



**MTKO v JMR (Civil Appeal E064 of 2023)
[2025] KEHC 3681 (KLR) (Family) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3681 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E064 OF 2023
PM NYAUNDI, J
MARCH 21, 2025**

BETWEEN

MTKO APPELLANT

AND

JMR RESPONDENT

*(Being an appeal from the Judgment of Hon E.M Muiru, Principal Magistrate
at Nairobi Children’s Case No.E491 of 2023 delivered on 31st July 2023)*

JUDGMENT

1. Before this court for determination is the Appeal filed by MTKO (the Appellant) through a Memorandum of Appeal dated 2nd August 2023. The Appeal arises out of a Judgment delivered on 31st July 2023 by Hon. E.M Muiru, Principal Magistrate in Nairobi Children’s Case No.E493 of 2023.
2. The Appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 18th April 2024 and 13th November 2024. The Respondent’s submissions are dated 20th March 2024.

Background

3. The Respondent herein is the biological father of the minor and of Grenadian Nationality . The Appellant is the minor’s maternal grandmother who currently lives in the United States of America. The child’s biological mother passed away in 2023.
4. The Respondent filed a suit (as Plaintiff) in the Children’s Court in Nairobi being Suit No.E491 of 2023 seeking the following orders against the Appellant;
 - a. That the Legal and actual custody, care and control of the child be granted to the Plaintiff.



- b. That the defendant forthwith release the child's original birth certificate as well as his two original passports, one Kenyan and one Grenadian to the Plaintiff.
 - c. That the Defendant and or her agents be restrained from removing the child from the custody of the plaintiff and from the jurisdiction of this honourable court.
 - d. Any other relief that this court may deem fit to grant.
5. The Defendant (Appellant), filed a defence and counterclaim dated 27th March 2023 seeking the following orders;
1. That the Plaintiff's suit be dismissed.
 2. That legal custody, care and control of the child herein be given to the Defendant with reasonable access to the Plaintiff.
 3. The Defendant be allowed to take the child to the USA.
 4. That the court be pleased to make such further orders as it may consider necessary to facilitate the best interests of the child.
 5. That the plaintiff be condemned to pay costs of the suit.
 6. The matter went for full hearing and the trial court delivered a judgment on 31st July 2023. The orders that were extracted from the impugned lower court's judgment read:
 1. That the Plaintiff is granted Legal Custody, Care and Control of the subject child.
 2. That the Defendant is ordered to hand over to the Plaintiff the child's original birth certificate and the child's passports (Kenya and Grenadian)
 3. That the Plaintiff is granted leave to travel with the child to Grenada.
 4. That there shall be no orders as to costs this being a family matter.
 5. That each party is at liberty to apply.
7. Dissatisfied with the Judgment of 31st July 2023, the Appellant(Defendant) filed a Memorandum of Appeal dated 2nd August 2023 in which she listed seven (7) grounds of appeal as follows:
1. The Learned Trial Magistrate erred in law and in fact by failing to consider the evidence adduced by the Appellant and her witnesses thereby arriving at a wrong decision.
 2. The Learned Trial Magistrate erred in law and in fact by failing to consider the very elaborate wishes of the deceased mother despite the fact that the same were not disputed.
 3. The Learned Trial Magistrate erred in law and in fact by failing to consider the Children's Officer's Report.
 4. The Learned Trial Magistrate erred in law and in fact by ordering the Appellant to produce the child's passport and birth certificate yet the Respondent did not adduce any evidence to prove that the Appellant was in possession of the said documents.
 5. The Learned Trial Magistrate erred in law and in fact by not considering the best interests of the child and the effects of an abrupt change of environment without proper transition.



6. The Learned Trial Magistrate erred in law and in fact by granting the Respondent leave to travel out of the country with the child without pronouncing herself on the modalities of access by the Appellant and the child's maternal relatives.
7. The Learned Trial Magistrate erred in law and in fact in granting the Respondent leave to travel out of the country immediately with the child without granting an opportunity to bid farewell to the Appellant thus failing to consider the psychological effect such a drastic decision would have on the child.
8. The Appellant sought the following orders in the appeal;
 - a. That the trial magistrate's judgment of 31st July 2023 be set aside and the custody of the child be granted to the Appellant with reasonable access to the Respondent.
 - b. That costs be awarded to the Appellant.
9. The Respondent opposed the Appeal by filing a Notice of Preliminary Objection dated 19th February 2024 on the following grounds;
 1. That the Memorandum of Appeal , the Record of Appeal and all the applications filed in this appeal cannot be sustained on the ground that the Honourable Court does not have jurisdiction to entertain them.
 2. That this Honourable Court does not have jurisdiction over the child subject matter for the following reasons;
 - a. That the child who holds Grenadian Citizenship is no longer resident in Kenya having left the said country on 31st July 2023 which is the date the Learned Trial Magistrate delivered Judgment in favour of the Respondent. The child now is settled in Grenada with the Respondent who is the sole surviving parent.
 - b. That the child's Kenyan passport was cancelled by the Children's Court by court orders issued on 3rd August by Hon. E.M Muiru, Principal Magistrate.
 - c. That the Appellant is herself not a resident in Kenya and she resides and works for gain in the United States of America.
 3. That the suit is frivolous and an abuse of the court process and should be dismissed.

Analysis and Determination

10. I have considered the Memorandum of Appeal, the Record of Appeal as well as the submissions filed by both parties.
11. This court is first tasked to determine the preliminary objection raised by the Respondent. The Respondent challenges the jurisdiction of this court to hear and determine the appeal because the minor in question is not within the Kenyan jurisdiction. When the trial court delivered its judgment, the Respondent immediately left with the minor.
12. "Jurisdiction is everything. Without it, a court has no power to make one more step. When a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the view that it is without jurisdiction."



13. Those powerful sentiments by Nyarangi, JA. in Owners Of The Motor Vessel Lillian “S” v Caltex Oil (k) Limited [1989] 1 KLR 1 ring true in this appeal. No matter how weighty a matter may otherwise be, if a court has no jurisdiction it cannot proceed to hear it, the provisions of Article 165(3) of the Constitution notwithstanding.
14. The High Court's jurisdiction is established under Article 165 of the Constitution of Kenya, which grants it unlimited original jurisdiction in criminal and civil matters, including matters concerning the rights of children. The fact that a minor is outside the country does not negate the High Court's jurisdiction, as the court's focus remains on the child's well-being and the need to protect their rights.
15. 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 and the relevant legislation, namely the Children Act of Kenya, (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.

16. This court therefore has jurisdiction to hear and determine the appeal and therefore, the Preliminary Objection raised by the Respondent is not sustained.
17. Now to the Appeal, this being a first appeal the court is obliged to re-consider and re-evaluate the evidence adduced in the lower court, but bearing in mind the fact that it did not see or hear the witnesses testify. In the case of Peters – vs- Sunday Posts Ltd (1958) E.A the Court of Appeal stated thus:-

It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.

18. It is also important at the outset to state that this is an appeal which emanates from the children's court and concerns the question of custody of the minor. Accordingly, it must be borne in mind that the best interest of the minor is of paramount priority.
19. Likewise Section 8(1) of the Children Act 2022, provides:-

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration”. (Own emphasis)

20. The UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child have also both emphasized the centrality of the best interest of the child. The first Schedule of the Children's Act sets out the principles to guide in determining the best interests of the Child.



The best interest of the child is to be determined based on the circumstances of each individual case. Consideration of what constitutes the Child's best interest will be guided by the basic rights of the child which are provided for under the Constitution of Kenya; Children Act and International Instruments, which have been ratified in Kenyan Law.

21. In case of *Ma vs Roo* [2013] eKLR, Hon Justice Kimaru stated as follows:

What is the best interest of the child has not been defined by the law. This is as it should be because the best interest of each particular child will depend on the circumstances of each particular case at any one particular time. What is not in dispute, however, is that there are certain minimum requirements that have universally been accepted to constitute the best interest of the child. This includes the right of a child to be provided with shelter, food, clothing and education. The child is entitled to medical care. The child's welfare should be taken care of under the best possible circumstances. (own emphasis)

22. Section 103 of the Children Act lists the principles which a court ought to take into account in making an order of custody as follows:-

- a. The conduct and wishes of the parent or guardian of the child;
- b. The ascertainable wishes of the relatives of the child;
- c. 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;
- d. The ascertainable wishes of the child;
- e. Whether the child has suffered any harm or is likely to suffer any harm if the order is not made;
- f. The customs of the community to which the child belongs;
- g. The religious persuasion of the child;
- h. 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;
- i. The circumstances of any sibling of the child concerned, and of any other children of the home, if any.

23. The Appellant in her evidence before the trial court told the court that the Respondent and her late daughter had issues while they were in Grenada. Her daughter then came back home with the minor. She also raised issues with how the Respondent dressed and that he was abusing intoxicating substances. She told the court that she would take care of the minor as her daughter would and give the minor the best education compared to the education in Grenada.

24. The Respondent on the other hand told the court that he was a responsible father and is interested in the well being of the minor. He told the court that he has a job in Grenada and that there are good schools in Grenada which the minor can attend. He also told the court that he supported the minor while he was in Kenya. He even came to Kenya to spend some time with the minor and his wife.

25. The Appellant in her appeal is asking this court to grant her custody while the Respondent is granted reasonable access.



26. This court is mindful of the provisions of Section 11(2) of the *Children Act*, which provides as follows:-

A child has a right to live with and to be cared for by his (or her) parents.

27. This is in tandem with international and regional norms on the rights of the child, Article 7 of the 1989 UN Conventions on the Rights of the Child states that a child shall have a right to live with and be cared for by his or her parents. This is also echoed at Article 19 of the African Charter on Rights and Welfare of the Child, which states that-“Every child is entitled to parental care and protection and shall whenever possible reside with his or her parents”.

28. Further section 34 (1) of the *Children Act* provides thus-

On the death of the mother of the child, the father of the child, if still living, shall have parental responsibility for the child either alone or with the testamentary guardian (if any) appointed by the mother.

29. As pointed out in the judgment of the lower court, the Child’s mother left a will appointing her sister Vanice on matters concerning her estate relating to the minor. The trial court held that the will did not expressly address the issue of custody, care and control of the minor therefore, she did not appoint a legal Guardian for the child.

30. Parental responsibility attaches to the parent of the child as it is the parent who has the responsibility to ensure that the needs of the child are catered for. The law provides that it is the parent of a child who has parental responsibility, The child has a right to parental care and it is in the best interest of the child that he is brought up and cared for by his or her parent. This right can only be denied if is proved with cogent evidence and valid grounds that the parent is not suitable or is incapable of taking care of the child.

31. The question of who between the father and the maternal grandparents of a minor ought to be granted custody was considered by the High Court in Civil Appeal No 108 of 2018 MJC v LAC & PFC. This was an appeal arising from Children’s Case No. 1283 of 2017 in which the trial magistrate granted custody of the minor to the maternal grandparents for a period of three (3) years. After the minors 10th birthday, custody was to revert to the biological father.

32. The father being aggrieved by the decision by the lower court appealed to the High Court. In allowing the appeal Hon Lady Justice Lydia Achode (as the then was) observed as follows: -

Further, Article 53 is clear with regard to where parental responsibility lies. There can be no basis for imposing parental responsibility on a person except in limited circumstances provided under the Children’s Act, where guardians are appointed and take up parental responsibility for the child. In the present case, the respondents have no legal obligation to assume parental responsibility for the child while the child has a surviving parent who is legally bound and is ready and willing to take on parental responsibility. They may have a moral authority since the child’s mother (their daughter) is deceased. The learned trial magistrate was therefore right in her determination that the respondents were not guardians of the child within the strict meaning of the law.

The learned trial magistrate in granting custody to the Respondents stated that it was in the best interest of the minor to remain in the respondent’s custody until she attained the age of ten years. She observed that custody of children of tender years was ordinarily granted to the mother unless there were exceptional circumstances. She proceeded to find that the 1st Respondent had taken the role of a mother figure and that the minor was very attached to



her. On this part I agree with the appellants' argument that the learned trial magistrate failed to appreciate his role as the surviving parent to the minor and that the 1st respondent was a grandmother to the minor and not the mother.....

The appellant being the surviving parent, has parental responsibility for the child absent of any legal guardian to act jointly with him. I find that it is in the best interest of the child in this cause to be placed in the custody of the surviving parent, her father. No exceptional circumstances have been demonstrated to justify why the appellant should not have full custody of his child". (own emphasis)

33. The matter did not end there. The maternal grandparents of the child in question filed an appeal in the Court of Appeal being Civil Appeal No 1191/2021 challenging the decision of the High Court to award full custody to the child's father. In dismissing the appeal, the Court of Appeal stated as follows:
24. In the English case of *Re G* [2006] 545, Lord Nicholl was considering the best interests of the minor and this is the way he expressed himself thereon: In reaching its decision the court should always have in mind that in the ordinary way the rearing of a child by his or her biological parent can be expected to be in the child's best interest in the short term and also, and importantly, in the longer term. I decry any tendency to diminish the significance of this fact. A child should not be removed from the primary care of his or her parents without compelling reason. Where such a reason exists the judge should spell this out explicitly". (own emphasis)
34. The above cited cases are virtually on all fours with the present case. Therefore, it is manifest that the surviving parent of a child ought not be denied full custody care and control of said child unless "exceptional circumstances" are shown to exist to warrant such denial.
35. No exceptional circumstances have been demonstrated to justify denying the respondent custody of his Son. This is a case in which the biological mother of the minor has unfortunately passed away. However, it must be noted that the minor was not rendered 'an orphan'. He has a surviving biological father who is ready, willing and able to raise his child. There is no evidence to prove that the respondent is an unfit father who ought to be denied custody of his own child. No matter how well-meaning the maternal grandparent is she can never replace and/or usurp the critical role of the biological parent in the life of a child. The maternal grandparent cannot be elevated to the role of "parent" in the lives of the minors.
36. Upon my own consideration, I agree with conclusions reached by the trial magistrate. The respondent was able to show in evidence that he had secured employment, he had family in the Grenada who lived with him in the same neighborhood, he would secure free or near free education of the minor in the Grenada and he was best suited to take care of the best interests of his son then and in the long term. He was the remaining parent, his wife having died. He had shown through the visits to the minor in Kenya, the holidays he spent with him and the time he spent with him that he loved the minor and was committed to his wellbeing. There were no exceptional circumstances for the child to be taken away from the surviving parent. The Trial Court was right to find that the best interests of the child were with the surviving parent, the respondent.
37. In conclusion, I find no merit in this appeal. The same is dismissed in its entirety. The judgment of the trial court dated 31st July 2023 is hereby upheld.
38. This being a family matter I make no orders on costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF MARCH, 2025.



M NYAUNDI

JUDGE

In the presence of:

Tole holding brief for Rose Mbanya for Respondent

Ms. Mbetsa for Appellant

Kanja Court Assistant

