under the Act, the Children’s Court is not bound by strict rules of evidence or procedure. In children matters, it is essential for Children’s Courts to thoroughly examine each case independently where



jurisdictional questions are raised, ensuring that they consider the specific circumstances of each case and prioritize the involved child's best interests.

15. 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 required court to give paramount importance to the best interests of the child.”

16. From the Respondent's submissions, paternity is acknowledged. The parties are Citizens of Kenya and the biological parents of the minor; the minor is thus a Citizen of Kenya under Article 14 of *the Constitution* of Kenya;

“ A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or the father of the person is a citizen.”

17. Though all parties involved - the parents and the minor - are citizens of Kenya, only the respondent currently resides in the country. Court attendance is not a concern, as hearings can be conducted virtually unless the Court specifies otherwise. This flexibility ensures accessibility and efficiency in the judicial process. The minor has not yet reached the age of majority, and it is in the child's best interest that formal orders for physical and legal custody be established. This is particularly important because the minor does not live with both parents. Additionally, significant decisions regarding the child's education, health, and welfare must be made.

18. There is no other case involving the minor pending in a different jurisdiction. Additionally, the plaintiff does not seek to enforce orders from another jurisdiction. The objective of the Foreign Judgment (Reciprocal Enforcement) Act is to make provisions for the enforcement of judgments given in countries outside Kenya that accord reciprocal treatment to judgments given in Kenya. The Foreign Judgment (Reciprocal Enforcement) Act does not extend its provisions to proceedings relating to the custody or guardianship of children.

19. This necessitates an examination of the context surrounding the orders sought, particularly in relation to the reciprocal arrangements question. The Appellant in the plaintiff indicated that the lack of formal custody orders has restricted her ability to travel freely with the minor and to make critical decisions regarding the minor. Had the Appellant initiated proceedings in the jurisdiction where the child currently resides (USA) and successfully obtained the relevant Court orders, they would likely encounter considerable challenges in enforcing those orders in Kenya, where the child's father resides. This challenge is primarily due to the absence of reciprocal agreements pertaining to custody and guardianship, as indicated above. The parties are not restricted from applying for orders to safeguard the interests of the minor in either jurisdiction to ensure that both parents are equally bound in each state.

20. Considering the specific nature of the orders being requested and the unique circumstances of this case, it was reasonable and appropriate for the Appellant to seek recourse through the Children's Court in Kenya. This Court is established under the Children's Act, which serves as the national legal framework governing the rights and welfare of children. The sovereignty of the Kenyan legal system over its citizens is irrefutable. The orders issued by the Children's Court cannot be considered ineffectual solely on the grounds that the Appellant and the minor are currently residing in the United States. The validity of its decisions remains intact, regardless of the geographical location of the parties involved, provided that



the orders issued are enforceable and subject to the Court's oversight within its jurisdiction, otherwise the Court would be acting in vain.

21. On the issue as to whether the child being outside of the country ousts the jurisdiction of the Court, this issue was considered by the Court in *Republic v Senior Resident Magistrate Mombasa ex parte HL & another* [2016] eKLR where Emukule J. stated as follows-

“The fundamental question here is the rights of the child. Under *the Constitution* of Kenya, and the relevant legislation, namely the *Children Act* (Cap 141, Laws of Kenya), which embodies and gives effect to the International Convention on the Rights of the Child, and the African Charter on the Rights of the Child, the Courts of Kenya have the jurisdiction to give effect to the rights of the child, irrespective of the origin of such child. It does not matter that child came from the howling sands and winds of the Sahara Desert, the depths of the Congo forests, the Miombo woodlands of Tanzania, the windswept Drakensberg mountains of the South of the continent, the steppes of outer Mongolia or the fringes of the world's oceans and seas, the courts of Kenya will give shelter and succour to that child. Under our Constitution, the rights of the child are paramount. It would be unworthy of our Constitution if jurisdiction were denied to our courts.”

22. In light of the foregoing, the Children's Court has jurisdiction to hear and determine the Children's Case E1696 of 2022 involving the minor JMO, notwithstanding his and the Appellant's current status of residence outside of Kenya. I refrain from discussing the merits or otherwise of the case as both parties will have an opportunity to present their arguments before the Children's Court.

23. Accordingly, I make the following orders;

- i. The Appeal is allowed;
- ii. The orders of the Children's Court upholding the preliminary objection are set aside;
- iii. The suit is reinstated for hearing and determination before a different trial magistrate;
- iv. Since the Respondent raised a preliminary objection upon entering appearance and before filing a defence or any other pleading, this court grants an extension of 30 days for the filing of necessary pleadings;
- v. Each party shall bear its own costs of the appeal.

It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 28<sup>TH</sup> DAY OF OCTOBER, 2024.**

**C. KENDAGOR**

**JUDGE**

In the presence of: -

Court Assistant: Beryl

Ms. Nira Advocate holding brief for Ogutu Advocate for the Appellant

No appearance for the Respondent

