



**In re EN & JK (Minors) (Civil Case E045 of 2021)
[2022] KEHC 354 (KLR) (Family) (22 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 354 (KLR)

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

FAMILY

CIVIL CASE E045 OF 2021

MA ODERO, J

APRIL 22, 2022

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

BETWEEN

**GAO APPLICANT
(SUING AS NEXT FRIEND AND MOTHER OF THE MINOR)**

AND

DNU RESPONDENT

RULING

1. Before this Court for determination is the Memorandum of Appeal dated 27th May 2021 filed by DNU (the Appellant) in which he seeks the following orders:-

“THAT the Ruling and orders of the Nairobi Children’s Court dated 7th May 2021 be vacated and set aside and replaced with an order of this Honourable court granting equal physical and actual custody of the minor children”.

2. The Respondent GAO filed a cross-Appeal dated 9th August 2021 in which the following orders were sought:-

1. THAT the court be pleased to maintain the Ruling and orders delivered by the learned Magistrate delivered on 7th May 2021 with only an addition of interim monthly maintenance expense order against the Appellant be added to the same pending the hearing and determination of the main suit.

2. THAT the court be pleased to analyse the evidence, submission on record and issue an additional of interim maintenance order as it may deem fit to



supplement the orders issued on the Ruling of the 7th May 2021 by the Hon learned Magistrate.

3. THAT the Appellants Appeal be dismissed with orders to pay costs of this cross-Appeal.”

3. Following directions made by the court the Appeal and cross-Appeal were canvassed by way of written submission. The Appellant filed the written submission dated 4th November 2021 whilst the Respondent relied upon her written submissions dated 18th December 2021.

Background

4. The Appellant and the Respondent were blessed with two issues of their marriage being EN born on 1st December 2009 and JK born on 13th March 2014. The parties had entered into a Parental Responsibility Agreement dated 28th June 2020 which Agreement governed issues of custody, maintenance and access to the two children.

5. However, the Respondent moved to the Children Court vide an Application dated 24th September 2020 and was granted ex parte interim, orders of custody of the minors. The Appellant thereafter also filed various applications in the lower court. The applications were all consolidated and were heard together.

6. The genesis of this Appeal is the Ruling delivered by Hon M W Kibe Resident Magistrate on 7th May 2021. In that Ruling, the learned Trial Magistrate made the following orders:-

- “ 1. THAT a children officers’ Report shall be filed in court.
2. THAT both parties shall have joint legal custody of the subject minor.
3. THAT the Plaintiff/mother shall have actual custody, care and control of the subject minor.
4. THAT the defendant/father shall have access to the subject minor on the 3rd and 4th Saturday or Sunday of every month from 9.00 am to 4.00 pm and in school within school rules.
5. THAT *status quo* as relates to the subject minor school is hereby maintained to avoid destabilizing the minors. Parties shall however agree on alternative schools pending hearing and determination of this case and in default the court will make a decision on the issues after hearing both parties.
6. THAT both parties shall contribute towards the subject minors maintenance and shall agree mutually on the contribution of each parent towards the minors maintenance. Both parties shall also file affidavit of means and indicate their income, finance obligations and the particular needs of the subject minor they will take up as parents.
7. THAT no order as to costs.
8. THAT mention be on 11th day of June 2021 to address issue of maintenance and confirm filing of Children Officer’s Report”.



7. Being dissatisfied with the Ruling of 7th May 2021 the Appellant filed the Memorandum of Appeal dated 27th May 2021 which Appeal was premised upon the following grounds-

- “ 1. THAT the learned trial magistrate erred in law and fact in failing in granting the Appellant only 12 hours per month of access to his only children contrary to his constitutionally guaranteed right to be treated as an equal parent.
2. THAT the learned trial magistrate erred in law and in fact in varying the terms of a valid and binding parental responsibility agreement lawfully executed by the parties.
3. THAT the learned trial magistrate erred in law and in fact in purporting to reward the malfeasance of the Respondent who unlawfully transferred the children from their school and clandestinely registered them in a much inferior school.
4. THAT the learned trial magistrate erred in law and in fact in failing to consider the best interest of the minor children which is wholesome, robust and adequately participation of both parents in their life.
5. THAT the learned trial magistrate erred in law and in fact persuaded injustice by further limiting the right of access of the Appellant to only 12 hours per month while aware that the Respondent has unjustly kept the minor children from their father, the Appellant, for 8 months.
6. THAT the learned trial magistrate erred in law and in fact in only paying salutary regard to law by granting joint legal custody by denying the Appellant actual custody, care and control of the minor children thus occasioning injustice.”

8. The Respondent similarly filed the cross-Appeal dated 9th August 2021 which set out the following grounds of cross-Appeal:-

- “ 1. THAT the learned trial magistrate erred in law and in fact by failing to order Appellant to contribute and cater for their two children namely EN currently aged (11) years and JK (7) years, monthly maintenance expenses in the interim basis pending the hearing of the main suit contrary to Article 51(1)(e) of the [Constitution of Kenya 2010](#).
2. THAT the learned trial magistrate erred in law and in fact by failing to appreciate evidence adduced at the interim stage which demonstrated that the Appellant had abdicated his parental responsibilities and as a matter of urgency in the two children best interest he was to be ordered to contribute to the childrens upkeep pending the hearing of the main suit.
3. THAT the learned trial magistrate erred in law and in fact by directing that the Appellant and Cross-Appellant to agree mutually on the contribution of the minors in the interim pending the hearing of the main suit yet the Appellant had shown total disregard for their expired Parental Responsibility Agreement dated 28th day of June 2020 which expired on 1st day of September 2020 and the Appellant had unlawfully taken away the children from the custody of he



Cross-Appellant forcing her to move the court vide Children Case No. E597 of 2020 as the last resort.

4. THAT the learned trial magistrate erred in law and in fact by directing the Cross-Appellant to engage the Appellant without considering that the Appellant had no respect for the expired parental agreement which was agreed mutually hence the Cross-Appellant has been overburdened as she caters for the two children's expenses without any support from the Appellant who has refused to provide for the children yet enjoys having access of the children without any provision of maintenance responsibilities which has deliberately abandoned."

Analysis and Determination

9. I have carefully considered the two Appeals before me, the Record of Appeal as well as the submissions filed by both parties. The three main issues which arise are, firstly whether the Parental Responsibility Agreement ought to be upheld, secondly, whether the access granted to the Appellant by the trial court is fair and sufficient and thirdly, whether the trial court ought to have ordered the Appellant to provide a specified sum as maintenance for the two children.
10. On the first issue the Appellant submitted that the access granted to himself being only once a month was not sufficient as he wished to be present in the lives of his children. He submitted that the parental Responsibility Agreement, which accorded him equal and shared access to the children ought to be upheld and enforced.
11. On her part the Respondent submitted that the orders of access made by the learned Magistrate were sufficient, bearing in mind that the same were interim orders which would only remain in place pending the full hearing of the suit. The Respondent further submitted that the second child who is aged seven (7) years was a child of tender years and that to vary the access orders would interfere with the children's programme of studies at their current school.
12. On the second issue of maintenance the Respondent submitted that following the lapse of the Parental Responsibility Agreement, the Appellant has failed and/or neglected to make adequate provision for the maintenance of the two children. She prayed that this court supplement the orders of 7th May 2021 by ordering the Appellant to pay a specified amount towards the maintenance of the two minors.
13. At the outset I wish to point out to both parties that the orders made on 7th May 2021 are interim orders. The said orders are only to remain in force pending the full hearing and determination of the suit by the Childrens Court. In the circumstances, it would not do for this court which does not have the benefit of the full evidence to step in and make orders which would embarrass the trial court later on.
14. At the centre of the dispute between the parties is the parental Responsibility Agreement entered into on 28th June 2020. The Appellant suggests that this Agreement is still valid and ought to be enforced whereas the Respondent maintains that the said Agreement lapsed on 1st September 2020. The question of the validity and indeed the enforcement of this Parental Responsibility Agreement is one which this court cannot make a pronouncement on at this stage. That is an issue which the



trial court will determine after hearing evidence from both parties. Indeed, in its Ruling the trial court observed that: -

“It is the courts view that the issue of whether the Parental Responsibility Agreement entered by the parties should be adopted by the court should be dealt with after hearing both parties in the main suit.”

15. I am in agreement with this finding and as such, I will make no pronouncement regarding said Parental Responsibility Agreement.

16. I reiterate that the orders regarding custody, access and maintenance made on 7th May 2021 are only interim orders, the main suit is yet to be heard. It is only upon hearing the main suit at which both parties will be at liberty to adduce evidence that final orders will be made.

17. On the issue of custody and access I note that the learned trial Magistrate has directed that a Report be filed by the Children’s officer making recommendations on custody and access. The report which is yet to be filed will guide the court in determining these two issues. The court is mindful of the fact that this matter involves the wellbeing and welfare of a child. Article 45 (2) of the [Constitution of Kenya 2010](#) provides as follows: -

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

18. Likewise [Children Act](#) at Section 4(2) provides as follows:-

“(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”. (own emphasis)

19. The children herein require stability in their lives. There are already interim orders of access in place. I am reluctant to vary those orders at this stage, and prefer maintenance of the status quo, which I believe to be in the best interest of the children pending a final decision from the lower court.

20. Similarly on the question of maintenance the trial court made orders as follows: -

“THAT both parties shall contribute towards the subject minors’ maintenance and shall agree mutually on the contribution of each parent towards the minor’s maintenance. Both parties shall also file affidavit of means and indicate their income, financial obligations and the particular needs of the submit minor they will take up as parents.”

21. I feel that the learned trial magistrate has proceeded with this matter in the correct manner. It would be inappropriate to make orders requiring the Appellant to pay a specified sum as maintenance without first having the benefit of an Affidavit of means from both parties.

22. Though the High Court has jurisdiction to interfere with the decision of a lower court I am not persuaded that this is a proper case for the High Court to so interfere. This court is loath to make any orders, which may pre-empt the final decision of the lower court.

23. In the case of [JMK \(suing as father and next friend of the minor\)- vs – CWK](#) [2021] eKLR, the Honourable court stated that:-

“45. Having given due consideration to this appeal, and noting that the trial court is yet to pronounce itself on the core issues of custody and access, I do not find reason to interfere



with the trial court's direction that the main suit be heard before any orders were made. That in my view, would enable that court make an informed decision whichever way it goes".

24. Similarly in the case of *AMM (suing as the mother and next friend of the Minor SM) v (Particulars withheld) School and Board of Governors* [2016] eKLR the Honourable court held that:-

".....It is my view that the issues that the petitioner herein has raised as regards the proceedings in the said court are issues that this court cannot address without pulling the carpet, so to say, right under the feet of the learned Magistrate. The said issues would be best addressed on appeal in the event that the petitioner will be dissatisfied with the decision of the said Magistrate".

25. In the case of the *Speaker of the National Assembly v Karume* [1992] eKLR it was stated thus:-

"Where a dispute resolution mechanism is provided for in a statute, and where there is a clear procedure for the redress of any particular grievance by the constitution or statute that provision ought to be strictly followed."

26. Instead of wasting time appealing against interim orders the parties would be better advised to pursue the expeditious hearing of the main suit and so obtain a final decision on the issues raised. Thereafter any party who is still aggrieved may appeal against those final decisions.

27. Based therefore on the foregoing I find no merit in the Appeal and the cross-Appeal filed by the parties in this matter. Both are hereby dismissed and this being a family matter each side shall pay its own costs.

DATED IN NAIROBI THIS 22 ND DAY OF APRIL 2022.

MAUREEN A. ODERO

JUDGE

