



NMS (Suing as Father and Next Friend) v HNS & another (Civil Appeal E044 of 2023) [2025] KEHC 4378 (KLR) (Family) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 4378 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E044 OF 2023
BK NJOROGE, J
FEBRUARY 13, 2025**

BETWEEN

NMS (SUING AS FATHER AND NEXT FRIEND) APPELLANT

AND

HNS 1ST RESPONDENT

DIRECTORATE OF IMMIGRATION SERVICES, KENYA 2ND RESPONDENT

JUDGMENT

1. This judgment arises out of the decision delivered by Hon. R.O. Mbogo (SRM) in Children’s Case No. E502 of 2022. The judgement of the Children’s Court was delivered on 12th May, 2023.
2. In its final decree, the Children’s Court stated as follows;
 - a. That the interim orders on travel are hereby lifted.
 - b. That I decline to make any order as sought by the Plaintiff.
 - c. That there is liberty to apply.
 - d. That each party is at liberty to apply.
 - e. That each party shall bear own costs.
3. The Appellant is the father of the children and the original Plaintiff before the Children’s Court, while the Respondent is the mother and the original Defendant.



Background Facts

4. The Appellant moved the Children's Court seeking orders barring the Defendant from removing the children from Kenya. That the passport of the children be deposited in Court or at a bank where they would be held in safety. That the children be made wards of the Court.
5. The Application was heard at the first instance and the interim orders, restraining the Respondent from removing the children from Kenya granted. The Court confirmed the interim orders, upon hearing the application interpartes. It further directed that the suit be heard within six (6) months, failure to which the orders granted would lapse.
6. The matter proceeded for hearing where the Appellant and the Respondent testified. The Court delivered a judgement dismissing the suit.
7. It is this order that has triggered this Appeal.
8. The matter was flagged down for the Rapid Results Initiative (RRI) for the month of July, 2024. The Court regrets the delay in delivery of this judgement and any inconveniences that the parties may have suffered.
9. Directions were given that this Appeal be disposed of by way of written submissions. The Court has seen and read the Appellant's written submissions dated 19/1/2024. The Court has also seen and read the Respondent's written submissions dated 31st January, 2024 with authorities attached.
10. The Appellant has filed a Memorandum of Appeal dated 3rd November, 2023. It raises ten (10) Grounds of Appeal as follows;
 - a. The Learned Trial Magistrate erred in law and in fact in failing to consider the best interests of the children subject of these proceedings.
 - b. The Learned Trial Magistrate erred in law and in fact in failing to pronounce himself on the issue of the legal custody of the children by dismissing the entire suit thereby creating uncertainty as to how the parties will exercise their parental responsibilities over the children.
 - c. That in not addressing the issue of custody, the Learned Magistrate failed to recognize the gap left in the children's lives given as the parties are estranged.
 - d. The Learned Trial Magistrate erred in law and in fact by lifting the travel ban, the Learned Magistrate failed to appreciate that the Respondent may leave the Court's jurisdiction with the children and the Appellant may never see them again.
 - e. The Court failed to appreciate how if the children were to be removed from their home, such drastic move would negatively affect the children who have known Kenya to be their home since birth.
 - f. The Learned Trial Magistrate in lifting the travel ban, erred in fact in failing to take into consideration that the Respondent had left the Court's jurisdiction in February, 2023, despite there being an existing travel ban order against her.
 - g. That the Learned Trial Magistrate erred in fact and in law by finding that the Appellant had no role in the Children's lives. This was despite the Court dismissing all the evidence tendered by the Appellant throughout the proceedings of his responsibilities towards the children.



- h. The Learned Magistrate erred in law and fact by making outright prejudicial substantive conclusions, applying selective justice and disregarding the evidence tendered by the Plaintiff.
- i. That the Learned Magistrate erred in fact by stating that the parties eat the same food while the evidence that was produced by the Appellant clearly showed that the children had developed medical conditions such as malnutrition as a result of the Respondent's negligence in ensuring that the children receive a healthy meal.
- j. The Learned Magistrate erred in law and fact by failing to rely on the overwhelming evidence presented by the Appellant that showed that the children's health had deteriorated as a result of the Respondent's negligence which brought into question her suitability and ability to care for the children. The Court, in its analysis completely overlooked the overwhelming evidence on the Respondent's character.

Issues for Determination

- 11. The Court frames issues for determination;
 - a. Whether the appeal has merits.
 - b. What reliefs should flow from this Appeal?

Analysis

- 12. This is a first appeal. This Court has a duty to relook, re-consider and re-evaluate the evidence presented before the Trial Court afresh. This Court is to reach its own independent conclusions. While doing so, this Court has to bear in mind and consider that it neither saw nor heard the witnesses and should make due allowance for such. See *Selle & another -vs- Associated Motor Boat Co. Ltd & others* [1968] EA 123.
- 13. The Court reminds itself that in all matters involving children, the Court has to act in the best interests of the child or children.
- 14. Section 8 of the Children's Act state as follows;
 - 8. Best interests of the child
 - (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—
 - (a) the best interests of the child shall be the primary consideration;
 - (b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.
 - (2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, 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; and
 - (c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.



- (3) In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child's age and degree of maturity.
- (4) The Cabinet Secretary shall issue guidelines to give effect to this section.

Whether the Appeal has Merits

15. The substantive reliefs sought by the Appellant in their Amended Plaint amended on 15th August, 2022, are as follows;
 - a. The children be made wards of the Court and the Defendant be restrained from removing the children from Kenya without the leave of the Court.
 - b. Sole physical custody of the Children be granted to the Plaintiff.
 - c. sole legal custody of the children be granted to the Plaintiff.
 - d. A permanent injunction restraining the Respondent from removing the children from the territory of Kenya without notice to the Plaintiff; the written consent of the Plaintiff and the physical presence of the Plaintiff during any trip by the Defendant where she intends to be accompanied by the children.
 - e. A permanent injunction compelling the Defendant to ensure the physical presence of the Plaintiff on any trip initiated by the Defendant or her associates or agent taking the children out of Kenya.
 - f. A residence order mandating the children continue residing in Kenya in the home of the Plaintiff taken in Nairobi County.
 - g. An order mandating the Directorate of Immigration Services in Kenya to alert all ports including airports, sea ports and road borders at Kenya Territorial boundaries to only allow travel of the children (K S of Passport Number CKXXXXXX and N N S of Passport Number CKXXXXXX from the territory of Kenya in the presence of both parents of the children, namely the Plaintiff father and the Defendant mother.
 - h. An order compelling the Defendant to surrender the custody and safe keeping of the passports of the children to a bank where either the Plaintiff or Defendant holds a bank account so that the passports may be held in a safety deposit box.
 - i. Costs of the suit.
 - j. Any other relief that the Honourable Court may deem fit to grant.
16. The court summarizes the reliefs sought into five (5) broad categories;
 - a. The children be made the wards of the Court.
 - b. The Appellant be granted the sole physical and legal custody of the children.
 - c. An injunction barring the children from being removed out of Kenya.
 - d. An order that the children reside with the Appellant at his home.
 - e. The children's passports be kept in safe custody at a bank.



17. The evidence presented to the Court is that the two parties reside in an Apartment House in Westlands at Nairobi. They reside with the two children. The Apartment belongs to the Appellant's father. That is as per the cross-examination of the Appellant.
18. The two children have parents who are very much alive. The evidence was presented to show that the children were in dire straits or in need of care.
19. Having reviewed the evidence, the Court is not convinced that it should make the children the wards of the Court. The parents have not even alleged that they can no longer take care of the children.
20. The two parents reside in the same house. They are still married to each other. In cross examination the Appellant stated the following;

“She is my wife. We have 2 children. K is 9 years old N is 6 years old. We live in Westlands. We live together with my wife and children. We came from the same house together. We came in the same car to court..... We both have physical custody of the children.”
21. The Trial Court's appraisal of the evidence was as follows;

“I have looked at the evidence, and the submissions before the court and I am at a loss on the nature of issues the parties are having. From the evidence, they both have physical custody of the children, they live on the same house and eat the same food.”
22. This Court equally raises its legal eye brows and is perplexed at the issues that have brought the parties to Court. It may well be that the couple may be experiencing some underlying marital conflicts. If that be so (and it is upon the couple to reflect on whether those are the issues) it does not relate to the children.
23. There is an old adage that if it is not broken, why fix it. The Court is reluctant to grant sole physical and legal custody to the Appellant. No evidence has been demonstrated that the Defendant is not a good mother. No grounds have been adduced as to why the Court should separate her from her children.
24. As to orders barring the children from travelling, the Court notes that even at the time of the hearing, the children were still in Kenya. This is despite testimony that the children had travelled out of the country with the Respondent, despite a travel ban by the Trial Court.
25. In cross examination, the Respondent testified that in defiance she decided to travel despite the Court order. The Court takes great exception to any party that openly defies any Court order. The duty to obey court orders extends to each and every party before the Court or affected by the orders. It is not up to the party to select which part of a Court order to obey or disobey. The Trial Court did not address this defiant conduct in its judgement. The Appellant did not file any contempt application before the Trial Court. The Court will restrain itself from saying more, suffice to warn the Respondent against such further conducts of disobedience. The penalty for contempt of lawful Court orders remains financial sanctions or deprivation of liberty. If parties chose to defy Court orders, the rule of law would be lost. Courts would become loud cymbals ringing among the deaf. Court orders must mean something especially in children's cases, enough said.
26. The Appellant testified as follows;

“We all travelled in 2027. We met in India. All children do like travelling. We should have joint custody of the passports. Not to hide it from me. She declined depositing them in a bank. One parent cannot hide passports. She gave me passports and later stole them and she



travelled without consent. She returned the passports to me. Left them in my desk never given in my hand.”

27. On the other hand, the Respondent testified as follows;

“In 2017 we travelled to India. My father in law was there. Had medical problem which was operated on. He did not have an issue with the travel.”

In 2018 we all travelled minus him and his brother. Did not stop us from travelling. Travelled in 2019, he refused to travel. In 2020 we travelled full family, N did not travel. Recently travelled to India. I asked him to travel, he asked me to ask my lawyers. I travelled and came back with the children. He should participate in other travels going forward.”

28. The trial court appraised the evidence as follows;

“He admits that the children love and enjoy travelling and they have always been brought back safely. He admits that he has custody of the passports and therefore there is no flight risk.”

29. The Court agrees with the Trial Court. There is testimony of frequent travel by the Respondent with the children. Sometimes the Appellant is involved. Sometimes he does not travel. At times the Appellant’s parents travel with the Respondent and the children. The Appellant’s parents are said to be heavily involved in the upkeep of the parties and the children.

30. The Trial Court further stated the following;

“The order or travel ban are self-serving to the Plaintiff and they serve no purpose. He has been offered an opportunity to travel with the family but he has shunned it.”

31. The Court is not persuaded that the children should only be allowed to travel while accompanied by the Appellant or with his express consent. What if he declines to give consent or to travel every time, will that not prejudice the children?

32. There is no report that the status of these children has changed since this Appeal was filed. The presumption therefore is that despite the lifting of the travel ban, the children are still in Kenya.

33. As to the order that the children reside with the Appellant in Kenya, the Court notes that the children were said to reside with him. There was no evidence that the Respondent intended to move them to another house in Nairobi. If that was to occur, the children’s Court has the jurisdiction to entertain such a case based on facts and render a determination. For now, as the parties reside in the same house with the children, the issue was moot.

34. The issue of the children’s passports also meets a similar fate. The evidence presented before the Trial Court was that the passports were kept by the Appellant.

35. The Trial Court in conclusion states as follows;

“In my considered view, there are other underlying issues of which cannot be remedied by this court. Section 95 (1) of the Children’s Act, provides that;

When the court is considering whether or not to make an order under this act with respect to a child, the court shall not make any order unless it considers that in doing so is in the best interest of the child. I have weighed in the circumstances of this case and I feel that this is



where a court should not make any orders unless they are in the best interest of the children. It is for these reasons I lift the interim orders in travel and I decline to make any orders as sought by the plaintiff. There is liberty to apply and each party shall bear own costs for the suit.”

36. The Court refers to the following decision with regards to what it means to act in the best interest of the children. In *LAC & another v MJC* (Civil Appeal E119 of 2021) [2022] KECA 68 (KLR) (4 February 2022) (Judgment) the Court of Appeal stated as follows;

“The importance of the best welfare of the child has constitutional imperatives in Kenya because Article 53 (2) of *the Constitution* of Kenya, 2010 declares:

“

a child’s best interest are of paramount importance in every matter concerning the child.”

18. Section 83 of the Children’s Act which the Judge relied on in extenso lists principles to be taken into account in making a custody order in respect of a child. These are elaborated to be the conduct and wishes of the parent or guardian of the child; the ascertainable wishes of the relatives of the child; the ascertainable wishes of any foster parent or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application; the ascertainable wishes of the child; whether the child has suffered any harm or is likely to suffer any harm if the order is not made; the customs of the community to which the child belongs; religious persuasion of the child; whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force; and the circumstances of any siblings of the child concerned, and of any other children of the home if any and finally the best interests of the child.

19. So, it will be noted that the principle that cuts through in all this is the best interests of the child.”

37. The Court is of the considered opinion, that it would rather err on the side of not making any orders in this Appeal, especially as it is not convinced it is in the best interests of the children.

What Reliefs Should Flow from the Appeal

38. The Court is not persuaded that the Appeal has merits.
39. That leaves the question of costs. In view of all that the Court has said in this matter, the fairest order is that let each party bear their own costs.

In Conclusion

40. The Court notes that issues of children are always live. Children’s needs are constantly changing. As the children grow up, so do their needs change. The Court should exercise caution and restraint when called upon to micro manage parents on how to bring up their children. It should not box itself into the role of a parent, where such parents are alive and able to act as parents. The Court should always strive to be an objective umpire. The Court should always be alert to sift and separate disputes involving children’s needs and disputes relating to adult personal issues.



Determination

41. The Appeal is hereby dismissed in its entirety.
42. Each party to bear its own costs.
43. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2025.

NJOROGE BENJAMIN K.

JUDGE

In the presence of;

Miss Lynn Ng'ang'a for the Appellant

Mr. Gakunju holding brief for Akonga for the Respondent

Mr. Luyai – Court Assistant

