



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. E.067 OF 2021**

**IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA 2010**

**CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) UNDER ARTICLE 27,45, 48 AND 53**

**IN THE MATTER OF THE CHILDREN'S ACT AND**

**IN THE MATTER OF MILIMANI CHILDREN'S CASE NO.E.597 OF 2020**

**IN THE MATTER OF EN (10) YEARS AND JK (6) YEARS (MINORS)**

**BETWEEN**

**DNU.....PETITIONER**

**VERSUS**

**CHIEF REGISTRAR OF THE JUDICIARY.....1<sup>ST</sup> RESPONDENT**

**RESIDENT MAGISTRATE CHILDREN'S COURT, MILIMANI.....2<sup>ND</sup> RESPONDENT**

**GAO ..... INTERESTED PARTY**

**RULING**

1. The Petitioner (DNU)vide a petition dated 4<sup>th</sup> March 2021 seeks the following reliefs:

- i. An Order of this Honourable Court granting the Petitioner equal custody and right of access to the minor children.**
- ii. An Order of this Honourable Court granting the Petitioner equal responsibility in the raising and maintenance of the minor children.**
- iii. An Order of this Honourable Court allowing joint equal input of the parents in choosing the schools to be attended by the minor children and incase of any dispute between the parties, the school with the best performance average in National Exams to be the default school.**
- iv. An Order of this Honourable Court that pending the litigation between the Petitioner and the Interested party in the Children's Court and this Court the Petitioner be allowed to have unhindered access and custody of the minor children during the weekends (FRIDAY EVENING TO SUNDAY AFTERNOON).**

2. Vide a notice of motion of even date the applicant seeks the following orders:

- i. ....spent**

ii. **THAT the Petitioner be granted equal custodial access to the minor Children pending the hearing and determination of this appeal as well as Children Case No. E597 OF 2020. Nairobi**

iii. **THAT the minor Children be admitted to the highest standard School that the parents are able to afford to [particulars withheld] Academy where the minor children have previously enrolled**

iv. **THAT the Parental Responsibility Agreement signed between the Petitioner and the Interested party in June 2020 be adopted in whole as an Order of this Court.**

v. **THAT the cost of this application be provided for.**

3. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have not filed any response to any of the pleadings and there is no evidence to any of service on them. The Interested party (GAO) filed a replying affidavit to the notice of motion. It was sworn on 6<sup>th</sup> April, 2021.

4. GAO further filed a preliminary objection (P.O.) dated 12<sup>th</sup> April, 2021 in which he raises the following issues for determination:

a. **THAT the Notice of Motion Application and the Constitutional petition Number E.067 Of 2021 dated 4th day of March 2021 herein are fatally defective as the matter is sub-judice before a court of Competent Jurisdiction the Children Court as Children Case No. E597 of 2020 contrary Article 159 (2) of the Constitution of Kenya 2010 and section 6 of the Civil Procedure Act Cap 2 Laws of Kenya.**

b. **THAT the Notice of Motion Application and the Constitutional petition Number E.067 of 2021 dated 4<sup>th</sup> day of March 2021 are fatally defective and incurably defectively in law as they offend the provisions of the Children Act Cap 141 Laws of Kenya more specifically the Section 73 (1) (a) of the said Act which provides that the Children Court shall have the Jurisdiction of Children's Court to conducting civil proceedings on matters set out under Parts III, V, VII, VIII, IX, X, XI and XIII.**

c. **THAT the Notice of Motion Application and the Constitutional petition Number E.067 OF 2021 dated 4<sup>th</sup> day of March 2021 herein are also fatally defective as they seeks to unilaterally exempt the Petitioner from the mandatory Jurisdiction of the Children Court as provided for under Section 73 (1) (a) of the Children Act Cap 141 notwithstanding no evidence has been provided that children best interest have been constitutional violated contrary to section 2(4) of the children Act Cap 141 Laws of Kenya and Article 53(2) of the Constitution of Kenya 2010.**

d. **THAT the Notice of Motion Application and the Constitutional Petition Number E.067 OF 2021 dated 4<sup>th</sup> day of March 2021 are fatally defective and incurably defectively in law as they are in violation of Article 160(1) of the Constitution of Kenya 2010 which provides for the independence of the Judiciary.**

e. **THAT the Notice of Motion Application and the Constitutional Petition Number E.067 OF 2021 dated 4<sup>th</sup> day of March 2021 are fatally defective and incurably defectively in law as they are in violation of Section 6 of the Judicature Cap 8 Laws of Kenya which states that no judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it.**

f. **THAT the Petition is forum shopping for Justice and did not exhaust all laid out legal avenues to even file the alleged Constitutional Petition nor has he established any constitutional right violation.**

g. **THAT the Notice of Motion Application and the Constitutional Petition Number E.067 OF 2021 dated 4<sup>th</sup> day of March 2021 should thus be dismissed with costs to the Interested Party.**

5. Upon confirmation of service directions were issued by the court for parties to file submissions to the P.O. which has been done same for the 1<sup>st</sup> and 2<sup>nd</sup> respondents who have never been served with the pleadings. I say so as there is no evidence of service placed on the court record.

6. I wish to highlight the undisputed facts in this matter as follows:

(i) **The petitioner and interested party have lived together as husband and wife until recently when they parted ways.**

(ii) **They were blessed with two children born on 1<sup>st</sup> December, 2009 and 13<sup>th</sup> March, 2014 respectively.**

(iii) **Before filing of the petition, the interested party had filed a children's case No.E597 of 2020 before the Children's court at Nairobi. This is an active matter before the said court.**

7. Upon perusal of the petition, affidavits, annexures, submissions and authorities, I find the only issue falling for determination to be whether this matter should be before this court.

8. First of all the respondents are public officers sued in their official capacities yet the Attorney General has not be enjoined as a party. See Article 156(4) of the constitution and section 12(1) of the Government Proceedings Act.

9. This petition originates from a Children's case which is ongoing. If the Petitioner was by any chance aggrieved by any order given by the trial court he should have either sought review or filed an appeal whichever was applicable.

10. The substratum of this matter rotates around custody of children. The court with jurisdiction to deal is either the Children's Court (see section 73 of the Children's Act cap 141 Laws of Kenya) OR Family division of the High Court and not this division. The petitioner may be complaining about violation of his constitutional rights, to be a father to his children. Bottom line is the quest for custody as a father. The Children's court and Family division are the courts empowered to make that determination.

11. For the above reasons I will not get into the merits of the petition, Application or even P.O. Let the petitioner go back to the drawing board and file his matters before the proper court. I therefore strike out the petition and notice of motion both dated 4<sup>th</sup> March, 2021.

There shall be no orders as to costs.

**DELIVERED ON LINE, SIGNED AND DATED THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.**

**HEDWIG ONG'UDI**

**JUDGE OF THE HIGH COURT**