



**JCW v LWK (Civil Appeal E105 of 2023)
[2024] KEHC 8583 (KLR) (Family) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8583 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E105 OF 2023
HK CHEMITEI, J
JULY 11, 2024**

BETWEEN

JCW APPLICANT

AND

LWK RESPONDENT

(This ruling relates to the application dated 5th October, 2023 filed by the Appellant/Applicant,)

RULING

1. This ruling relates to the application dated October 5, 2023 filed by the Appellant/Applicant, JCW; seeking orders that:-
 1. Spent.
 2. Pending the hearing and determination of this Application, this Honourable Court be pleased to Order that the Respondent pays Kshs.75,000/= per month, payable forthwith and every 5th day of the month towards maintenance of the children herein.
 3. Pending the hearing and determination of the Appeal, this Honourable Court be pleased to Order that the Respondent pays Kshs.75,000/=, per month, payable forthwith and every 5th day of the month towards maintenance of the children herein.
 4. This Honourable Court be pleased to grant such other orders as it deems fit and just.
 5. Costs of this application be provided for.



2. The application is supported by affidavit sworn by JCW on October 5, 2023. He avers *inter alia* that the judgment delivered on September 1, 2023 in Milimani Children’s Court Case No. E280 of 2021: LWK vs JCW ordered him to pay for all maintenance requirements of the children save for clothing and grooming for ASM. He has complied with the orders to the best of his ability despite his limited financial resources. He paid school fees for ASM and college fees for CM. He is in custody of ASM whom he offers non – monetary support, in addition to other financial and maintenance requirements.
3. The orders issued on September 1, 2023 are unjust as he has been ordered to pay the bulk of maintenance responsibilities contrary to the principle of equality in maintenance of children. It disregarded his prayer for joint maintenance. He is shouldering the expenses of FW, their first born, who is in the United Kingdom (UK). The Respondent has a stable income and earns over Kshs.212, 000/= and should be compelled to take up a fair share of responsibility.
4. The application is opposed vide replying affidavit sworn by LWK sworn on November 21, 2023. She avers *inter alia* that the Applicant is seeking orders, in the instant application and appeal, that he did not seek nor canvass in Milimani Children’s Court Case No. E280 of 2021: LWK vs JCW. He committed to educating their son CM and proceeded to enroll him in the University of [Particulars withheld] and has been paying the school fees and he should continue to do so.
5. He is in full control of all their joint income streams i.e. rental income, matrimonial home and family business and has ensured that she cannot access them. She is substantially contributing towards the needs of the children due to her input in the joint income streams. Their joint assets that they acquired together are available to take care of their children’s expenses. She has requested him to dispose off one of the properties but he has remained adamant.
6. On November 2, 2023, he asked for her signature in order to dispose off one of their joint properties. She confirmed her cooperation in the sale but she thereafter went silent and instead filed the instant application. He occupies their jointly owned matrimonial home at [particulars withheld] while she rents a home for her and their daughter ASM. He does not fully provide for the children’s accommodation. She put in great effort to develop their matrimonial home which he now utilizes to her exclusion. They have joint physical custody of ASM and when she is with her, she takes care of all her daily needs i.e. food, accommodation, transport, clothing, grooming and other non – material nurturing.
7. The Applicant filed written submissions dated March 7, 2024 placing reliance on the following:
 - 1) Section 134 (1) of the *Children’s Act, 2022* which provides that, “The Court may make any order under this *Act* or any written law for the protection of a child in any proceedings concerning the welfare and upbringing of the child.”
 - 2) *KMM V KMO* [2022] eKLR where the courts stated as follows:

“It would appear to me that the learned magistrate placed a heavier responsibility on the Appellant without knowing just how much each of the parties brought in by way of income. With regard to the terms of maintenance, I note that the Children’s Court failed to conduct a proper inquiry and assessment into the level of the incomes of both parents and their respective financial responsibilities in apportioning maintenance... In the end, having evaluated the evidence and the law, I am satisfied that there is sufficient ground to interfere with the order of the learned Magistrate, in so far as it relates to the maintenance of the minor.”



- 3) [*RWN v PMM*](#) [2021] eKLR where the court stated as follows:

“Maintenance orders are made in the best interests of the children and ought not to be oppressive or punitive to any party. The court further cited with authority the holding in [*SKM v MWI*](#) [2015] eKLR, where Musyoka J. expressed himself thus:

Maintenance orders are not meant to punish or oppress any party. They should be designed to provide for the needs of the child or children in question, while at the same time respecting the financial status of the parent. A child can only be maintained within the means of the parent in question.”

- 4) [*MOA v HAO*](#) [2021] eKLR where stated as follows:

“Literally, the Respondent is not making any single contribution towards the minor’s welfare or needs. I am alive to the fact that equal parental responsibility does not mean equal and similar contribution. See [*EMM, Vs MOO*](#) (2016) where Meoli J observed that:

“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.”

Although parents may not have equal financial ability for the Court to demand equal contribution, one must at least exhibit some sense of seriousness in making some contribution as a sign of good will that he or she is not geared towards overburdening the other parent for the sole purpose of punishing him or her using the best interests of a child principle or as a ground to settle scores out of marital differences.”

8. The Respondent has filed undated submissions placing reliance on the following:

1. [*KMM v MMO*](#) [2022] eKLR where the court stated as follows:

“With regards to the terms of maintenance, I note that the Children’s Court failed to conduct a proper inquiry and assessment into the level of the incomes of both parents and their respective financial responsibilities in apportioning maintenance...”

Background

9. The genesis of this application is the Judgment delivered by Hon. C. C. Oluoch (Mrs.) – Chief Magistrate in Milimani Children’s Court Case No. E280 of 2021: LWK vs JCW delivered on September 1, 2023 where judgment was entered in the following terms:

- a. Both parents shall have joint legal custody of CM and the minor ASM.
- b. The minor ASM shall engage both parents and make a decision on her shared actual custody, that suits her school schedule.
- c. The Defendant shall pay school fees and cater for all college expenses for CM.
- d. The Defendant shall pay school fees and cater for school related expenses for ASM, except school uniform, for the minor, until she completes her college education.



- e. The Plaintiff shall cater for all clothing (including uniform) and grooming needs of the minor ASM.
 - f. Each party shall bear its own costs.
10. Being aggrieved by the decision above, the Appellant filed the instant application dated October 5, 2023 that is before this court for determination and a memorandum of appeal dated September 28, 2023.

Analysis and Determination

11. I have carefully considered the application before the court, the reply filed in response thereto as well as the rival written submissions; the issue for determination is “Whether this honourable court should issue an order for the Respondent to pay Kshs.75,000/= per month towards maintenance of the children of the union.”
12. This application in my view and the entire appeal for that matter cannot be determined without ascertaining the source of income of the two parties. The Respondent for instance is contenting that the Applicant is holding all the assets of the family including income from rentals.
13. She has further stated that the Applicant is holding the matrimonial home and that she is forced to rent. It is not therefore possible for instance to allow the application without first knowing whether or not she will be able to shoulder.
14. At the same time, it is not possible to deal with the appeal without knowing whether the goal post in terms of their income has changed post the lower court’s judgement. In any event being a children’s matter this court is permitted to tamper despite the previous decisions.
15. In *KMM v MMO* [2022] eKLR the court stated as follows:
- “ 13... It would appear to me that the learned Magistrate placed a heavier responsibility on the Appellant without knowing just how much each of the parties brought in by way of income. With regard to the terms of maintenance, I note that the Children’s Court failed to conduct a proper inquiry and assessment into the level of the incomes of both parents and their respective financial responsibilities in apportioning maintenance...”
16. Taking cue from the above authority I think it shall be better to hold the application and by extension the appeal in abeyance so as to ascertain the current means of each of them.
17. The court therefore directs that:-
- (a) That the parties do file an affidavit of means within the next 30 days from the date herein.
 - (b) Costs shall await the outcome of the appeal.

DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 11TH DAY OF JULY 2024.

H K CHEMITEI

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JUDGE

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

