



**LWM v SMN & 2 others (Children’s Appeal Case E036 of 2020)  
[2023] KEHC 596 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 596 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CHILDREN’S APPEAL CASE E036 OF 2020  
CM KARIUKI, J  
FEBRUARY 9, 2023**

**BETWEEN**

**LWM ..... APPELLANT**

**AND**

**SMN ..... 1<sup>ST</sup> RESPONDENT**

**FK ..... 2<sup>ND</sup> RESPONDENT**

**MN ..... 3<sup>RD</sup> RESPONDENT**

*(Ruling Senior Resident Magistrate at Chief Magistrate Nyahururu, delivered on 9th December 2022 in Nyahururu children Civil Case no. 14B of 2020)*

**RULING**

1. The Applicant/Appellant married one SMN on September 3, 2014 at the Registrar’s Office and begotten an issue Minor TWM (TWM) now nine years or thereabout. The Applicant subsequently went to work in Bahrain in 2018 while the child’s custody was vested via consent in SMN’s mother, MWN. The Applicant would visit whenever in Kenya and also make calls. The grandmother was taking care of the child on behalf of her Son SMN, a soldier with Kenya Defence Force deployed in Somalia.
2. Subsequently, the Applicant returned to Kenya in October 2020, and the deceased (S) and his mother are said to have denied Applicant access to the child, and that is when Applicant learned that the said late husband had started to cohabit with one FK and had a child already namely L.
3. Thus, Applicant lodged children’s case No 14B of 2020 seeking handing over of the child subject herein and sought full custody of the same Minor.
4. The Custody matter was instituted against her late husband and his new fiancée FK.



5. Subsequently, a consent order dated November 14, 2020 was entered to compromise the entire suit. The parties recorded consent to the effect that the late husband to have actual custody of the subject. Further, the Applicant was to have unlimited access and visitation rights over the subject while she was in the Country, including overnight stays, and to communicate with Minor via telephone and video conferencing while she was abroad.
6. Both parents were to agree on the manner of maintaining the Minor to the best of Minor's interest. Accordingly, the 2<sup>nd</sup> Respondent was struck out of the case.
7. Meanwhile, by divorce case No xx/2020, the late husband lodged proceedings to dissolve their marriage, which was countered by a across-Petition. However, the same was declared abated after the death of Petitioner *vide* ruling of October 17, 2022.
8. The Children's matter came for direction over an Application dated July 19, 2022 before the trial court after the death of the Applicant's husband as Applicant sought handover of the custody of the Minor to her given the changed circumstances.
9. The Applicant also sought to set aside the consent orders on custody entered between her and her late husband.
10. The trial Court gave directions as follows:
  - i. Children's Officer report be availed.
  - ii. Access to the child by the Applicant is to obtain via the Paternal grandmother of the child.
11. This was on December 9, 2022, and the matter was fixed for mention on January 13, 2023, which date still needed to materialize as the parties never appeared, according to the court record. Thus, the matter was fixed for mention by the trial court on January 27, 2023.
12. This prompted the Applicant to lodge an instant appeal to impugn the Rulings of December 9, 2022 and another of November 13, 2020.
13. Meanwhile, Chamber summons dated December 23, 2022 was lodged, seeking handing over Minor's custody to the Applicant.
14. The contest is focused on Respondents No 2 and 3, who were neither parties to the consent in the trial court file nor enjoined as parties in either the trial file or the instant Appeal. The only party would be the 1<sup>st</sup> Respondent, who died on July 14, 2022. However, someone has yet to be appointed to take over the matter, as F was removed from the case.
15. The Application is grounded on the facts that Applicant is the sole surviving parent of the Minor, and consent on custody of the child was only between her and her late husband.
16. Thus, according to the applicant, given her husband's demise, she automatically acquired the actual custody as her access right escalated or transposed into full custody.
17. The Respondents oppose the Application primarily on the grounds that the Applicant's deceased husband had actual custody when he commenced cohabiting with the 2<sup>nd</sup> Respondent. Thus, both took parental responsibility for the Minor and have had complete control.



18. The order of custody dated November 4, 2020 is still in force, and the deceased and 2<sup>nd</sup> Respondent cohabiting together as husband and wife while having custody of the Minor status quo has to remain as so.
19. The 2<sup>nd</sup> Respondent has lived with Minor for four years and thus acquired parental responsibility.
20. It is also averred that custody ought to be with a person who had custody for over three months before the Application's lodging and that the child's best interest will be served.
21. The trial court is yet to get the Children Officer Report to determine the custody given the Applicant's husband's demise.
22. The child was to resume school on January 23, 2023, and a change of custody would disrupt her learning. Thus, the Court was urged to dismiss the Application.
23. I entertained the parties' Advocates' Submissions which largely dwelt on the content of the party's affidavits.
24. I had to interview the subject, Minor, who is said to be ten years of age, privately in the presence of MN, my secretary, and I got the following response relevant to the issues at hand: First, the Court observed keenly that, the Minor is quite intelligent and highly informed. She informed the Court that;
  1. That her mother is FK, and she lives with her sister L whom she loves. They live in Nakuru, and she is in school at St. A Nakuru.
  2. LWM is her mother.
  3. MWN is the paternal grandmother who lives in Olkalou and visits her in Nakuru.
  4. She said she would be ok with going with her mother, L WM, and even staying with her overnight and then being taken back to her mother, FK.
  5. However, she desires to live with her mother, FNK and her sister (step) L.
25. After going through the pleadings, affidavits, and lower court records, I find that the Appeal against the orders of November 13, 2020 can only be valid with leave as it is filed out of time.
26. The orders of December 9, 2022 are directional and Administrative. The trial court is yet to determine the fate of the consent on custody of the Minor, given the changed circumstances occasioned by the demise of the Applicant's late husband. Thus, the orders may only be appealed against with the leave of the Court. The Court has noted that the matter was scheduled for mention before the trial court for further directions on January 27, 2023.
27. Thus, the Appeal is incompetent and lacks legal basis because the two respondents(2 and 3) are not enjoined as parties in the matter, giving rise to the impugned orders. The 1<sup>st</sup> Respondent is a deceased person, and there is no substitution. Thus, the Applicant should either validate the enjoining of Respondents No 2 and 3 in the trial court file and proceed with an application to vary the consent order on custody of the Minor or seek Respondent No 2 to be substituted instead of the deceased on the issue of custody or seek afresh custody in a separate case.
28. Meanwhile, the trial court would have to determine the *status quo* to prevail as it entertains parties on the consent status before it.
29. This Court would have used inherent power to direct that child be handed over to the Applicant; however, the following factors constrain this Court from so ordering:



- i. The child has been in respondent No 1 and 2 custody for over four years.
  - ii. The child is in school and an environment she said she is happy with and desires to live with the 2<sup>nd</sup> Respondent and her step-sister L.
  - iii. The Respondent, who voluntarily ceded actual custody to the deceased husband, has been away from the child for over four years.
  - iv. There is no complaint of mistreatment of the Minor by respondents.
  - v. The Court thus will allow the trial court to investigate the suitable and best interest of the child in determining the custody of the Minor after hearing parties and Children Officer.
30. This Court cannot lose sight of the fact that this case involves a minor's welfare. Article 45(2) of the Constitution of Kenya 2010 provides as follows: -

"A child's best interests are paramount in every matter concerning the child.

17. The *Children Act* elaborates further in Section 4(3) that:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the child's best interest shall be a primary consideration." (own emphasis).

31. Currently, pending the trial court determination of the consent status in the issue, the Minor deserves stability in her life. Children shunted about from one place to another often develop emotional problems. However, the Minor is now settled in a home and has a routine. Therefore, I am not inclined to interfere with the minors living arrangements at this stage.

The trial court has to determine the essence of the provisions of 83, which gives guidelines in custody matters and, in particular; Where it states, (1) In deciding whether or not a custody order should be made in favor of the Applicant, the Court shall have regard to—

- (a). .....
- (b). the ascertainable wishes of the relatives of the child;
- (c). the ascertainable wishes of any foster parent or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the Application;
- (d). the ascertainable wishes of the child;
- (e). whether the child has suffered any harm or is likely to suffer any harm if the order is not made;
- (f). .....
- (g). .....
- (h). .....
- (i). the circumstances of any sibling of the child concerned and any other children of the home, if any;



(j). the best interest of the child.

32. The above views should not be used to influence the trial court nor to urge the trial court to determine custody of Minor on the same holdings. Still, the obtaining facts and the law the trial court will gather after hearing the parties shall obtain in Court's independent mind. Any aggrieved party can challenge the trial court verdict if it so desires thereafter.
33. Thus, the Court finds no merit in the Application and the incompetent Appeal and directs that:
- a. The Application and the instant Appeal are struck out.
  - b. The child will remain in the custody of Respondent No 2 FNK until the trial court orders otherwise.
  - c. The trial court is to proceed to determine custody of Minor in the prevailing circumstances.
  - d. The terms of consent of November 14, 2020 are to be strictly complied with as the trial court determines custody issue.
  - e. The party's Advocates are the medium via which the Minor will be changing hands to minimize conflict unless otherwise agreed in writing and informed to the trial court.
  - f. No orders as to costs.
  - g. The trial court to expedite hearing custody matter on a priority basis.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023.**

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**CHARLES KARIUKI**

**JUDGE**

