



**LKR v MJA (Civil Appeal E092 of 2022)
[2024] KEHC 11794 (KLR) (Family) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11794 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E092 OF 2022
CJ KENDAGOR, J
OCTOBER 3, 2024**

BETWEEN

LKR APPELLANT

AND

MJA RESPONDENT

(Being an appeal from the Ruling of Hon. Maureen W. Kibe, Senior Resident Magistrate, delivered on 06th September, 2022 in Nairobi Children Case no. 267 of 2019, In the matter of J.R and T.M – (minors).)

JUDGMENT

///ARGUMENTS

1. The Appellant and the Respondent got married on 17th December, 2011, and the marriage was blessed with the subject minors, code named J.R and T.M. Their union faced challenges, they separated, and it was the subject of Divorce Cause No 167 of 2019. The Respondent sued the Appellant at the Lower Court in March, 2019 and sought full custody, care, and control of the children, among other reliefs. The Appellant filed a Defense and Counter-claim where he also sought legal and actual custody, care, and control of the subject minors. He also prayed for unlimited access to the children. The lower Court delivered the judgment on 14th December, 2021.
2. The court granted both parties joint legal custody in respect to the subject minors. It gave the Respondent actual custody, care, and control of the subject minors. It also gave the Appellant access to the subject minors and issued 5 directions on how the right of access would be exercised. One of the directions, which is important to this appeal. It allowed the Appellant to have custody of the minors “The 3rd and 4th Weekend of every month on Saturdays and Sundays for a period of 12 months.” It also ordered the Appellant to cater for the clothing, shoes, and grooming expenses of the subject minors.



3. The Respondent went back to the lower Court through a Chamber Summons dated 20th April, 2022. She asked the court to review its order regarding the Appellant's access to the minors on the 3rd and 4th weekend of every month on Saturdays and Sundays for the period of the first 12 months by putting a pick-up time of 10.am and return at 6.pm on the subject Saturdays and Sundays. She also requested the Court to assess the minors clothing, shoes, and grooming expenses at Kshs.15,000 every 3 months and order that the Appellant remits the same to the Respondent every 3 months. Lastly, she requested the Court to order the Appellant to avail his identity card to the Respondent and give his consent for purposes of securing the minors passports.
4. The Court delivered a Ruling on the Application on 6th September, 2022. It reviewed its previous orders and directed that the subject minors shall be picked at 9.00 am and returned at 6.30 p.m. on the said Saturdays and Sundays for the period of 12 months set by the Court. It also ordered the Appellant to avail his identity card to the Respondent and give his consent for purposes of securing the minors' passports.
5. The Appellant was dissatisfied with the Ruling and appealed to this Court vide a Memorandum of Appeal dated 19th September, 2022. He listed two Grounds of Appeal namely;
 1. The Learned Magistrate erred in law and in fact in her ruling dated the 6th September, 2022 in ordering that I surrender my documents for the processing of the minors' passport documents, yet there was evidence that the Respondent intends to relocate abroad and is further highly likely that she would move without the Court's orders, the minors out of the court's jurisdiction.
 2. The Learned Magistrate erred in law and in fact in her ruling dated 6th of September, 2022 in holding that I could only pick the minors at 9 a.m. and return them before 6.30 p.m. on the days that I have access despite the minors required to attend swimming classes on or before 8.30 am during the weekends.
6. He asked the Court to partially set aside the Ruling of the lower Court, and dismiss the Respondent's application dated 20th April, 2022 with costs. The appeal was disposed of by way of written submissions.

Appellant's Written Submissions

7. The Appellant submitted that the Magistrate erred in law in ordering him to surrender his documents for the processing of the minors' passport documents. He argued that he was apprehensive that if the Respondent obtains and keeps possessions of the Minors' passport, it is likely that she might abscond with the minors. He stated that he was agreeable with the minors obtaining passports, but argued that since he was not in the primary possession of the minors, he should be the one to keep the passports. He submitted allowing the Respondent to keep the passports is not in the best interest of the minors because the Respondent is likely to abscond with the minors to a foreign country and defeat the Court's order for joint custody.
8. On the issue of altering the time for pick-up and return the minors, the Appellant submitted that the court erred in directing him to pick the minors at 9 a.m. and return them before 6.30 p.m. His opposition to this Court order was that, on every Saturday, the minors have to attend school for swimming lessons from 9.00 am. He argued that it was impossible for him to drop the children for swimming lessons at 9.am in school if he is allowed to access the minors from 9.am, because they will obviously be late for the swimming lessons.



9. He cited the case of *Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021)* [2022] KEHC 282 (KLR) (6 April 2022) (Judgment), *Selle & Another v Associated Motor Boat Co. Ltd & Others*, and *Peters v Sunday Post Limited*.

Respondent's Written Submissions

10. The Respondent argued that the lower Court rightly pronounced itself on the issue of passports and asked this Court to uphold the lower Court on the issue. She argued that the lower Court exercised caution and prudence because it put a rider that the subject minors shall not be removed from the Court's jurisdiction without leave of Court or consent of either party. She argued that it was unjustifiable to deny the minors the right to have passports just because the Appellant was apprehensive that she might relocate with them. She argued that the Appellant's apprehension is unfounded because the lower Court had already made orders to ensure that no parent could travel with the children out of the country without the consent of the other or that of the Court. She relied on the case of *MAA v ABS* 2018 eKLR.
11. On the issue of altering the time for pick-up and return the minors, the Respondent submitted that the Ground of Appeal had been overtaken by events. She argued that the orders to pick the minors from 9.00 a.m. and return by 6.30 p.m. were only in relation to the access granted to the Appellant for the first 12 months from 14th December, 2021. She thus argued that the orders lapsed on 14th December, 2022 as per the judgment of the trial Court. On the flipside, the Respondent argued that the Court was justified in setting the picking time and returning time as it did.

Issues for Determination

Whether the Appellant's ground of Appeal on the pick-up time is overtaken by events

Whether Court should give the Appellant the possession of the Passports

12. Being a first appeal, the duty of this Court is to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. This principle was set out in *Selle and Another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123 where the Court held:

“...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 allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

13. This being a child matter, the Court is aware of its special role in upholding the best interests of the Child. The *Constitution* of Kenya, 2010 requires that in all matters concerning children, the best interest of the child shall be of paramount importance. Article 53(2) of The *Constitution* of Kenya provides as follows:-

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



14. Section 4(2) and 4(3)(b) of the *Children Act*, 2001 (now Section 8 of the *Children Act*, 2022) echoes the constitutional imperative that:-

“In all actions concerning children whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration...

All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act 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. and promote the welfare of the child”

15. I have perused the judgment of the lower Court with a view to ascertaining whether the Appellant deserves the orders sought in this appeal. With respect to the Appellant’s right to access the minors, the court gave 5 directions to guide how he would realize the access, but two of the directions are of importance to this present appeal. I shall reproduce them;

“The Appellant shall therefore have access to the subject minors as follows;

- (a)
- (b) The 3rd and 4th Weekend of every month on Saturdays and Sundays for a period of 12 months. (Hereinafter referred to as Direction (b)).
- (c) The 3rd and 4th weekend of every month starting Saturday 10.00 a.m. to Sunday 5.00 p.m. after the expiry of the said period of 12 months. (Hereinafter referred to as Direction (c)).
- (d)
- (e)

16. There is no dispute that the Respondent’s application for review of the judgment at the lower Court was restricted to the second direction, Direction (b). This is particularly so because throughout the Chamber Summons dated 20th April, 2022, the Respondent made it clear that she had a problem with Directive (b) because it did not have pick-up time as opposed to Direction (c) which had clear pick-up time.
17. Upon perusal of the judgment, it occurs to me that Direction (b) was designed to operate for the first 12 months of the judgment. This is to be deduced from the wording of the judgment, especially Direction (c). A reading of the two directions (Direction (b) and Direction (c)) shows that the Court intended Direction (c) to set in upon the expiry of Direction (b). The judgment was delivered on 14th December, 2021, and so 12 months lapsed on 14th December, 2022. While the ground was viable at the time of bringing up the application on 20th April, 2022, the ground lost its viability on 14th December, 2022, when the 12 months of its lifetime expired. Its place was properly succeeded by Direction (c).
18. I, therefore, agree with the Respondent that this Ground of Appeal has been overtaken by events and, therefore, moot. It has been caught up with the mootness doctrine as it ceases to present a justifiable



dispute by the events (being the lapse of 12 months after the judgment). Therefore, any resultant decision would be of no practical value or use.

19. The Court of Appeal in *Okiya Omtatab Okioti & 2 others v Attorney General & 4 others* [2020] at paragraph 65, while citing the case of *Daniel Kaminja & 3 others (suing as Westland Environment Caretaker Group) v County Government of Nairobi* [2019] e KLR, Mativo J stated that:

“A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case and any ruling by the court would have no actual practical impact.”

20. The Court went on:

“No court of law will knowingly act in vain ... a Suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity.”

Whether Court should give the Appellant Possession of the Passports

21. The next issue for determination is whether the Court should give the Appellant possession of the minor’s passport. From the record, the Appellant states that he is agreeable with the minors obtaining passports. His only concern is that the Respondent should not be allowed to keep the passports because she is likely to abscond with the minors. On the other hand, the Respondents argue that she should be allowed to keep the passports because the court has already made orders ensuring that no parent can travel with the children out of the country without the consent of the other or that of the court.
22. In the case of *SCK v TA* [2014] eKLR, where the Appellant had similar fears as those expressed by the Appellant herein, the court expressed itself in the following words;

“The applicant’s fears that the child might be spirited out of Kenya especially because the respondent has her passport - that is the only real fear. Claims of an amorous liaison with some un-named individual from Angola, or an intended relocation to that country are not supported by any evidence. I think the fear of leaving this court’s jurisdiction can easily be addressed by ordering the respondent to deposit the said passport in court”.

23. In *M A A v A B S* [2018] eKLR, the High Court upheld a lower Court’s decision where the lower Court had allowed parents to have custody of the child’s passport during the period of actual physical custody. The Court had stated;

- c) The Plaintiff and the Defendant shall be at liberty to leave and re-enter the Republic of Kenya. The party travelling to inform the other and the period of travel should not affect the child’s schooling and either party’s right of custody/access i.e half period of school holidays.
- d) Both the Plaintiff and the Defendant to have custody of the child’s passport during the period of actual physical custody.

24. The Appellant argued that the Respondent is likely to abscond with the minors if she is allowed to keep their passports. I have looked at his Replying Affidavit deponed on 10th June, 2022. However, the affidavit was not supported by tangible evidence to prove that the Respondent is planning to



kidnap the minors and take them out of the Court's jurisdiction. He also claimed that the Respondent has travelled with the minors to Tanzania without his approval and consultation, but he did not substantiate these claims.

25. In any event, the Appellant's fears and concerns, whether well-founded or not, are well addressed by the existing Court order restraining the parties from removing the minors from the Court's jurisdiction without leave of Court or consent of either party.
26. I therefore do not find cogent reasons why the Appellant should be given possession of the minors' passports at the exclusion of the Respondent. I shall follow the rule in *MAA v ABS* [2018] eKLR, and allow both parties to have custody of the child's passport during their respective period of actual physical custody.

Disposal

27. Having found as outlined above, the Appellant's appeal partially succeeds.
28. Both the Appellant and the Respondent to have custody of the child's passport during their respective period of actual physical custody.
29. This being a family matter each party to bear their own costs.

It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS
ONLINE PLATFORM ON THIS 03RD DAY OF OCTOBER, 2024.**

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Advocate for Appellant: Odipo

Advocate for Respondent: Muthini holding brief for Kangethe

