



REPUBLIC OF KENYA



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**EGK v JMM (Children's Appeal Case E058 of 2022)
[2024] KEHC 8838 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8838 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CHILDREN'S APPEAL CASE E058 OF 2022
LM NJUGUNA, J
JULY 18, 2024**

BETWEEN

EGK APPELLANT

AND

JMM RESPONDENT

*(Appeal from the judgment of Hon. S. Ouko SRM in SPM Court at
Runyenjes Children E011 of 2021 delivered on 03rd November 2022)*

JUDGMENT

1. The appellant has filed a memorandum of appeal dated 17th November 2022 being dissatisfied with the abovementioned decision, seeking orders;
 1. That the ruling and all consequential orders be set aside and the appeal be allowed;
 2. That the appellant be granted orders as per the application dated 30th May 2022 to allow a fair determination of the entire suit being Runyenjes Children E011 of 2021;
 3. That the court grant any other order it deems fit; and
 4. That costs of the appeal be provided for.
2. The appeal is premised on the grounds that the learned magistrate:
 1. Erred in law and fact by failing to take into consideration that this is a matter involving the welfare of minors;
 2. Erred in law and fact by failing to consider that the Mpesa statement sought was essential and crucial to prove that indeed the respondent was supporting the minors through his mobile



phone Mpesa account number and the appellant cannot access the Mpesa statement sought to prove her case on her own;

3. Erred in law and fact by failure to consider that the allegation by the appellant that the respondent used to pay school fees, house rent, shopping, DSTV, M-kopa solar water bills and electricity through his mobile phone to the various mobile money accounts, the Mpesa statement is the only way to support the appellant's case;
 4. Misdirected herself by alleging that the documents sought were for 6 years yet that was not the case;
 5. Erred in law and fact by failing to consider the fact that the respondent was sending money to the appellant from Equity Bank bulk account hence the statement was essential and crucial considering that the Mpesa statement listed by the appellant does not show the name and number of the respondent;
 6. Erred in law and fact by failing to adhere to the provision of section 8(1) of Children Act 2022 that the best interest of the child shall be the primary consideration in all actions concerning the child;
 7. Misdirected herself by mistaking that the documents sought were not relevant yet they were the guidelines in determining the welfare of the children in the case;
 8. Misdirected herself by alleging that the documents sought were too broad and wide and failing to consider the fact that the appellant was also ready to produce the document sought if the respondent failed to do so;
 9. Misdirected herself by failing to consider that the court had discretion to consider some of the orders sought and not to dismiss all of them;
 10. Failed to consider the fact that the respondent was making payments using Mpesa and that the appellant only sent the till numbers to the respondents to pay; this information can only be found in an Mpesa statement and enable the appellant to prove her case;
 11. Misdirected herself by dismissing the appellant's application without considering that the minors require adequate support from the respondent considering the lifestyle they were accustomed to; and
 12. Erred in law and fact by failing to consider that the respondent paid school fees for the minors T.W. and G.G. in Embu Shepherd Academy and Tenri Primary School via paybill and sent money to the appellant from Equity Bank Bulk Account which is only accessible by the respondent.
3. The appellant filed a plaint dated 10th February 2021 seeking for judgment against the respondent for custody of a minor named L.K., a declaration of parental responsibility and monthly maintenance of Kshs.410,000/= plus costs of the suit and interest. It was the appellant's case that the respondent had taken up parental responsibility for 2 minors names TYEW and GGG, both minors born to the appellant from another relationship. That the respondent used to pay all the bills concerning her and the children since 2016 until 2020 when he stopped. That she has another child with the respondent, making a total of 3 children in her custody.
 4. In her quest for maintenance as prayed in the plaint, the appellant filed a notice of motion dated 30th May 2022 seeking inter alia, orders that the respondent be compelled to provide his Mpesa and call records for his mobile number 0728738*, his Equity Bank Account statements and Biashara Sacco



Account statements for various periods. It was the appellant's case that the respondent used to take care of the children before and that he ought to be compelled to produce the said documents as proof since he is the only one who can access the accounts in question. That the court order will enable her to access the respondent's records from the various service providers. The respondent opposed the application through grounds of opposition where he stated that the documents sought are not necessary to determine the children's claim and they will provide no bearing to the court.

5. In its ruling, the trial court relied on section 22 of the *Civil Procedure Act* and the cases of *Lustman & Company (1990) Limited v Corporate Business Centre Limited & 4 others* (Civil Suit 311 of 2018) [2022] KEHC 42 (KLR) (Commercial and Tax) (4 February 2022), *Ramji Megji v Kisii University* [2016] eKLR), *Concord Insurance Co. LTD v NIC Bank Ltd* [2013] eKLR and *Selecta Kenya Gmbh & Co Kg & another v Peter Wanderi* [2015] eKLR and stated that the essence of discovery was not to send a party on a fishing expedition while riding on the discretion of the court. The court dismissed the application, stating that it did not see the relevance of the documents sought to the case at hand.
6. The court directed that the appeal be canvassed by way of written submissions but none of the parties complied.
7. The issue for determination is whether the trial court erred in dismissing the application dated 30th May 2022.
8. The orders sought by the appellant emanates from her need to succeed at litigating the plaint since she seeks to prove that the respondent abdicated his responsibility of maintaining the children, a task that he was doing until 2020. Section 22(a) of the *Civil Procedure Act* provides:

“Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—

 - (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence”
9. This provision gives discretion to the court to make any orders regarding discovery, as it deems fit. In its ruling the trial court, in a nutshell, stated that the issues raised in the plaint can be adjudicated successfully without having to summon the records sought. It stated that the orders sought will send the appellant on a fishing spree since the data requested is expansive and covers a long period of time. This court is inclined to agree with the sentiments of the trial court since the appellant should demonstrate that the documents sought are relevant to her case.
10. In the case of *Concord Insurance Co. Ltd Vs. NIC Bank Ltd* (2013) eKLR (*supra*), the court quoted *Halsbury's Laws of England, Volume 13* para 38, that:

“Relevance must be tested by the pleadings and particulars and when particulars have been served which limit a particular issue then discovery on that issue is limited to the matter raised in the particulars. Discovery will not be ordered in respect of an irrelevant allegation in the pleadings, which, even if substantiated, could not affect the result of the action nor in respect of an allegation not made in the pleadings or particulars nor will discovery be allowed to enable a party to “fish” for witnesses or for a new case, that is to enable him frame a new case. Each case must be considered according to the issues raised: but where there are



numerous documents of slight relevance and it would be oppressive to produce them all, some limitation may be imposed”.

11. The Supreme Court of India court stated similarly in the case of *M. L. Sethi vs R. P. Kapur*, 1972 AIR 2379, 1973 SCR (1) 697, that:

“The documents sought to be discovered need not be admissible in evidence in the enquiry or proceedings. It is sufficient if the documents would be relevant for the purpose of throwing light on the matter in controversy. Every document which will throw any light on the case is a document relating to a matter in dispute in the proceedings, though it might not be admissible in evidence. In other words, a document might be inadmissible in evidence yet it may contain information which may either directly or indirectly enable the party seeking discovery either to advance his case or damage the adversary's case or which may lead to a trail of enquiry which may have either of these two consequences.”

12. The issues raised in the plaint may be argued and determined without necessarily having to summon the sought for documents. Being a children's case, the appellant has the backing of other laws and procedures at her disposal since it is not clear how the said records will impact her case. Moreover, the orders sought may be granted as a matter of discretion of the court and the trial court already applied itself on the matter.
13. Therefore, I find no error in the findings by the learned trial magistrate. The appeal lacks merit and the same is hereby dismissed. There shall be no order as to costs.
14. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF JULY, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent

