



**PAO v SMEO (Civil Appeal E131 of 2024) [2025] KEHC 10873 (KLR) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10873 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA**

**CIVIL APPEAL E131 OF 2024**

**S MBUNGI, J**

**JULY 23, 2025**

**BETWEEN**

**PAO ..... APPELLANT**

**AND**

**SMEO ..... RESPONDENT**

*(Being an appeal from the judgement of Hon, T. A. Obutu (CM)  
delivered on 27th June 2024 in Mumias Divorce Case no. E010 OF 2023)*

**JUDGMENT**

1. This judgement is in respect to the appeal raised by the appellant after being dissatisfied with the judgement of Hon. T. A. Obutu vide Divorce case no.E 010 of 2023 at Mumias law courts dated 27th June 2024 appealing against the said Judgement on the following grounds:-
  - i) The Trial Magistrate erred in law and fact in compelling the Appellant to be making a monthly contribution of ksh. 10,000/= towards the upkeep of his children yet the court had no jurisdiction to determine a children's matter in a divorce cause.
  - ii) The Trial Magistrate erred in law and fact in saying that the matter involved children yet this was a divorce cause.
2. The learned magistrate dissolved the marriage between the Appellant and the Respondent and further ordered that the Appellant shoulders the responsibility of paying school fees and further contribute ksh, 10,000/= monthly to the Respondent for the purpose of rent and upkeep for the children.

**Appellants Case**

4. In his submissions the appellant avers that he has been a responsible father to all his children. That he has always ensured that their school fees is paid on time and has gone into debt to meet all their needs and that the children have never been sent away from school over school fees.



5. He also submits that the children are under his insurance coverage, which caters for all their medical needs.
6. That the children's best interests have always been catered for as evidenced by the attached school fees payments indicating fee overpayments in their respective schools.
7. He submits that the court should take into consideration the following factors
  - i) That his net salary of K.sh. 8,399.85 after all deductions.
  - ii) That he does not have any other source of income
  - iii) That most of his deductions on his pay slip are due to loans from various financial institutions taken to pay for the school fees of the children in question.
  - iv) That he has other children depending on his earnings
8. The appellant also avers that the children's needs have largely been catered for though the school fees payment and the medical insurance and that the children are not of tender age as two of the children have already attained the majority age and only one is a minor.

### **Respondents case**

9. The respondent argues that the trial court did have jurisdiction in relation to children maintenance and that the trial court considered the financial capabilities of both the parents and ruled on the matter considering the best interests of the children after divorce.
10. That all the children are school going children that require specialized care through financial support for their education, place to stay, transport to school, food, clothes, books, uniforms and other needs.
11. The respondent argues that the appellant has not demonstrated that he spent all the resources acquired from taking loans from various financial institutions on fees . She relies on her replying affidavit sworn on 19<sup>th</sup> March 2024 paragraph 12 that she ended up looking for bursary when the appellant deserted them in July 2023.
12. The respondent avers that the children are still dependable on both parties herein as DS is a polytechnic pupil at Okame, AA is a form four student at Mwitoti secondary school a day scholar who requires transport of Kshs.200/- per day and FA is a grade 9 pupil at Muslim primary school a day scholar and she requires transport of Kshs.100/= per day.
13. The respondent avers that the appeal lacks merit and prays for the same to be dismissed.

### **Issues to be determined**

- i. Whether the trial magistrate court had jurisdiction to determine a children's matter in a divorce cause.
- ii. Whether the maintenance order of Ksh 10,000/- is cruel to the appellant



## Analysis and Determination

13. As a first appellate court, I am required to re-evaluate the evidence on record afresh and come to my own conclusions. I am not bound to go by the findings of the trial court. See the case of *Selle v Associated Boat Co. Ltd.* [1968] EA 123 where the court of Appeal stated that:-

“An appeal to this Court from a trial by the High Court is by way of re-hearing and the Court of Appeal is a duty bound to reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
14. After considering the application, the response thereto and the submissions, the first issue that arises for determination is whether the trial magistrate court had jurisdiction to determine a children's matter in a divorce cause.
15. Jurisdiction is the cornerstone of any court's authority. Without it, a court acts in vain, and its proceedings, however well-intentioned, are a nullity. This fundamental principle was articulated by the Supreme Court of Kenya in the landmark case of *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR , and reiterated in *Samuel Kamau Macharia & Anor v Kenya Commercial Bank Ltd & 2 Others* [2012] eKLR, where the Supreme Court stated:

“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
16. Under Section 90 and 91 of the *Children Act*, 2022, the Children's Court is vested with original jurisdiction over matters relating to child custody and maintenance. Specifically:

Section 91(1)(a) empowers the Children's Court to conduct civil proceedings on matters under Part IX of the *Act*, which includes custody and maintenance
17. This very issue was directly addressed in the case of *JKM v COO* [2014] KEHC 7487 (KLR). In that instance, the High Court unequivocally held:

“The Children's Court had jurisdiction in the first instance to consider all questions relating to the custody and maintenance of children... It is that court that has jurisdiction in the first instance to consider any issue regarding the custody and maintenance of children. If either party shall be aggrieved by the decision of that court, they shall be at liberty to appeal to this court.”
18. In this case, the learned trial magistrate, while dissolving the marriage, proceeded to issue a definitive order for monthly contribution towards the children's upkeep. This, in my considered view, amounted to exercising a jurisdiction that was not conferred upon the trial court.
19. Therefore, I find that the trial magistrate erred in law by venturing into the substantive determination of children's maintenance in a divorce cause, as this jurisdiction rightfully belongs to the Children's Court.
20. The second issue that arises for determination is whether the making of the maintenance order of Ksh 10,000/- is cruel to the appellant.



21. Upon finding that the trial court acted without jurisdiction in issuing the maintenance order, the issue of whether the sum of Ksh. 10,000/= imposed on the Appellant is excessive or oppressive is rendered void before this Court. A decision rendered without jurisdiction is void ab initio and of no legal effect. Consequently, there is no lawful order before this Court upon which it can exercise its appellate jurisdiction to assess the appropriateness or fairness of the quantum. The Children's Court remains the proper and competent forum to determine the amount of maintenance, having due regard to the financial means of both parents and the best interests and needs of the child.
22. In my considered view, what must remain the guiding light in all matters involving children is the best interests of the child. This principle, far from being a mere procedural consideration, is a substantive constitutional imperative that demands the child's welfare, safety, and development be placed above all else. Article 53(2) of the *Constitution* of Kenya provides that
- ‘A child's best interests are of paramount importance in every matter concerning the child
23. In conclusion, I have considered the competing arguments and the relevant law and I do find that the appeal has merit. Therefore the appeal is allowed and the ruling of the trial court is hereby set aside and is replaced with the following orders.
- i) The appellant is ordered to present his case regarding the maintenance of the children before the Children's Court at Kakamega as it is that court that has jurisdiction in the first instance to consider any issue regarding the maintenance of children.
  - ii) If either party shall be aggrieved by the decision of that court, they shall be at liberty to appeal to this court.
  - iii) There shall be no orders as to costs as this is a family matter. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 23 DAY OF JULY 2025.**

**S. MBUNGI**

**JUDGE**

In the presence of:-

Court Assistant-Elizabeth Angong'a

