



**SM v DK & another (Civil Appeal 120 of 2023)
[2024] KEHC 162 (KLR) (Civ) (19 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 162 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 120 OF 2023

PM NYAUNDI, J

JANUARY 19, 2024

BETWEEN

SM APPELLANT

AND

DK 1ST RESPONDENT

PK 2ND RESPONDENT

(Being an appeal from the Ruling and Orders of Hon Festus Terer, Senior Resident Magistrate at Nairobi Children’s Case No.E 1733 of 2023 delivered on 31st October 2023)

Interviewing and weighing the child’s views against all the circumstances of the case to determine the best interests of the child

In the instant case the appellant was aggrieved by the ruling of the trial court issuing interim access orders of his children to their maternal grandparents. The court held that it was the interests of the child which were paramount and not the interests of the parent. The court further held that one sure way of determining the interests of the child was to interview that child and then weigh the views of the child against all the circumstances of the case.

Reported by Kakai Toili

Constitutional Law – fundamental rights and freedoms – children rights – right to access children - whether it was necessary and in the best interests of children for courts to interview children before issuing interim orders of access of the subject children – Constitution of Kenya, article 53; Children Act (cap 141), sections 3(b), 4(2) and 76.

Brief facts

The respondents were the maternal grandparents of the minors who were 12 and 10 years old. The appellant was their biological father. The mother of the minors died on February 26, 2020. The respondents moved the trial court and sought for among other interim orders; that pending the hearing and determination of the application, they be granted reasonable access to the children as follows; two evenings after school during the



week and one overnight stay either on Friday or Saturday during the school term; four days out of the ten days of the half term break; and two weeks of the long school holiday and one week out of the other holidays.

The appellant opposed the request for access on the reason that the grounds upon which the same was sought was fraught with misrepresentation of facts. He argued that the children were in school and attending evening classes and that the access order would disrupt their schedule. The trial court made the following orders; that the respondents to have access of the minors one evening during the week on Wednesdays for a period of 120 minutes; that the plaintiffs have an overnight access on alternate weekends from Friday evening to Saturday morning; access during the summer vacation to await determination of the application. Being dissatisfied with the trial court's ruling, the appellant filed the instant appeal.

Issues

Whether it was necessary and in the best interests of children for courts to interview children before issuing interim orders of access of the subject children.

Held

1. The guiding principles when considering matters concerning children's welfare were found in the Constitution which required that the best interests of the child be of paramount importance. The same principles were echoed in section 4(2) and 3(b) of the Children Act. Section 76 of the Children Act provided the general principles applicable in regard to proceedings in children's courts.
2. The respondents were very attached to the minors. The trial court erred in principle in failing to interview the minors prior to granting the interim orders of access especially since there was a request for the court to do so. That ran afoul of the best interests of the child principle which recognized children as subjects and not objects of the law. Persons who had agency to articulate and share their views and preferences when given an opportunity to do so.
3. There were no aggravating circumstances that necessitated the court to move with haste to grant orders that impacted the children without hearing them. If the trial court had interviewed the children they would have for instance pointed out that the proposed after school visits on Wednesdays were in conflict with their school calendar.
4. In the circumstances, given the age of the minors, the events of February 28, 2023 that had occasioned one minor to send a message voicing concern to the appellant, the court was obligated to ascertain the wishes/views of the children. It was the interests of the child which were paramount and not the interests of the parent. The one sure way of determining the interests of the child was, where as in the instant case there was a request to interview the child, to interview that child and then weigh the views of the child against all the circumstances of the case. It was in the best interest of the child that the matter before the lower court be heard on merits expeditiously.

Appeal partly allowed.

Orders

- i. *The court directed that the matter be referred back to the Magistrate's Court for hearing of the main suit on a priority basis.*
- ii. *On interim access pending the determination of the main suit, when the matter was mentioned before the instant court, the court directed that the appellant would facilitate supervised visits by the minors. The court directed that the visits continue having regard to the school and social calendar of the minors at times to be mutually agreed upon.*
- iii. *Each party to bear their own costs.*

Citations

Cases

Kenya

1. *In re DNK (Minor)* Civil Appeal 138 of 2019; [2022] KEHC 3034 (KLR) - (Explained)
2. *JO v SAO* Civil Appeal 43 of 2015; [2016] KECA 55 (KLR) - (Applied)



3. *MAK v RMAA & 4 others* Petition 2 (E003) of 2022; [2023] KESC 21 (KLR) - (Explained)
4. *MSA v PKA* Matrimonial Case 122 of 2006; [2009] KEHC 2179 (KLR) - (Explained)
5. *Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa)* Civil Appeal E20 of 2021; [2022] KEHC 282 (KLR) - (Applied)

United States

Boyles v Boyles (1973), 14 III. App. 3d 602 - (Explained)

Regional Court

1. *Mbogo & another v Shah* [1968] EA 93 - (Explained)
2. *Patel v EA Cargo Handling Services Limited* [1974] EA 75 - (Explained)
3. *Peters v Sunday Post Limited* [1958] EA 424 - (Applied)
4. *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123 - (Applied)
5. *TM & CM v Republic of Moldova* (Application No 26608/11) - (Explained)

Statutes

Kenya

1. Children Act (cap 141) section 4(2)(3)(b); 76(1); 95; 134(1) — (Interpreted)
2. Constitution of Kenya article 53(2) — (Interpreted)

Advocates

Ms Thongori Senior Counsel and Ndirangu for the respondent

Ms Jan Mohammed Senior Counsel for the appellant

JUDGMENT

1. Before this court for determination is the Appeal filed by SM(the appellant) through a Memorandum of Appeal dated October 31, 2023. The Appeal challenges the Ruling delivered
2. On October 31, 2023 by Hon Festus Terer, Senior Resident Magistrate in Nairobi Children’s Case No E 1733 of 2023.

Background

3. The respondents are the maternal grandparents of RM(1) and RM(2) who are 12 years old and 10 years old respectively . The appellant is their biological father. The mother of the minors died on February 26, 2020. The respondents herein moved the court vide Nairobi Children’s Court Suit No E1733 of 2023 and in Chamber Summons dated October 12, 2023 sought the following interim orders;
 1. That pending the hearing and determination of this application, the applicants be granted reasonable access to the children RM(1) and RM(2) as follows;
 - i. 2 (two) evenings after school during the week and 1(one) overnight stay either on Friday or Saturday during the school term;
 - ii. 4 (four) days out of the 10 (ten) days of the half term break;and
 - iii. 2 (two) weeks of the long school holiday and 1 (one) week out of the other holidays.
 2. That pending the hearing and determination of this suit, the applicants be granted reasonable access to the children RM(1) and RM(2) as follows;
 - i. 2 (two) evenings after school during the week and 1 (one) overnight stay either on Friday or Saturday during the school term;



- ii. 4 (four) days out the 10 (ten) days of the half term break; and
 - iii. 2 (two) weeks of the long school holiday and 1 (one) week out of the other holidays.
3. That pending the hearing and determination of this application, the applicants be granted phone and video call access to the children RM(1) and RM(2) twice a week.
4. That this honourable court be pleased to make such further orders as it may deem fit.
5. That each party bear their own costs.
4. The applicant opposed the request for access on the reason that the grounds upon which the same is sought is fraught with misrepresentation of facts. He argued that the children are in school and attending evening classes and that the access order will disrupt their schedule.
5. On October 31, 2023, Hon Festus Terer, Senior Resident Magistrate made the following orders;
 1. That the applicants to have access of the minors, RM(1) and RM(2) one evening during the week on Wednesdays for a period of 120 minutes.
 2. That the plaintiffs have an overnight access on alternate weekends from Friday evening to Saturday morning.
 3. Access during the summer vacation to await determination of the application dated October 12, 2023 or future directions as the vacation may draw near.
6. Being dissatisfied with this ruling of October 31, 2023, the appellant filed a memorandum of appeal dated October 31, 2023 in which he listed three (3) grounds of appeal as follows:
 1. That the learned magistrate erred in law by making drastic orders affecting the children without either having heard the views of the children or sought for a children's officer's report as requested by the appellant and as required by law.
 2. That the learned magistrate erred in law by allowing access to the children by the respondents despite evidence that the children had expressed reservations engaging with the respondents in the absence of their father, the appellant.
 3. That the learned magistrate erred in law by failing to consider the best interest of the child by issuing drastic orders having not considered the psychological effect of their actualization would have on the children.
7. Simultaneously with the memorandum of appeal the appellant filed notice of motion dated October 31, 2023 seeking the the orders of the Magistrate's Court be stayed pending the hearing and determination of the Application in the first instance and the Appeal. On November 1, 2023, this court issued orders staying the orders of the magistrate's court pending the hearing and determination of the Application.
8. On November 29, 2023, based on the nature of the matter and the need to have it determined expeditiously directed that the matter would proceed by hearing of the Appeal and directed that the same be canvassed by written submissions. Both parties complied and have filed their respective submissions.
9. The court further varied the interm orders of stay by directing that the applicant would facilitate accompanied visits to the respondent to facilitate the celebration of the birthday and further prior to the departure of the Children on a trip to Dubai.



Summary of the Appellant's Submissions.

10. The appellant filed the written submissions dated October 31, 2023 and identifies 5 issues for the court to resolve, namely
 - a. The matter of the best interests of the child, which is a first, paramount and overarching consideration
 - b. The principle of child participation in all matters (and more so judicial proceedings) affecting them
 - c. The matter of parental rights and responsibilities over the children
 - d. The scope and enforceability of the privilege of grandparents and other relatives and third parties over one's children.
 - e. The obligation of a court exercising jurisdiction and/ or discretion over children's matters to be judicious at all times.
11. The appellant challenges the impugned ruling on the basis that the same was arrived at without having heard the children and especially as the said orders of access conflict with the school schedule of the minors and did not address the trauma the children were subjected to at the visit of February 28, 2023 when the respondent's made known their intention to seek legal recourse for increased access.
12. It is the appellant's submission that the happenings at that visit are what triggered his decision to limit access and that the court may have arrived at a different decision if it had factored in all these issues.
13. The appellant relies on the decision of the Supreme Court in the case of *MAK v RMA & 4 others* Petition 2(E003) of 2002 [2023] KESC 21 (KLR) (Civ) (2 March 2023) in which the court set out the guidelines to be considered when balancing a child's best interests and parental rights and responsibility.
14. Which guidelines had also been enunciated in the decision of *MSA Versus PKA* [2009] eKLR.
15. The appellant further takes issue with the manner in which the court disposed with the application dated October 31, 2023 and in particular submits that by failing to hear the parties on the substance of the application, there was an injustice occasioned and the court arrived at the wrong decision that did not coincide with the best interests of the child.

Respondents' Submissions.

16. The respondents submissions are dated December 13, 2023. Relying on the decision in *JO v SAO* [2016] eKLR, the respondents submitted that the wishes of the child are to be considered alongside all the circumstances of the case
17. That although the court should not make orders in respect of a minor without considering the ascertainable wishes of the child, the decision made by the trial court were in conformity with the law to safeguard the best interests of the minors. They further submitted that the allegation that the minors are not comfortable around the respondents is baseless.
18. They submit that they have a close relationship with the minors and they would never make them uncomfortable. That the court should consider the evidence that the appellant voluntarily brought their children over during Diwali and on several occasions. They urged the court to uphold that the orders for access were issued in the best interest of the child .



19. Lastly, the respondents submitted that the appeal should be dismissed because they are only seeking access and not parental rights and responsibilities of the minors. They relied on the following decisions which allowed grandparents access of the minors; *re DNK(Minor)* Civil Appeal 138 of 2019) [2022]KEHC 3034(KLR) (Family) (1 April 2022) (Judgement); *Boyles v Boyles* (1973), 14 III. App. 3d 602; and *CM and TM (applicants) v RG (respondent)* April 12, 1996.

Analysis and Determination.

20. The appellant is aggrieved by the ruling of the trial court issuing interim access orders. Having considered the pleadings filed herein alongside the submissions filed, authorities cited and relevant law, I discern the following as the issues for determination

- a. Whether the orders of the court issued on October 31, 2023 are in the best interests of the minor children?
- b. Who should pay the costs of the appeal.

21. In determining this appeal i am well guided by the decision in *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123 and *Peters v Sunday Post Limited* [1958] on the duty of the appellate court to re-evaluate the evidence before the trial court as well as the judgment and arrive at its independent conclusion bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.

22. In the case of *Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa)* (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment) Hon Mativo J (as he then was) further enunciated on the role of the appellate court as follows:

A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.

23. I am further guided by the decision in *Mbogo & Another vs Shah*, [1968] EA, on general principles upon which an appellate court may interfere with a discretionary power of a trial, which were set out as follows: -

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”



24. In *Patel v EA Cargo Handling Services Limited* [1974] EA 75, this court held as follows:

“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.”

25. It is my view that at this stage the only issue for determination is whether the learned magistrate erred in fact and in law in finding that it was in the childrens’ best interests to grant the interim orders of October 31, 2023.

26. At page 6 and 7 of the impugned ruling the magistrate posed the following as the question for determination:

Based on the foregoing rival positions, the question that I ask myself on the interim is whether, it is in the best interest of the minors for the plaintiff’s being their maternal grandparents to have a relation with them by way of access. Put it the other way round, whether by asking for access is (sic) the manner sought, the plaintiffs have threatened the defendant primary right to have actual custody, care and control of the minors. My answer is in the negative....It follows therefore that the minors have a right to relate with the plaintiff in the same manner as they would if their biological mother was alive. For the lives of the minors to be complete, their interests tilt in favour of them having a meaningful relationship with both sides of the family- Maternal and Paternal. The only way of achieving this is vide access.

27. The learned magistrate then proceeded to observe that the mode of access sought by the plaintiff’s was not disruptive to the routine of the minors and invoked section 134(1) of the *Children Act* No 29 of 2022 which vests the court with powers to make orders geared towards the protection of the child’s welfare.

28. In the concluding paragraph of the impugned ruling the court stated:

In the wake of the foregoing and so as to protect the interest of the minors I find it (sic) that pending the hearing and determination of the plaintiff’s application dated October 12, 2023 or even the main suit, the plaintiffs have a right to reasonable access to the minors on terms that I set out herein.

29. The guiding principles when considering matters concerning children’s welfare are found in the *Constitution* that requires that the best interests of the child be of paramount importance. Article 53(2) provides:

“A child’s best interests are of paramount importance in any matter concerning the child.”

30. The same principles are echoed in section 4(2) and 3(b) of the *Children Act* that provides that:

(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.

31. Section 76 of the *Children Act* provides the general principles applicable in regard to proceedings in Children’s Courts. Section 76(3) of the *Children Act* is critical in that it requires as follows:

- “(3) Where the court is considering whether or not to make an order with regard to a child, it shall have particular regard to the following matters-
- a. the ascertainable feelings and wishes of the child concerned with reference to the child’s age and understanding.
 - b. the child’s physical, emotional and educational needs and in particular, where the child has a disability, the ability of any person or institution to provide any special care or medical attention that may be required for the child.
 - c. the likely effect on the child of any change in circumstances.
 - d. the child’s age, sex, religion personality and cultural background.
 - e. any harm the child may have suffered or is at risk of suffering.
 - f. the ability of the parent or any other person in relation to whom the court considers the question to be relevant, to provide for and care for the child.
 - g.
 - h.
 - i. the range of powers available to the court under this Act.”

32. It is evident from the court record and also from my interviewing of the parties that the grandparents (respondents) are very attached to the minors. This is as it should be. The authorities cited suggest that it is preferable not to disrupt a child’s ecosystem of relationships especially where there has been a bereavement. This is not a one size fits all approach but in instances where the court is invited to make a determination it must have regard to the circumstances of the individual case.

33. In the instant case, prior to the death of their mother it is not disputed that the children had contact with their grandparents, the scope is disputed. It is also not disputed that the appellant curtailed access of the grandparents to the minors after the incident of February 28, 2023. At the time of hearing of



- the appeal, the applicant was facilitating limited supervised access. The grandparents are opposed to having supervised visits and are petitioning for additional access.
34. The appeal is hinged on the failure by the court to interview the minors as requested in paragraph 76 of the appellant's replying affidavit sworn on October 23, 2023 in opposition to the Chamber Summons Application dated October 12, 2023.
 35. The question I must pose is whether in determining the best interests of the child, the court looked at all the circumstances of the case. In the authorities cited by the respondent, the courts interviewed the minors.
 36. In the instant case, I find that the court erred in principle in failing to interview the minors prior to granting the interim orders of access especially since there was a request for the court to do so. This runs afoul of the best interests of the child principle which recognises children as subjects and not objects of the law. Persons who have agency to articulate and share their views and preferences when given an opportunity to do so.
 37. I am not persuaded that there were any aggravating circumstances that necessitated the court to move with haste to grant orders that impacted the children without hearing them. I have no doubt that if the court had interviewed the children they would have for instance pointed out that the proposed after school visits on Wednesdays were in conflict with their school calendar.
 38. At this juncture it is not for this court to determine whether the grandparents have an enforceable right with regard to accessing the minors. This court however must review whether the court in granting the interim orders of access was properly guided by the best interests of the child.
 39. In response to that question I find in the negative and hold that in the circumstances of the case, given the age of the minors, the events of February 28, 2023 that had occasioned one minor (RM 1) to send a message voicing concern to the appellant, the court was obligated to ascertain the wishes/ views of the children.
 40. As was stated in the case of *MSA versus PKA* [2009] eKLR by Onyancha J '... It is the interests of the child which are paramount and not the interests of the parent.' The one sure way of determining the interests of the child is where as in this case there is a request to interview the child, interview that child and then weigh the views of the child against all the circumstances of the case.
 41. Having faulted the decision of the trial court I am still by virtue of section 95 of the *Children Act* required to make an order that serves the best interests of the child. It is in the best interest of the child that the matter before the lower court be heard on merits expeditiously. I have looked at the court record of the lower court, on October 24, 2023 when the matter came up for mention, the parties intimated that they wished to proceed to the main suit. This is the preferred approach.
 42. I therefore direct that the matter be referred back to the Magistrate's Court for hearing of the main suit on a priority basis.
 43. On interim access pending the determination of the main suit, when the matter was mentioned before this court, the court directed that the appellant would facilitate supervised visits by the minors. I direct that these visits continue having regard to the school and social calendar of the minors at times to be mutually agreed upon.
 44. On costs, each party will bear their own costs.
 45. It is so ordered



**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
19TH DAY OF JANUARY, 2024.**

P. NYAUNDI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the Presence of;

Ms Thongori SC and Ndirangu for the Respondent

Ms Jan Mohammed SC for the Appellant

