



NS v JM (Family Appeal E031 of 2023) [2024] KEHC 3566 (KLR) (5 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3566 (KLR)

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

FAMILY APPEAL E031 OF 2023

G MUTAI, J

APRIL 5, 2024

BETWEEN

NS APPELLANT

AND

JM RESPONDENT

JUDGMENT

1. The Appellant herein moved the trial court vide a Plaint dated 12th November 2019 and filed on 14th November 2019 seeking a declaration that both the plaintiff and the defendant have equal parental responsibility for the minors named TE and LM and an order giving that effect, a residence order in favour of the Plaintiff giving her actual physical custody of the children and that the children do reside with her, an order requiring the Defendant to contribute Kes.68,108/- per month for the maintenance of the said children. The Plaintiff further sought to have the Defendant compelled to remit the said sum to the Plaintiff's account on/or before the 5th day of every month, an order requiring the defendant to make an adequate contribution towards additional medical and educational expenses, as and when the same may arise, costs of the suit and interests at court rates and any other relief that the honourable court may deem fit.
2. The Plaint was accompanied by a Notice of Motion application under Certificate of Urgency dated and filed on the same date as the plaint. The application sought interim orders compelling the Defendant to clear the school fees balance of Kes. 62,000/- and to pay school fees and related school fees expenses in respect of the subject minors.
3. When the matter came for hearing on 24th January 2022, the Plaintiff/Appellant told the court that she was the one catering for all expenses concerning the children and wanted the Defendant to be compelled to take up his responsibilities. She stated that she had only received a total sum of Kes. 30,000/- from the Defendant on diverse dates. She also sought for the sole custody of the children.



4. The Defendant, on the other hand, told the court that he was not able to take care of the children as his work was not consistent and that he was unable to provide a sum of Kes. 20,000 for each child towards school fees.
5. The trial court delivered its judgement on 11th May 2022. The said judgment provided in part as follows: -
 - a. Both parties to have joint legal custody, the Plaintiff (mother) shall have actual physical custody with access to the Defendant by way of phone calls and video calls and physical access whenever the Defendant visits the country and if during school holidays to have the children for the entire period he is in the country. Upon the children joining high school, the Defendant is free to take them to the United States and allow access to the Plaintiff;
 - b. The Defendant to pay school fees directly to the children's school or in the alternative, a bank account be opened where the Defendant will be depositing the same. The Plaintiff to cater for the rest of the remaining school expenses, shelter, food and medical.
 - c. The clothing needs of the children be catered for by both parties and the Defendant to be providing once a year assessed at Kes. 15,000/- payable preferably every December.
 - d. No orders as to costs and either party to be at liberty to apply.
6. The Appellant filed a Notice of Motion dated 5th May 2023 seeking to have the judgement reviewed to the effect that the Defendant be ordered to contribute Kes. 54,650/- per month as maintenance, the Plaintiff to cater for rent and utilities, and the Defendant to cater for school fees and school-related expenses while she caters for the medical needs of the children.
7. The trial court, in its ruling of 13th September 2023, reviewed its judgement. It ordered the Defendant (the Respondent in this Appeal) to continue catering for shopping and pocket money for the child in boarding school and to cater for transport during opening and closing day, while the Plaintiff (the Appellant in this Appeal) is to pay transport costs for the child during half term.
8. Being dissatisfied with the orders of the trial court, the Appellant appealed to this court vide the appeal dated 24th October 2023, seeking to have the trial court's ruling set aside and or varied, an order that the respondent to contribute in the children's maintenance and upkeep, in the sum of Kes. 54,650/- per month, or such other sum as may be assessed by this honourable court, the honourable court to compel the Respondent to take the children to the United States and allow access to the Appellant as was ordered by the subordinate court, upon joining high school, this honourable court to order that the children's welfare not be subjected to any third party and to only allow access to the Appellant and the Respondent and costs of the appeal.
9. The appeal is based on the grounds stated in the Memorandum of Appeal dated 12th October 2023. The said grounds are to the effect that: -
 - a. That the learned magistrate erred in law in by ruling that the defendant/respondent not to contribute in the children's maintenance and upkeep to a sum of Kes. 54,650/- per month as prayed by the Plaintiff/Applicant.
 - b. That, the learned magistrate erred in law and fact by ruling that the Defendant is allowed to send whomever is he trusts to deliver items to the child in school;
 - c. That the learned magistrate erred in law and fact by not ruling that the defendant to cater for school fees and other school-related expenses.



10. The Appeal was canvassed by way of written submissions. The Appellant filed her written submissions dated 5th January 2024. The Appellant identified 3 issues as coming up for determination, namely; does the Respondent have parental responsibility, in terms of maintenance, beyond school fees? Did the court err in fact and in law in deciding the way it did in the circumstances of the case? Is the Appellant entitled to the reliefs sought?
11. On the first issue, she submitted that the Respondent’s averments on his ability to provide did not align with the law of maintenance as provided for in Section 94 (1) of the [Children’s Act](#).
12. On the 2nd issue, she submitted that the trial court’s judgement was not based on the facts and evidence on record and that it also failed to consider fundamental elements such as the fact that she has been solely providing for the children since 2014 to 2019, and after divorce, to date; that maintenance is an aspect of parental care and responsibility of both parents; that paying school fees does not amount to the 50/50 shared responsibility as her responsibilities are way above that; and that the trial court did not consider the fact that the respondent did not provide documentary evidence of his earnings to enable the court come up with a just and fair judgment on the maintenance issue.
13. On the third issue, she submitted that no inquiry was made into the Respondent’s income level. She urged the court to allow the appeal as prayed.
14. The respondent, on the other hand, filed his written submissions dated 20th February 2024. He submitted that the Appellant’s appeal was on the ruling in respect of the application for review and not on the judgement delivered on 11th May 2022. He relied on Sections 80, 63(e) and 3A of the [Civil Procedure Act](#) and Order 45 Rule 1 of the [Civil Procedure Rules](#). He submitted that the issue for determination is whether the appellant has established grounds to warrant an order for review. Further, his position has not changed as he is still on temporary employment as submitted in the trial court fact, which the appellant never rebutted. He submitted that the child in boarding school is given comprehensive care, which he caters for, while the Appellant only caters for breakfast and dinner for the child in day school as he pays for the other expenses.
15. He submitted that he is not opposed to the relocation of minors to the USA; however, the same has to follow the United States of America requirement for migration, which is beyond him.
16. He submitted that both parents have equal responsibility, which the trial court adhered to, and urged the court to dismiss the appeal with costs.
17. I have considered the appeal and the rival submissions by both parties. It is now my duty to determine whether the reliefs sought should be issued by analysing the grounds, the record of the court below, as well as the written submissions by the parties.
18. As this is a matter concerning children, the Court must consider and be guided by the principle of best interest of a child as provided for in Article 53(2) of the [Constitution](#) and Section 8(1) of the [Children’s Act 2022](#).

Article 53 (2) of the [Constitution](#) provides:

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

Section 8 (1) of the [Children’s Act 2022](#) provides:-

(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—

- a. the best interests of the child shall be the primary consideration;



- b. the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.”
19. This being the first appeal, I have the duty to re-evaluate the evidence tendered before the trial court. I must, however, warn myself that I did not see or observe the witnesses testify. Although this is an appeal against a decision of the trial court in respect of a review application the said warning holds. The Court of Appeal in the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR stated: -
- “This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must 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 allowances in this respect.”
20. The Appellant has not appealed against the judgement of the court below; rather, he has appealed against the ruling in respect of the application for review.
21. On whether the learned Magistrate erred in law and, in fact, in ruling that the Respondent should not contribute towards the children’s maintenance and upkeep, in the sum of Kes.54,650/- per month, as prayed by the Appellant, I note from the court’s ruling that no such order was issued; instead, the learned magistrate enhanced the provision orders given to the Respondent by ordering him to continue catering for shopping and pocket money for the child in boarding school as well as transport during opening and closing day.
22. On the needs tabulated by the Appellant for the child in a day school in terms of electricity, water bill, house manager, shopping, etc, the trial court stated that they were expenses for a full household, which the Appellant would have incurred whether with the children are there or not. The court further stated that there hadn’t been significant changes in the living conditions of the children to warrant its review of the judgement of 11th May 2022.
23. Review applications are made under Order 45 Rule 1 of the *Civil Procedure Rules*. The said Rule provides as follows: -
- “(1) Any person considering himself aggrieved—
- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”
24. I have looked at the application filed by the Appellant in the Court below. I am unable to discern any new fact that she discovered after the trial concluded that wasn’t hitherto available to her. I have not



seen an error apparent on the face of the record of the Court. Lastly, no other sufficient ground was produced.

25. The Children's Court has power under section 116 of the *Children's Act* to review the maintenance order. Section 116(3)(b) of the said *Act* provides that this may only be done if there is significant changes in the circumstances of the parents or guardians. In this case no evidence of a significant change in either parent's circumstances was tendered.
26. Based on the foregoing I am unable to disagree with the Learned Magistrate.
27. On whether the learned magistrate erred in law and fact by ruling that the defendant is allowed to send whomever he trusts to deliver items to the child in school, this came as a result of the evidence tendered before the court on the abusive text messages sent to the Respondent who is out of the country. The trial court, in its ruling, stated: -

“I have noted the text messages written by the plaintiff which are threatening, abusive and depicts that of a bitter person. The text shows that the defendant has sent shopping for the child, I do not know how the plaintiff wants the defendant to exercise his responsibilities yet she is aware that the Defendant is out of the country and the Plaintiff is also far from the child's school. She is hereby ordered to desist from such and leave the Defendant to perform the duties allocated to him by sending whoever he trusts to deliver items to the child. If the Plaintiff is not agreeable, she can take over the responsibility as she is equally a parent.”
28. The trial Magistrate had the benefit of hearing the parties during the trial. In my view she made the right call. I cannot fault her decision.
29. On whether the learned magistrate erred in law and fact by not ruling that the Respondent caters for school fees and all other school-related expenses, from the judgement and the ruling of the court below, it is evident that the Respondent is the one catering for all the said expenses. There is therefore no need to interfere with the said determination. Therefore, this ground must fail.
30. The Upshot of the foregoing is that the appeal lacks merit. The same is dismissed.
31. This being a matter concerning the welfare of children, this court is of the view that an award of costs is not an inappropriate remedy. Each party will, therefore, bear his or her own costs.
32. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 5TH DAY OF APRIL 2024

GREGORY MUTAI

JUDGE

In the presence of:-

Ms Nampojo Singo, the Appellant (pro se litigant);

Mr. James Matoke, the Respondent (pro se litigant); and

Arthur – Court Assistant

