JJ (Suing as the Mother & Next Friend of the Minors) v NKN (Civil Appeal E006 of 2025) [2025] KEHC 7932 (KLR) (5 June 2025) (Ruling)

Neutral citation: [2025] KEHC 7932 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E006 OF 2025

RC RUTTO, J

JUNE 5, 2025

BETWEEN

JJ (SUING AS THE MOTHER & NEXT FRIEND OF THE MINORS) ..... APPLICANT

AND

NKN ..... RESPONDENT

RULING

1. The Appellant/Applicant herein being aggrieved by the ruling of Children's Court rendered on 11th February 2025 filed a Memorandum of Appeal together with a Chamber Summons application dated 11th March 2025 seeking the following orders, that:

    a. The application be certified urgent and be heard Ex-parte in the first instance.

    b. Pending the hearing of this application, the Defendant be ordered to make payment of a sum of Kshs.30,780 per term to cater for the school fees of TKN (minor) for the term starting 7th January 2025.

    c. Pending the hearing of the suit, the Defendant be ordered to make payment of a sum of Kshs.30,780 per term to cater for the school fees of TKN (minor) for the term starting 7th January 2025.

    d. The Honourable Court be pleased to make an interim order of maintenance of food, entertainment, clothing, school fees and medical expenses for the children as particularized herein below, pending the hearing and determination of this Application;

        i. Food and upkeep of the children, Kshs.5000 per month,

        ii. Clothing Kshs.5,000 per month,

iii. Medical Insurance be added to his insurance,

iv. School fees, books & other related expenses for the school going minor Kshs.30,748,

e. The entire Ruling Delivered by Hon. Barbara Ojoo delivered in Mavoko Children Case No. E002 OF 2025- JJ (Suing as the mother and next friend) Versus NKN be set aside.

f. Costs of this Application be awarded to the Plaintiff.

2. The application is supported by the Affidavit of the Applicant sworn on even date. The Applicant deponed that she met the Respondent in 2013 and they started living together under the Akamba customary marriage law. That at that time, she had three children namely; JMM, JMM and TKN. That the Respondent took full parental responsibility of the children by providing and catering for the minor's school fees and other expenses for 10 years.

3. The Applicant faulted the trial court for failing to consider the fact that the Respondent has not disputed that they started leaving together in 2013 until July 2023 when they separated; failed to consider that the disputed birth certificate was issued 7 years ago and the Respondent has never challenged or had issue with his name being used on the minor's birth certificate; that she is unable to raise school fees for the minors; the appeal raises substantial, arguable issues of law and has overwhelming prospects of success; appeal has been filed within reasonable time and that the orders of the trial court go against the child's best interest principle. She urged the court to allow the application

4. The Respondent opposed the application by filing a Replying Affidavit dated 28th March 2025. He deponed that, the Applicant had filed a similar application seeking similar orders before the lower court being Mavoko MCCMCC No. E002 of 2025 which was dismissed. He stated that the minors are not his children neither is he married to the Applicant under Kamba customary law or any other law of the land. He contended that they were just friends and the friendship ended; they did not have a child together and did not plan to have any. He denied being a guardian and indicated that there was no guardianship order exhibited. The Respondent also stated that the Applicant should pursue the father(s) of the children for support. He urged the Court to dismiss the Application.

5. The Chamber Summons was dispensed with by way of both oral and written submissions. The Applicant in her submissions dated 15th April 2025 set out the issue for determination as, whether the application is merited. She sought to rely upon the cases of HOO V MGO [2021] eKLR; FSL v FNK, Civil Appeal no E060 of 2021 [2022] eKLR to emphasize the overriding principle of safeguarding the best interests of the minors under Article 53(2) of *the Constitution* of Kenya, 2010, and Section 4(3) of the *Children Act*, 2022.

6. The Applicant submitted that it is not in dispute that they met with the Respondent in the year 2013 and lived together as husband and wife until July 2023 when they separated. She submitted that at all material time during the subsistence of the marriage, the Respondent took care of the children, including payment of their schools fees and other school related expenses. As such the Respondent assumed parental responsibility. To buttress the argument on taking up parental responsibility, reference was made to the case of ZW *v MGW (Miscellaneous Case 108 of 2013*) [2014] KEHC 5318 (KLR), to explain the circumstances under which a father may be saddled with parental responsibility where the mother and father of the child are not married. She urged that a father can be compelled to assume parental responsibility, they need not be a married.

7. The trial court was faulted for failing to take into account the provisions of section 114 of the Children's Act, 2022 in making its determination; by failing to consider the issues raised in the

Appellant's affidavit of means and in requiring the Applicant to demonstrate where they stayed with Respondent in the 10 years they cohabited.

8. It was submitted that the trial court failed to take into consideration all these factors before making the decision regarding maintenance of the children in its ruling dated 11th February 2025. Reference was made to SI v AS & As Minors (Suing through the Mother & Next of Friend FAA) (Children's Appeal Case E011 of 2020) [2024] KEHC 14122 (KLR) and EMO v JMN [2021] eKLR.

9. This Court was urged to find that the Appellant is exercising her right of appeal and that the application is not similar to the application before the lower court as alleged by the Respondent and to grant the orders sought by setting aside the ruling delivered on 11th February 2025.

10. On his part, the Respondent opposed the application. He relied upon his Replying Affidavit and submissions dated 24th April 2025 and submitted that the application is misconceived, bad in law and an abuse of the court process. That the orders sought cannot be granted for reasons that; the current application is word for word duplication of the lower court's application that was dismissed for lack of merit. Therefore, the chamber summon is res judicata, misconceived, misleading, frivolous and a non-starter.

11. Secondly it was submitted that the Appellant failed to demonstrate before the Court how and when he assumed parental responsibilities over the children. Reference was made to the case of Trusted Society of Human Rights Alliance vs Cabinet Secretary for Devolution and Planning & others HC Constitutional and Human Right Division Petition No 351 of 2015 to urge the Court not to make orders in vain.

12. The Respondent urged the Court to find that the trial court heard both parties, considered all the facts of the case and pleadings as well as analysed the provisions of *the Constitution* and the Children's Act, before arriving at it decision. Hence, that the trial court was correct in its decision.

13. Lastly it was submitted that the Memorandum of Appeal raises no arguable appeal as the issues being raised are similar to those dealt with by the trial court as well as those on the Chamber summons, hence the same should be dismissed with costs.

Analysis and determination

14. I have considered the Chamber Summons, the affidavits and the submissions of the parties, and the question arising for determination is whether the Court should grant the prayers sought in the application? Is the application merited ?

15. This Court notes that the Appellant, in his memorandum of appeal, challenges the Children Court's Ruling denying the request for maintenance orders against the Respondent for the benefit of the minors named in the application. The appellant initially approached the Children's Court, arguing that the Respondent should be compelled to provide maintenance and upkeep for the minors. This claim was based on the assertion that the Appellant had started living with the Respondent as husband and wife under Kamba Customary Law, and that, at the time, the Appellant had three children for whom the Respondent had taken full parental responsibility, including providing for their basic needs.

16. Upon hearing both parties, the Children's Court dismissed the application, stating that the claim that the Respondent had assumed parental responsibility for the children was unequivocally disputed. The court further noted that it would be appropriate to first establish parental responsibility before determining the extent of each party's responsibility. It is therefore worth noting that the substantive suit as filed by the Applicant herein is pending determination before the Children's Court. The Applicant had sought for interlocutory orders, which orders the trial Children's Court found that

they could not be granted until a preliminary issue, to wit, whether indeed the Respondent bore any parental responsibility is determined.

17. In addition to appealing the Children's Court decision, the Applicant also seeks this court to set aside that ruling and make a fresh determination on the application for maintenance, despite it being held that the issue of whether the Respondent assumed parental responsibility be first determined before the issue of responsibility can be determined.

18. Setting aside of an order is at the discretion of court. In the case of Mbogo and Another vs. Shah [1968] EA 93 where guidelines for the exercises of discretionary powers were discussed. The Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

19. Also, in the case of Patel v EA Cargo Handling Services Ltd [1974] EA 75, the Court held that:

> "There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

20. Upon reviewing the Memorandum of Appeal annexed to the Chamber Summons, the Court notes that the orders sought in the appeal are identical to those in the current application. These orders directly pertain to the core issues of the appeal and, therefore, cannot be determined at this interim stage. Setting aside the order at this point would result in a premature resolution of the matter. If the Court were to grant the requested orders now, the appeal would become moot, leaving no substantive issues to adjudicate.

21. Be that as it may, this Court has asked itself a fundamental question, what determination did the trial court make that the Applicant is aggrieved with? The trial court determination was that it cannot delve into granting orders sought at an interlocutory stage, since it was disputed whether the person against whom the orders were sought indeed legally bore the responsibility, that is, whether he was a person against who orders for parental responsibility could be issue against. Can this Court proceed to the contrary when that fundamental question, which ordinarily will form the crux of the appeal before it, remains unanswered? I do not think so. Hence, the reason why I have no hesitation in finding that the prayers sought in this application do not obtain.

22. Furthermore, I have already stated that the substantive matter before the Children Court remains pending. It is in that suit that among other things, the question of the Respondent's standing in regard to the children is to be determined. Consequently, this Court should guard against sitting on appeal of a ruling on an interlocutory application where substantive findings are yet to be determined by the trial court. Ordinarily, orders sought in an interlocutory application invoke the court exercises discretionary powers, and any challenge to such a ruling must demonstrate an apparent and glaring error in the exercise of that discretion in either granting or declining to grant the orders. In this instance, no such error or abuse of discretion has been alleged and/or proved.

23. Consequently, the application lacks merit and is hereby dismissed. Costs shall be on the cause.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 5TH DAY OF JUNE, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....for Appellant

.....for Respondent

Sam Court Assistant