



POO v LKM (Suing as mother and next friend) (Family Appeal E008 of 2024) [2025] KEHC 4523 (KLR) (3 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY APPEAL E008 OF 2024
FN MUCHEMI, J
APRIL 3, 2025**

BETWEEN

POO APPLICANT

AND

LKM (SUING AS MOTHER AND NEXT FRIEND) RESPONDENT

RULING

Brief facts

1. The application for determination is dated 14th January 2025 seeks for orders of directing the Children Officer, – Thika to file a report in court detailing the current status of the minor to wit his welfare, residence and with whom he lives and the whereabouts of the respondent.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 28th January 2025.

Appellant’s/Applicant’s Case.

3. The applicant states that pursuant to the consent order dated 20/6/2024, he was granted scheduled access to the minor during the school holidays. The applicant avers that he was unable to access the minor during the August and October 2024 to January 2025 school holidays because the respondent frustrated and denied him access.
4. The applicant states that he tried to contact the respondent but it proved futile and he further learnt that the respondent had travelled to the United Kingdom in mid October 2024 to her husband and left the minor under the custody of third parties.
5. The applicant avers that he has been suffering emotionally as he does not know the whereabouts of the minor and he is apprehensive that he is suffering and that his wellbeing is at stake.



6. The applicant further avers that he has always been ready and willing to take care of and stay with the minor but the respondent has frustrated any attempt to access the minor.
7. The applicant states that the respondent has relinquished her parental responsibilities to third parties and she has neglected to give the required consistent physical, emotional, psychological and financial care to the minor.
8. The applicant states that the minor's welfare, living arrangements, security, emotional stability, social development and educational progress are being greatly affected and disrupted all to the detriment of the minor owing to the remote parenting being exercised by the respondent.

The Respondent's Case

9. The respondent states that the consent order dated 20th June 2024 was made further to the orders of the court dated 21st March 2024 apportioning parental rights and responsibilities to the parties. On 2nd August 2024, being the school closing day, the respondent states that she was at the minor's school for the closing ceremony, at the end of which she was informed by the school that no communication from the applicant had been made to the school regarding the collection of the minor in line with the applicant's access. The respondent avers that the applicant was not present and never seemed keen to pick up the minor and exercise his right of access as granted by the court.
10. The respondent states that she went home with the minor and was aggregable to delivering the minor to the applicant the next day, 3rd August 2024 at 11.30at at Thika Town Quickmart but on trying to communicate with the applicant, the same proved futile and the applicant never showed up leaving her no choice but to return with the minor.
11. The respondent avers that since the delivery of the court orders dated 21st March 2024 and 20th June 2024, the applicant has adopted an approach of selective participation in critical matters relating to the minor. Whilst the applicant purports to assert and focus on his right of access and only when it is convenient to him, the applicant has deliberately shunned his parental responsibilities, particularly as relates the minor's school fees and monthly maintenance. Despite various communications on 18th October 2024, 23rd October 2024 and 25th November 2024 through her advocates, the applicant has to date not been keen on the overall well being and academic progress of the minor.
12. The respondent avers that the applicant has shown no interest in the life and well being of the minor before filing the present application. The applicant has ignored, refused and neglected to discharge his parental responsibilities and has not contributed the sum of Kshs. 7,000/- towards the minor's food and shopping since October 2024 as per the court order leaving her to shoulder the entire burden alone. Furthermore, the applicant has deliberately failed, refused or ignored to clear the balance of the school fees and related expenses for the minor since Term 3 2024 despite several reminders which has led to the minor being refused entry into school and not permitted to sit his end of term 3 examinations. Thus, the applicant has approached the court with unclean hands when he purports to assert his access rights yet he does not adhere to court orders concerning his parental responsibilities.
13. The respondent states tat the applicant has not tried to reach out to her directly on matters related to the minor despite him having her telephone number. The respondent avers that the minor continues to enjoy her good, loving and nurturing care as his biological mother despite the applicant refusing, ignoring and neglecting to discharge his parental responsibilities towards the minor since the delivery of the judgment of the trial court.



14. The respondent states that the applicant has failed to disclose to the court that he has abandoned his responsibility to pay school fees and related expenses for the minor for the current academic calendar Term 1 2025, despite several reminders on 9th January 2025 which has occasioned the minor psychological suffering.
15. The respondent avers that the applicant is not guided by the best interest of the minor but by his misplaced and false sense of superior rights over her as pertains to the minor, and the applicant's constant use of the minor as a weapon to settle scores, hurt her psychologically and curtail her parental rights.
16. The respondent states that the trial court acted within the law when it granted her primary custody of the minor and she has never denied the applicant the enjoyment of his parental rights towards the minor, but for the applicant's refusal to exercise those rights and responsibilities as ordered by the court.
17. The respondent argues that the current application is unmerited, frivolous and an abuse of the court process and ought to be struck out in its entirety as the same is brought with the applicant's malicious intent to settle personal scores, subject the minor and her to psychological suffering and disrupt the minor's accustomed way of life.
18. The applicant filed a Further Affidavit dated 18th February 2025 and states that the replying affidavit is a forgery as the same is purporting to have been signed and commissioned in Nairobi yet the respondent is in the United Kingdom and thus seeks for the same to be struck off the record. The applicant further reiterates that the respondent is skirting around the main issue which is that she is out of the country and that she left the minor in the actual custody and care of third parties unknown to him and thus the children officer should write a report on that issue only to guide the court in rendering its judgment on appeal.
19. The applicant further avers that the respondent's advocate wrote to the minor's school directing the school only to allow the minor's maternal aunt one MM to be picking up the minor from school thus supporting his contentions that the respondent is delegating the actual custody of the minor to third parties. The applicant states that the said letter was never served upon him and he only came to learn of its contents when he went to pick the minor from school on 31/1/2024.
20. The applicant avers that he has been diligent and keen in discharging his obligation as ordered by the court and in the best way possible to his capabilities and commit to do so in the best interest of the minor.
21. The applicant states that the respondent has lost physical touch and custody of the minor as she left the country for the United Kingdom in the month of October 2024 and the prospects of returning back to Kenya are unknown which aspect should be investigated and ascertained by the court through the children officer – Thika before it makes its decision on appeal as it is untenable that the minor leaves with strangers while he is around, available and ready to live with the minor.
22. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

23. The applicant submits that it is within the respondent's rights and freedoms to travel as she pleases but her actions have resulted in the grave infringement of the minor's rights as stipulated in Article 53 of *the Constitution*. The applicant argues that the respondent has shown no interest in the minor's welfare as she bestowed his custody to her younger sister without any care or worry. Thus, the applicant submits that the court orders the children's officer Thika to report to the court on the whereabouts of



the respondent, the well being of the minor and the person in actual custody of the minor as a way of upholding and protecting the minor's rights.

24. The applicant submits that his actions of respecting court orders issued in the suit are way beyond recommendable and buttressed by his love and care as depicted by his continuous provision, he deserves to be granted custody of the minor not forgetting that he is the only parent within the Republic. In his custody, the applicant argues that the minor's needs are guaranteed to be met as and when they arise.

The Respondent's Submissions

25. The respondent relies on Article 53 of *the Constitution* and Section 8 of the Children's Act and submits that in determination of any matter where the welfare of a child is concerned, the child's best interest should be of paramount consideration.
26. The respondent further relies on the cases of KMM vs JIL [2016] eKLR; Githunguri vs Githunguri [1979] eKLR and HGG vs Y.P [2017] eKLR and submits that custody of children of tender age should be granted to the mother unless there exist exceptional circumstances. In the instant case, the minor is a child of tender age as she is 5 years of age. The respondent submits that the only reason advanced by the applicant to support his prayer that he should be granted physical and actual custody of the minor is false and unsubstantiated allegation that she has abandoned the minor. The respondent argues that no evidence has been produced before the court by the applicant to support those allegations. The respondent submits that the minor has at all times been in the care, love and nurture of herself as her mother. Thus the applicant's fears are unfounded and without any basis. As rightfully held by the trial court, there is nothing wrong with her pursuing a private life with anybody. Fundamentally, the best interest of the minor has not been prejudiced at any time in any manner whatsoever in the respondent doing so.
27. The respondent submits that the reason advanced by the applicant in seeking physical custody is not guided by the best interest of the minor but by the applicant's misplaced and false sense of superiority over her when it comes to the minor, the applicant's hostility towards her.
28. The respondent submits that the trial court considered the issues in the instant application extensively and rendered its final orders with clarity, fairness and finality upon taking all relevant testimony. Furthermore the applicant has also confirmed that he is acutely aware of the legal requirements for any intended removal of the minor from the territorial jurisdiction of the Republic of Kenya.
29. The respondent submits that she and the minor have strong family ties in the country and it is not her intention to remove the minor from his accustomed life within the territorial boundary of Kenya without the knowledge and consent of the applicant. Indeed the minor is at ACK Thika Memorial School for his learning.
30. The respondent submits that the applicant has only made partial payment of the minor's school fees and related expenses on 3rd February 2025 after she filed her replying affidavit dated 28th January 2025 bringing the non compliance by the applicant to the attention of the court. The respondent argues that the applicant made the said payment to hoodwink this court that he has been complying with the orders of the trial court dated 21st March 2024 when he is not.
31. The respondent submits that since the applicant shunned his parental responsibilities, she took over the daily maintenance, care, love and nurture of the minor personally and with the help of her sister as the minor's authorized caregiver in line with Section 12(6) of the *Children Act* 2022, which confirms that a child may be placed in alternative temporary care of an authorized caregiver pursuant to the initiative of the minor's parent in the best interest of the minor. In the instant case, the respondent



argues that she placed the minor in the authorized care of the minor's maternal aunt as and when necessary as she works and fends for the minor.

32. The respondent argues that there are no exceptional circumstances to justify departure from the general rule on custody of children of tender age. As such, the prayer for granting physical custody to the applicant is misplaced and ought not to be granted.
33. The respondent submits that the minor's best interest is safe with her and there is no justification for a further children report.

The Law

Whether the application has merit.

34. In matters concerning a child, it is a constitutional imperative that of paramount importance is the best interests of the child. To that extent, Article 53(1) of *the Constitution* of Kenya provides that a child's best interests are of paramount importance in every matter concerning the child. This position has been enshrined in the Children's Act in section 4 which provides for the welfare of the child. Section 8(1) and (2) of the Children's 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.
35. The applicant argues that the respondent left the country in October 2024 and currently resides in the United Kingdom with no foreseeable possibility of returning to Kenya and by doing so the custody of the minor as well as his well being has become unascertainable. From the record, it is evident that some of the issues the applicant has raised were dealt with by the court below and determination of the said issues made.
36. The court below having given the final orders in its judgment, it is the court possessed of the jurisdiction to deal with any issues regarding execution of the said orders. The applicant has a right to approach the said court for execution of its orders as well as for review of its orders on custody in view of the new developments. The applicant alleges breach by the respondent of several orders in the court's judgment delivered on 21/03/2024. The remedy lies in the court that made the orders. At the moment, this court's jurisdiction is limited to the issues in the appeal and will pronounce itself on the issues raised therein.
37. Consequently, it is my considered view that this court lacks the requisite jurisdiction to make new orders regarding the case already heard and determined by the honourable magistrate. The only area this court would have acted is granting stay of the orders of the court below pending appeal if the such orders were found deserving. Thereafter, this court can only hear the appeal and determine it



accordingly. It is noted that this appeal is at an advanced stage in that it was pending delivery of judgment at the time, the applicant applied to arrest the judgment which orders were granted to allow court hear and determine this application. The other prayers Nos. 3, 4, and 5 are out of character in this appeal that is pending delivery of judgment. I will not hesitate to say that I decline to grant any of the prayers which are in my view displaced in an appeal that had already been fully heard.

38. Consequently, I find no merit in this application and hereby dismiss it with no orders to costs.

39. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 3RD DAY OF APRIL 2025.

F. MUCHEMI

JUDGE

