



**HMK v FSA (Children’s Case E035 of 2024)
[2024] KEHC 13171 (KLR) (Family) (28 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13171 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

CHILDREN’S CASE E035 OF 2024

CJ KENDAGOR, J

OCTOBER 28, 2024

BETWEEN

HMK APPLICANT

AND

FSA RESPONDENT

RULING

1. This case concerns a minor, RHM, who is the biological child of the parties involved. The Plaintiff/ Applicant moved this Court via an Amended Complaint dated 20th February, 2024 seeking the following orders;
 - 1A. That this Honourable Court be pleased to grant a mandatory injunctive order compelling the Defendant to return the child to Kenya and/or within the Jurisdiction of this court pending the full hearing and determination of this suit.
 - 1B. That this Honourable Court be pleased to grant a mandatory injunctive order compelling the Attorney General of Kenya to coordinate with the relevant authorities particularly the United Kingdom’s central authority, to ensure the child is returned back to the country within seven (7) days.
 - 2A. That consequent to orders 1A and 1B, this Honourable Court be pleased to grant injunctive orders restraining the Defendant herein either by themselves, their agents or servants and anybody whosoever from removing the child from the Court’s jurisdiction pending the full hearing and determination of this suit.
3. That both parents be granted the joint legal custody of the child.



4. That the Plaintiff be granted the physical custody, care and control of the child, with reasonable access rights to the 1st Defendant.
 5. In the alternative, both parents be granted a shared custody order, with suitable modalities that will bear in mind the child's convenience and comfort as well as the parent's competence to take care of her.
 6. That maintenance of the child be jointly and equally catered for by both parents.
 7. Costs of this suit together with interest thereon at such rates and for such period as this Honourable Court may deem fit.
 8. Any other relief this Honourable Court may deem fit, just and expedient to grant.
2. The Applicant also filed an Amended Notice of Motion dated 20th March, 2024 which seeks the following orders;
2. That this Honourable court be pleased to issue production orders against the Respondent and her family, who is harboring, concealing and/or unlawfully detaining the child, compelling them to disclose any information regarding the child's whereabouts.
 3. That this Honourable court further be pleased to issue production orders against the 1st Respondent, who is harboring, concealing, and/or unlawfully detaining the child, compelling them to produce the child in court or as directed by the court.
 - 4A. That this Honourable Court be pleased to grant a mandatory injunctive order compelling the Respondent to return the child to Kenya and/or within the jurisdiction of this court pending the full hearing and determination of this suit.
 - 4B. That this Honourable Court be pleased to grant a mandatory injunctive order compelling the Attorney General of Kenya to coordinate with the relevant authorities particularly the United Kingdom's central authority, to ensure the child is returned back to the country within seven (7) days.
 - 5A. That consequent to orders 4A and 4B, this Honourable Court be pleased to grant injunctive orders restraining the Respondent herein either by themselves, their agents or servants and anybody whosoever from removing the child from the court's jurisdiction pending the full hearing and determination of this suit.
 - 6A. That a declaration be issued to declare that the Respondent's Actions violated both the Applicant's and the child's rights as enshrined under section 8, 11, 13, 22 and 32 of the Children's Act 2022.
 7. That the children's officer, with the assistance of the Officer Commanding Central Police Station to ensure compliance by the Respondent.
 - 7A. That this Honourable Court grants any other orders or relief as it may deem fit and just.
 8. That the costs of this application be provided for.
3. The Respondent filed a Notice of Preliminary Objection dated 23rd February, 2024, raising five grounds challenging the court's jurisdiction to hear the case. They contended that the Children's Court holds original jurisdiction to hear this case, arguing that the current pleadings before the High Court are misplaced and constitute an abuse of court processes. They asked the court to strike out the application, and the suit on the grounds advanced. This decision relates to the Preliminary Objection.



4. The Applicant opposes the preliminary objection and contends that Sections 90 and 91 of the Children’s Act 2022 do not expressly preclude the High Court from exercising concurrent jurisdiction. According to the Applicant, the High Court is suitably positioned to adjudicate complex issues concerning the welfare and best interests of the child, particularly pertinent in cases of international abduction, where multiple legal jurisdictions may be involved.
5. The parties filed their submissions, which I have considered alongside the cited authorities. The issue for determination is whether this court has jurisdiction to hear and determine the application dated 20th March, 2024 and the suit herein.
6. As I consider the issues before the Court, 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.
7. According to the pleadings before the Court, the Applicant filed the case after being aggrieved by the Respondent’s decision to remove the minor from Kenya to the United Kingdom. The Respondent, who is the child’s biological mother, acknowledges that the minor is with her in the United Kingdom. While the amended pleadings may portray intricate issues, they essentially revolve around the core matter of the minor’s custody. Custody and maintenance are fundamental issues, the interests of the child are paramount and supersede those of the parties.
8. 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.
9. 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;
 - e. exercise any other jurisdiction conferred by this Act or any other written law.
10. The prayers sought by the Appellant in the Amended Complaint, as described in paragraph 1 of this judgment, fall under Part IX of the Children's Act concerning custody and maintenance.
 11. Whereas the High Court has original jurisdiction in civil and criminal matters as provided for under Article 165 of *the Constitution*, with exceptions outlined in Clause 5, the Children's Act provides a recourse granting original jurisdiction on issues of custody and maintenance to the Children's Court and the High Court exercising appellate jurisdiction. Because this recourse is available, the High Court cannot assume jurisdiction over the case solely on its ability to do so; the provided avenue must be pursued.
 12. The Applicant urged the Court to recognize precedent regarding the High Court's exercise of original jurisdiction in SAJ v AOG & Attorney General [2019] KEHC 10083 (KLR). The two cases are distinguishable because that case was a constitutional petition, which exclusively placed it under the jurisdiction of the High Court at the first instance.
 13. From the foregoing, I find that the subject matter falls within the original Jurisdiction of the Children's Court. I hereby uphold the Notice of Preliminary Objection dated 23rd February, 2024.
 14. The Plaintiff/Applicant amended their pleadings, likely as a reaction to the grounds raised in the Preliminary Objection. Generally, Courts exercise discretion to transfer cases to the appropriate jurisdiction rather than strike them out outright. However, considering the specific circumstances of this case and the necessity for clarity and organization in the court's records, I proceed to strike out the applications and the suit and allow the Plaintiff/Applicant to file new pleadings before the Children's Court. This will facilitate a more orderly resolution at the Children's Court thereby enhancing access to justice.
 15. Each party shall bear their costs of this suit.

It is so ordered

DATED, DELIVERED AND SIGNED AT NAIROBI THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 28TH DAY OF OCTOBER, 2024.

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Ms. Irine Odhiambo Advocate, holding brief for Bake Advocate for the Plaintiff/Applicant

Ms. Filsan Advocate, holding brief for Salim Advocate for the Defendant/Respondent

