



**DWS v DWM (Appeal E086 of 2023) [2024] KEHC 10758 (KLR)
(Family) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10758 (KLR)

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

**FAMILY
APPEAL E086 OF 2023**

**H NAMISI, J
SEPTEMBER 19, 2024**

BETWEEN

DWS APPELLANT

AND

DWM RESPONDENT

(Being an Appeal from the Ruling by Hon. C. C. Oluoch (Mrs), Chief Magistrate, dated 1 September 2023 delivered in Nairobi Children’s Case No. MCCHCC E713 of 2023)

JUDGMENT

1. The Respondent herein filed a suit in the Children’s Court, seeking the following prayers, inter alia:
 - i. An order granting the Plaintiff legal and actual custody of the minors, NMS (2 years), JKWA (1 year) and AW (1 Year);
 - ii. An order granting the Defendant access to the minors through supervised visits on weekends;
 - iii. An order directing the Plaintiff and Defendant to jointly cater for the shelter, food and clothing needs of the minors;
2. Accompanying the Plaintiff was Chamber Summons dated 3 May 2023 seeking, inter alia:
 - i. That interested parties be enjoined to these proceedings limited only for the hearing of this Application;
 - ii. That pending the hearing and determination of the Application inter partes, this Honourable Court be pleased to issue an order compelling the Defendant/Respondent to issue an order compelling the Defendant/Respondent and the Interested Parties herein to release the minors to the Plaintiff/Applicant;



- iii. That pending the hearing and determination of the suit, the Honourable Court be pleased to grant the Plaintiff/Applicant actual custody of the minors;
- iv. That the Officer Commanding Station and/or the officers under his command to assist in the execution of the orders of this Honourable Court.

The Application

3. The Application was premised on the numerous grounds on the face of it, and supported by an Affidavit sworn by the Respondent herein. The Respondent deponed that she and the Appellant had been involved in an amorous relationship between 2018 and 2022, which resulted in the birth of 3 children. Following the birth of the twins in April 2022, the Appellant left their shared home for an entire month, leaving the Respondent stranded with 3 children, unable to care for them. The Respondent was thus compelled to vacate the house and sought assistance from the Appellant's parents, who agreed to help her.
4. In July 2022, things took a turn as the Appellant's parents denied the Respondent access to her children, forcing the Respondent to seek the intervention of FIDA-Kenya. The Respondent was finally able to see her children in September 2022. The Respondent secured employment and returned to pick her first child. She left the twins with their grandparents.
5. In December 2022, the Appellant's parents suggested that the Respondent should move in with them so as to ensure the wholesome wellbeing of the children. The Respondent agreed to do so, and returned the first child to the grandparents' home as suggested. The Respondent did not move in immediately. On her return to the home on 12th December 2022, the Respondent was denied access to the home and to her children.
6. The Appellant herein filed his response to the Application, in which he averred that the Respondent abandoned the two youngest minors when they were merely 2 months old and failed to show love and support to them. The Appellant deponed that when the Respondent returned home, she became hostile and violent, rendering the said house inhabitable for the Appellant. It was as a result of these irreconcilable differences stemming out of the Respondent's manipulative nature that the he was forced to seek alternative accommodation.
7. The Appellant stated that in July 2022, the Respondent abandoned their home, leaving the 3 children behind, and called the Appellant's parents to go and pick the children. When the Respondent later reappeared to visit the children, she left with the oldest child. The Respondent appeared again in December 2022, claiming that she had nowhere to stay and was not in a position to take care of the child. The Respondent also sought accommodation at the Appellant's parents' home but was turned away.
8. The Appellant averred that he and his parents live adjacent to one another, and the children are always welcome at their grandparents' home. The grandparents have offered him both moral and financial assistance in raising the children.
9. In the Report dated 6 July 2023, the Children Officer noted that both parties live in spacious homes, in conducive environments for the upbringing of the children. His recommendation was that the Court grant the Respondent full actual and physical custody of the minors due to their tender age.
10. In her Ruling, the trial Magistrate observed that there was only one issue for determination; whether the mother should have actual custody of the minors. The Court relied on the provisions of section 103 (1) of the *Children Act*, 2022 as well as the case of J.O -vs- S.A.O [2016] eKLR. The Court made



reference to the report filed by the Embakasi Children's Officer, noting that, at the time, the children lived with their father and his female partner. The Respondent had settled in a spacious 3-bedroom house that was conducive for raising the children. The view of the Appellant's female partner towards the children was not captured in the Report.

11. The trial court ruled as follows:
 - i. Both parents shall have joint legal custody of the minors;
 - ii. The Plaintiff/Applicant (Respondent herein) shall have actual custody, care and control of the minors;
 - iii. The Defendant/Respondent is at liberty to arrange for access to the minors directly with the Plaintiff or through the Advocates on record;
 - iv. That the Defendant/Respondent shall cater for all the educational needs of the first child;
 - v. There shall be no orders as to costs.

12. Being aggrieved by the said Ruling, the Appellant lodged this appeal on the following grounds:
 - i. That the learned Magistrate erred in law and in fact by her failure to take into account the prevailing circumstances and the abandonment of the minors by the Respondent when they were only 2 years old;
 - ii. That the learned Magistrate erred in law and in fact by her failure to appreciate that the abandonment of the minors by the Respondent at a very tender age amounted to peculiar circumstances;
 - iii. That the learned Magistrate erred both in law and fact by her failure to consider the fact that the Appellant has been able to take care of the minors and this grossly discriminated against the Applicant on the account of his gender by holding that only the Respondent is capable of taking care of the minors and as such be granted custody;
 - iv. That the Honourable Learned Magistrate's decision flew on the face of precedents and authorities to the effect that both parents have equal rights to the minors. This is despite the same being pointed out to her;
 - v. That in arriving at her Ruling, the Honourable Learned Magistrate failed to scrutinize the capability of the Respondent to take care of the minors while in her custody;
 - vi. That the learned Magistrate erred in both law and fact by issuing final orders at the application stage;
 - vii. That the learned Magistrate erred in both law and fact by failing to take into consideration that any abrupt separation of the minors with their father and placing them in the hands of their mother who abandoned them when they were only 2 weeks old is prejudicial to the minor's well being. Notably the minors were thus separated from their friends, relatives and even grandparents whom they have known and spent their time with their entire life;
 - viii. That the learned magistrate's decision failed to take into account the principles set out on Section 103 (1) of the *Children Act*, 2022;
 - ix. That the learned Magistrate erred in law in not taking into account entirely the submissions of the Appellant;



- x. That the learned magistrate’s finding and decision were against the weight of the evidence adduced.
13. The appeal was canvassed by way of written submissions.

Analysis and Determination

14. Having read the Record of Appeal, Memorandum of Appeal as well as the respective submissions by the parties, the issue for determination herein primarily is one of interim custody of the children.
15. Relying on the case of *Re RJ – LD (minor) [2020] eKLR*, the Appellant submitted that the lower court erred in its ruling allowing an abrupt separation of the minors from the Appellant placing them in the custody of the Respondent who is apparently a stranger to the minors. The Appellant also relied on several other cases in which the court has departed from the general rule that custody of a child of tender years should always be granted to the mother.
16. On her part, the Respondent pointed out that there was an occasion when the Appellant, too, abandoned their home, leaving the Respondent to care for the children single-handedly. The Respondent submitted that for an appeal to be successful in overturning the entire decision of the trial court, the Appellant should have demonstrated that the trial court erred both in fact and in law. It was her contention that in this instance, none of the grounds raised in the memorandum of appeal both on points of fact and law have been substantiated.
17. Both parties relied on the case of *SMM vs ANK [2022], Children Appeal No. E011 OF 2021*, in which Justice Joel Ngugi stated as follows;
- “...it is apparent that while the Tender Years Doctrine, is persuasive in considering custody of children, it can no longer be considered as an inflexible rule of law. This is not to say that the substance of the rule has dissipated completely; it is to say that its inflexibility has been eroded by the evolving standards of decency reflected in Article 53 of *the Constitution*. Differently put, the Tender Years Doctrine must now be explicitly subjected to the Best Interests of the Child Principle in determining custody cases. Differently put, the welfare of the children is the primary factor of consideration when deciding custody cases. The judicial rule that a child of tender years belongs with the mother is merely an application of the principle in appropriate cases. The modern rule begins with the principle that the mother and father of a child both have an equal right towards the custody of the child.”
18. Article 53 (2) of *The Constitution* of Kenya, 2010 requires that in all matters concerning children, the best interest of the child shall be of paramount importance. Section 8 of the *Children Act* echoes this constitutional imperative. In addressing the issue of interim custody of the children herein who are of tender age, I am minded to subject the various considerations to the test of the best interest of the children, as pronounced in the SMM case (supra).
19. The “best interests of the child’ standard is used by courts to make decisions about child custody and other matters affecting a child’s well-being. Although the same is not defined in our statutes, the common factors that courts consider are the child’s physical, emotional and educational needs, the parental ability to meet these needs, the child’s preferences depending on their age and maturity, the



parent-child relationship, parental co-operation and safety of the child. In the case of *M A v R O O [2013] eKLR, Busia HC Appeal NO. 21 of 2009*, the Court opined thus:

“What is the best interest of the child has not been defined by the law. This is as it should be because the best interest of each particular child will depend on the circumstances of each particular case at any one particular time. What is not in dispute, however, is that there are certain minimum requirements that have universally been accepted to constitute the best interest of the child. This includes the right of a child to be provided with shelter, food, clothing and education. The child is entitled to medical care. The child’s welfare should be taken care of under the best possible circumstances. The child is also entitled to parental guidance. This guidance shall where possible, be provided by both parents. The child is further entitled to be given a suitable, conducive and loving environment in which to grow up in. In Kenya, it has been accepted by the courts that the custody of a child of young and tender years (defined in Section 2 of the *Children Act* to mean a child of the age of ten (10) years and below) ought to be with the mother unless there are compelling reasons for the said custody to be removed from the mother and be given to the father. However, this will be subject to the best interest of the child.

20. Turning to the undisputed facts herein, the Appellant and Respondent are the biological parents of the three children. When the twins were born in April 2022, the Appellant left their home for a period of about one month, claiming that the environment at home was inhospitable. The Respondent, who had just delivered the twins and presumably was on maternity leave, was left to care for the children. The issue of whether or not the Appellant contributed financially during this period of his absence is disputed.
21. It is undisputed that in July 2022, the Respondent left the three children in the custody of the Appellant’s parents. At paragraph 9 of his Replying Affidavit, the Appellant admitted that the Respondent made regular visits to see the children. The Respondent, therefore, was not a stranger to the children and had regular contact with them. It is during one of these visits that the Respondent took the eldest child with her, only to return him sometime in December 2022. It is at this juncture that the Respondent claims she was denied access to the children, thus necessitating the institution of the proceedings in the lower court.
22. The Appellant’s main contention against the custody orders was that the Respondent abandoned the children when they needed her most. She left the children when they were only 2 months old. On her part, the Respondent stated that she was compelled to do so because she did not have any means by which to take care of the children. She was unemployed and the Appellant had equally abandoned their family at some point. Once she secured employment, she took custody of the eldest child.
23. The Appellant also raised concerns regarding the Respondent’s ability to provide for the children and the fact that the eldest child had been enrolled in school. The Respondent stated that she was in active employment and renting a house. The Report by the Children’s Officer confirmed that both parties were able and capable of caring for the children.
24. The Appellant admitted that he had remarried, and the children were under the care of their step-mother. It would have been helpful to the court if the wife to the Appellant had sworn an Affidavit to indicate her willingness to support the Appellant in his quest to obtain custody of the children. That information was not forthcoming, and the absence thereof was duly noted by the court in its Ruling. It is this missing information that convinced the court that the best interests of the children are best served with interim actual custody being granted to the Respondent.



25. Going back to the doctrine of tender years, the children herein are all below the age of 6 years. Other than the issue of abandonment, which both parties are guilty of, the Appellant did not present any exceptional circumstances to displace the tender years doctrine. I, therefore, see no reason to disturb the ruling of the lower court.
26. In the circumstances, the Appeal does not succeed and is hereby dismissed. This being a children's matter, there are no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 19 DAY OF SEPTEMBER 2024

HELENE R. NAMISI

JUDGE

Delivered on virtual platform in the presence of:

...Manyara h/b Mabeyafor the Appellant

..Kisigwa.....for the Respondent

