



REPUBLIC OF KENYA



MMK v JON (Family Appeal 8 of 2022) [2024] KEHC 6729 (KLR) (6 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6729 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL 8 OF 2022**

**G MUTAI, J
MAY 6, 2024**

BETWEEN

MMK APPELLANT

AND

JON RESPONDENT

(Appeal Against the Judgement and Decree of the Trial Court delivered on 26th January 2022 by Hon. V. J. Yator, Principal Magistrate, in Tononoka Children Case No. 202 of 2020.)

JUDGMENT

Introduction

1. This Appeal arises from the Judgement and Decree of the Trial Court delivered on 26th January 2022 by Hon. V. J. Yator, Principal Magistrate, in Tononoka Children Case No. 202 of 2020.
2. The Trial Court entered Judgement and granted the following reliefs:
 - a. Limited access to the Plaintiff on alternate weekends;
 - b. Legal custody to be joint between the parties;
 - c. Both parties to share school fees and related expenses at 50:50;
 - d. The Plaintiff's contribution of Kes.28,000/- per month towards the maintenance of the minor is sufficient and upheld.
 - e. Plaintiff to continue catering for the therapy of the minor at Kes.1,500/- per session;
 - f. Both parties' medical covers to apply to the medical expenses of the minor as appropriate;
 - g. The prayer seeking to prevent the Defendant from changing the name of the child is granted.



- h. The Defendant is restrained from making unilateral decisions about the minor without consulting the Plaintiff;
 - i. Defendant had cleared all the arrears per the Notice of Show Cause dated 2nd September 2021;
 - j. Parties are restrained from taking the children out of the country without each other's consent; and
 - k. Each party to bear own costs.
3. The Appellant herein was the Defendant in the case before the trial Court. Being aggrieved, she preferred 25 grounds in the Memorandum of Appeal dated 24th February 2022.
 4. In my view, the 25 grounds of appeal can be condensed into only four grounds, to wit: -
 - i. Access
 - ii. Maintenance
 - iii. Change of the minor's name
 - iv. Dismissal of the Notice of Show Cause dated 2nd September 2021.

Pleadings

5. I must first set out the pleadings filed before the Court below. The Respondent filed the suit vide the Plaint dated 11th February 2020. seeking the following reliefs against the Appellant:
 - i. Shared legal and actual custody of the child;
 - ii. Permanent order restraining the Appellant from removing the children from the Jurisdiction of the court;
 - iii. Permanent order restraining the Appellant from changing the child's name.
 - iv. An Order for equal financial support to the minor.
6. In her response the Appellant averred in the Defence that the Respondent had subjected her to psychological and emotional abuse during the subsistence of the marriage following which she moved out of the matrimonial home in February 2020 with the children.
7. She stated that the child was born on 7th September 2016 and lived with both parents until August 2019 when their marriage irretrievably broke down.
8. Further, that the Respondent would send money to the Defendant to cater for the upkeep of the minor at Kes.29,000/- per month.
9. The Appellant stated that the Respondent had to time for the minor and did not support him.
10. The Appellant filed a counterclaim in which she pleaded that the minor was in need of the following:-
 - i. AAR medical cover- Kes.90,000/-;
 - ii. Annual holiday- Kes.150,000/-;
 - iii. School fees per term – Kes.50,000/-;
 - iv. Speech therapy- Kes.1,500/- per session;



- v. Motor vehicle service- Kes.50,000/-;
- vi. Food per month – Kes.25,000/-;
- vii. Personal items- Kes.25,000/-;
- viii. Domestic staff- Kes.12,000/-;
- ix. Cooking gas- Kes.3,000/-;
- x. Garden expenses- Kes.10,000/-;
- xi. Electricity- Kes.10,000/-;
- xii. Water- Kes.6,000/-;
- xiii. Dstv- Kes.2,500/-;
- xiv. Wifi- Kes.7,000/-
- xv. Clothing- Kes.20,000/-;
- xvi. Phone- Kes.4,000/-;
- xvii. Swimming lessons- Kes.10,000/-;
- xviii. Fuel per week- Kes.5,000/-;
- xix. Bicycle- Kes.6,000/-; and
- xx. Motor vehicle tires- Kes.10,000/-.

11. The Appellant thus prayed for reliefs thus:

- a. The suit be dismissed with costs
- b. Legal and actual custody, care and control of the minor be with the Appellant with limited access by the Respondent;
- c. Plaintiff to render periodic financial support for the minor.

Evidence

12. During trial, PW1, one GA testified that she was the house help for the parties.
13. It was her case that it was the Respondent who was paid her salary.
14. Further, that she left because the Appellant was very harsh.
15. On cross examination, it was her case that she was paid Kes.400- daily, payable weekly.
16. PW2 was the Respondent. He relied on list of documents dated 1st February 2020 and a further list of documents filed on 20th April 2021.
17. It was his case that he was catered for rent, electricity and food while the parties herein lived together at Kizingo
18. Further, that he spent with the minor most times and only the Appellant disrupted his time with the minor, for instance when she took the child to Kirinyaga without his knowledge.



19. It was his case that he fully catered for the minor and would refund expenses incurred by the Appellant.
20. That he came to know that the child was of special needs when his speech delayed when he reached one year of age.
21. It was his further case that he came to court after he could not access the minor.
22. On cross examination, it was his case that he had office and salary expenses and Kes.800,000/- loan repayment.
23. He testified that he paid Kes.28,000/- per month on the minor's food, shelter and nanny and that he paid school fees and therapy charges.
24. On the other hand, the Appellant testified as Defendant in the lower court case. She relied on her witness statement dated 7th August 2020.
25. It was her case that she had had the custody of the child since his birth.
26. She testified that the child had moderate autism and it was difficult for him to speak.
27. It was her further case that the Respondent was not consistent in meeting his obligations to the minor.
28. It was her further stated case in cross examination that she would not object to 50:50 parental responsibility as well as the order restraining the changing of the minor's name.
29. On the notice to show cause, it was stated that the Respondent never sent a penny for the therapy of the minor.

The Appellant's Submissions

30. The Appellant submitted on custody and maintenance.
31. She reiterated the contents of the memorandum of appeal and substantially and extensively submitted on how the impugned judgement was not in the best interest of the minor as major consideration in making a decision about the minor.
32. I have perused and considered the authorities relied on by the Appellant.
33. I was urged to allow the Appeal.

Respondent's Submissions

34. The Respondent also filed submissions.
35. It was submitted that the Trial Court applied the correct legal principles relating the access, and maintenance.
36. It was the submission of the Respondent that Appellant testified that she had no objection to the order restraining her from changing the name of the minor.
37. I have perused and considered the authorities relied on by the Respondent.
38. It was thus submitted that the court did not err in its Judgement.
39. I was thus urged to dismiss the Appeal.



Analysis and determination

40. I have perused the pleadings, evidence as well as the submissions and authorities filed by the parties in support and opposition to their respective cases.

Duty of the first Appellant Court

41. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
42. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 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 it 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.”
43. The duty of the first appellate Court was settled in the case of *Selle & another Vs Associated Motor Board Company and Others* [1968]EA 123. In the said case the Court stated as follows:-
- “.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
44. Further, in the case of *Peters vs Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-
- “It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
45. The issue that fall for this Court’s determination is whether the Trial Court erred in law and fact in its finding on the custody and maintenance of the child herein.
46. This Appeal does not challenge the finding of the Trial Court on custody and I will not venture to interfere with the court’s finding in that aspect.
47. I understand Article 53 (1) of *the Constitution* of Kenya provides that a child’s welfare and best interest are of paramount importance in every matter concerning the child.
48. The Constitutional imperative is given effect by Section 8 of the *Children Act 2022 Act No 29 of 2022* which provides as follows:-
- (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 No. 29 of 2022 Children.
2. All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, 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; and
- (c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.
- (3) In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child's age and degree of maturity.
49. The aforesaid principles are well anchored in the Convention on the rights of the child to which Kenya is a party. Under the UN Convention on the Rights of the Child (CRC) that Kenya ratified on 30 July 1990, Article 3 provides that:
1. 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.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
50. I therefore have no doubt that there are enough safeguards to guide this court in arriving at a finding founded on the welfare and best interest of the children in this case.
51. The Appellant consequently submitted that Trial Court erred in law and fact in failing to consider the special needs of the minor and also misapprehended the principles of access and maintenance.
52. I note on this that the Trial Court directed as follows:
- a. Limited access to the Plaintiff on alternate weekends.
- b. Legal custody to be joint between the parties
- c. Both parties to share school fees and related expenses at 50:50.
- d. The Plaintiff's contribution of Kes.28,000/- per month towards the maintenance of the minor is sufficient and upheld.
- e. Plaintiff to continue catering for the therapy of the minor at Kes.1,500/- per session.
- ...
53. Inasmuch as the Appellant appealed that it was unfair for the Trial Court to dismiss the counterclaim, I note that the counterclaim substantially sought reliefs thus:
- a. The suit be dismissed with costs.



- b. Legal and actual custody, care and control of the minor be with the Defendant with limited access by the Plaintiff.
 - c. Plaintiff to render periodic financial support for the minor.
54. The Appellant did not however appeal on the finding the court on custody. The only contention in the appeal is on access.
55. As I have stated above, the Appellant craved for limited access by the Respondent and the Trial Court directed for limited access for the Respondent on alternate weekends.
56. On access, the Appellant has not satisfied this court that the finding of the Trial Court on access is against the welfare and best interest of the minor or denies or bars the Appellant's parental rights.
57. As was held by the Supreme Court in MAK v RMAA & 4 others (Petition 2 (E003) of 2022) [2023] KESC 21 (KLR) (Civ) (2 March 2023) (Judgment):-
- The society in which children grew up shaped who they were. Having both a mother and father involved in a child's life could provide significant social, psychological, and health benefits. The stability of having a relationship with both parents could provide security and greater opportunities for children to find their own paths to success. Even if circumstances may warrant limited access to a parent, a court should order supervised access. The Supreme Court had the constitutional obligation to ensure that the child had access to parental care and protection as enshrined in *the Constitution*.
58. It is not, therefore, in the interest of justice to deny the child access to his father. I am cognizant of Article 19 of the African Charter on the Rights and Welfare of the Child, which stipulates that: "every child is entitled to parental care and protection and shall, wherever possible, reside with his or her parents."
59. On maintenance, the Appellant's contention was that the Trial Court erred in its finding on maintenance and disregarded the special needs of the minor. It was submitted that the child had moderate autism. Whereas the Respondent denied this fact, I note from the testimonies and evidence at the trial court that it was the common position of the parties that the child suffered a delayed speech and which necessitated sessional therapy and which the Respondent conceded to have remitted Kes.1,500/- per session. This court, therefore, cannot rule out special needs for the minor if a provision for therapy was necessary in parental care.
60. On parental responsibility, I am fortified by the finding of the Court in M.K. vs C.K.K HCA. 51/2015 where the court held:-
- "Parental responsibility is shared and not equal based on the financial position of each parent. The mother as the resident parent has a nurturing role to the children and the father to provide maintenance and upkeep of the children.
61. To this court, the welfare and best interest of the minor in this case demands that he access quality education, health, nutrition, interaction, among other necessary child developmental parameters. It was uncontested in evidence that the parties were both advocates of the High Court with the Appellant



working as Prosecutor and the Respondent in private practice. Section 94 (1) of the Children's Act guides the Court when making an order for financial provision for maintenance of a child as follows;

- a. the income or earning capacity, property and other financial resources which the parties or any other person in whose favour the court proposes to make an order, have or are likely to have in the foreseeable future.
- b. The financial needs, obligations, or responsibilities which each party has or is likely to have in the foreseeable future
- c. The financial need of the child and the child's current circumstances

62. This Court is also alive to the reality that the Appellant was given full actual custody with limited access by the Respondent. This means the Appellant has exclusive care and control of the minors. This court understands that rent obligations may swell with time and the family needs may increase requiring a better and larger shelter, clothing and food to accord with reasonable standards of living. Furthermore, it is to be considered that there will be need for consistent assistance of the children to move to and from school. Therefore, exclusive care and control of the children is not an easy task. Under Section 23 of the Children Act it is provided thus;

1. in this Act, parental responsibility "means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.
2. The duties referred to in Sub-section (1) include in particular-
 - (a) the duty to maintain the child and in particular to provide him with-
 - (i) Adequate diet
 - (ii) Shelter
 - (iii) Clothing
 - (iv) Medical care including immunization
 - (v) Education and guidance.

63. I note that the Appellant, in his testimony in the Trial Court confirmed that he was able to raise only Kes.28,000/- per month, all-inclusive to cater for food, clothing, rent and education and other needs. It is trite law that equal parental responsibility does not mean equal financial or other contribution as it was held in the case of E.M.M Vs M.O.O(2016) eKLR:-

"However equal responsibility does not mean equal and similar contribution as the income of each parent, and other non-monetary contribution must be borne in mind."

64. I understand that for this court interfere with the discretion, it should be demonstrated that the discretion of trial court was not supported by the facts, law or evidence. Dealing with the same point, the Court of Appeal in Kiruga vs Kiruga & Another [1988] KLR 348, observed that:-

"An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly



wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

65. Under Article 18 of the Convention on the Rights of the Child, it is stated thus:

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.

66. On maintenance, this court finds Kes.28,000/- to be inadequate towards the maintenance of the minor in the circumstances of this case. In my re-evaluation, I note that the Trial Court did not entirely appreciate the circumstances and special needs of the minor in ordering the Respondent to continue paying Kes. 28,000/- monthly towards the needs of the minor. As was held in *CM v DN* [2020] eKLR:

“While considering the order for financial provision for maintenance of children, the trial court was obligated to take into account the income or earning capacity, property and financial resources of the parties both then and in the foreseeable future. The trial court was also to consider the parties’ financial needs, obligations or responsibilities. As regards children, the court was required to bear in mind their financial needs and circumstances.”

67. I note that the Appellant also contended that the trial court erred in issuing an injunction against the Appellant not to change the name of the minor. I note that the court stated that whereas Section 14 of the *Births and Deaths Registration Act* permitted the change of name within the first two years of age, the minor was more than two years. The court, however, noted that there were chances of changing the name through a late registration application and issued an order against the change of the name. On this, I find no basis to interfere with the trial court’s reasoning. I understand paternity is not disputed and the child has the right to have the identity and recognition by both parents.

68. The right to a name is provided under Article 53 (1)(a) of *the Constitution*. Name and identity have also been exemplified as crucial parameters in the rights and welfare if the child as far as family ties are concerned. Under Article 8 of the United Nations Convention of the Rights of the Child, it is stipulated thus:

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

69. Similarly, the Appellant urged that the trial court erred in its dismissal of the Notice to Show Cause dated 2nd September 2021. I find no basis to interfere with the trial court’s finding that the Respondent had fully settled the arrears in the therapy expenses. The Appellant did not lay the basis for the allegation that there were pending arrears.

70. The upshot of the foregoing is that the appeal succeeds in part.

Disposition

71. I make the following Order:



- i. The Appeal against the decision of the trial court on access, change of name of the minor and the notice to show is dismissed. It is in the welfare and best interest of the minor to benefit from access by both parents as they are his biological parents;
- ii. The Order for maintenance for Kes.28,000/- per month by the Respondent is set aside and substituted with an Order for the Respondent to pay maintenance of Kes.45,000/= per month for the minor. The payment of the said sum shall commence immediately; and
- iii. This being a Children's matter, each party to bear their own costs.

72. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 6TH DAY OF MAY 2024.

GREGORY MUTAI

JUDGE

In the presence of: -

Ms. Osino for the Appellant;

Mr Oduor Opalo for the Respondent; and

Arthur – Court Assistant.

