



REPUBLIC OF KENYA



KENYA LAW
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**In re RM.and TJMN (MINORS) (Civil Appeal E043 of 2021)
[2023] KEHC 2037 (KLR) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2037 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E043 OF 2021
LM NJUGUNA, J
MARCH 8, 2023
IN THE MATTER OF R.M. AND T.J.M.N (MINORS)**

BETWEEN

NKN APPELLANT

AND

WNK RESPONDENT

RULING

1. What is before the court for determination are two applications one dated November 26, 2021 and the other dated 25/1/2023. In the application dated the 26/1/2021 the applicant sought the following orders;
 - i. The custody of the minors herein be given to the applicant pending the hearing and determination of the appeal herein or this court makes such orders of custody that shall be fair to both the applicant/appellant and respondent herein in respect to the best interest of the minors herein.
 - ii. An order restraining the respondent from transferring the children from [Particulars Withheld] Schools in Embu pending the ruling of the court.
 - iii. The applicant be granted access to the children pending the ruling the determination of the matter herein.
2. In the application dated the 25/1/2023, she sought the following orders;
 - i. That this matter be certified urgent and this application be heard exparte in the first instance.



- ii. That an order to issue restraining the respondent from transferring the two issues of the marriage from [Particulars Withheld] School to Siakago, pending the ruling on this issue scheduled on 15th day of February 2023.
 - iii. That the respondent do give the appellant access to the children pending the ruling of 15th day of February 2023.
3. The applications are premised on the grounds on their face and further supported by the affidavits of the applicant.
4. In response to the application dated November 26, 2021, the respondent filed a replying affidavit sworn on January 19, 2022 deposing that he has not denied the applicant access to the minors herein as alleged, as the applicant had the minors during the December holidays. It was stated that the schools closed for holiday on December 17, 2021 when the applicant requested to have the children but unfortunately she fell ill, and ended up not picking the minors as had been agreed upon. That on December 18, 2021, on his way to the applicant's house, together with the minors herein, they passed by Focus Medical Center for medical checkup of the children and for updating of his medical insurance to include the minors. It was his case that the applicant stayed with the minors till January 4, 2022 when the schools opened. In general, the respondent averred that the applicant has had unlimited access to the minors herein. That the children herein have been in their joint custody and at no time have the children missed any parent as the applicant is always present in their lives. It was argued that after the honourable court directed that the parties appear before the Children's Officer to agree on how to work on custody between themselves, the applicant approached the said talks with one clear mind and that is having the actual custody of the minors and nothing less. That the same expectation having failed, the applicant left dejected and therefore filed the applications herein instead of engaging in the discussion. It was his case that he is ready to sit down with the applicant together with the Children's Officer to ensure that the children herein get the best.
5. He conceded that indeed one minor, R is asthmatic since birth but the same has been managed well and further, he has had him covered under his medical cover and therefore, the same should not be regarded as a threat to the wellbeing of the minor. He thus contended that the applications herein lack merit and are bad in law and as a result, should be dismissed with costs.
6. The court gave directions that the applications be canvassed by way of written submissions and both parties complied with the directions.
7. In reference to the application dated November 26, 2021, the applicant submitted that the application before the court is merited as the applicant has denied her access to the minors for a period of four months. That she learnt that RM was sick and thus required her attention but the respondent has refused to cooperate. Further, it was stated that this court should be guided by the best interest of the minors herein as set out in the law and various case laws to wit High Court Civil Appeal Number 149 of 2015. The applicant reiterated that the main issue before this court revolves around custody of the children herein. This court was therefore urged to make an order for joint and equal actual custody of the children herein during school and holidays taking into account the best interest of the minors herein.
8. The respondent on the other hand reiterated that the applicant is misleading the court on being denied access to the children. That she has based her application on the fact that the minor RM being asthmatic, requires close medical attention and yet no medical proof has been tendered before this court to support the same. It was contended that the respondent has managed to cover the minor's condition by taking out insurance cover and therefore, the minor's health is well taken care of. Reliance



was placed on article 53 of the Constitution. Further that the applicant has failed to comply with the directions given by the trial court, and has refused to cooperate in coming up with a workable schedule on how as parents, they should bring up the minors herein. That the respondent is ready to have a discussion with the Children's Officer in realizing the best interests of the minors. Reliance was placed on the case of DOO Vs JAO [2015] eKLR in urging this court to maintain the *status quo* pending the determination of the appeal herein.

9. Further, it was submitted that the applications before the court is bad in law as the same dwelt on the merits of the appeal on the unsuitability of the orders made by the trial court. Reliance was placed on the case of ANT v AMA [2015] eKLR where it was held that in an application for interim custody, one must not dwell on the merits of the case. In the end, this court was urged to maintain the *status quo* of the matter herein and dismiss the applications with costs to the respondent.
10. In the second application dated January 25, 2023 the respondent in a replying affidavit sworn on February 7, 2023 deposed that as at the time that the respondent got the orders of this honorable court issued on January 26, 2023, the minors had already been transferred to their current school, [Particulars Withheld], which is at Kiritiri. That he had already paid school fees and the children had already completed interviews. The respondent conceded that he indeed transferred the minors to their current school herein without consulting the applicant but further defended his actions by stating that the reason why he did not contact the applicant is that previously, he had been warned via a letter dated September 14, 2023 against making any form of communication to the applicant.
11. It was his case that on November 21, 2022, the applicant who by then had the custody of the minor, RM had let the minor attend school despite the fact that he was sick. That she instructed the teachers to call her in case of any emergency and it so happened that the teachers called the respondent informing him that the boy had an asthmatic attack on that day. He was categorical that he took the minor to the hospital and wherein the applicant came to visit the minor together with TM and thereafter left the two children with him at the hospital. He deposed that upon discharge, he decided to take the children to a school in Siakago which place is warmer and not congested as compared to the school in Embu. He prayed that the orders issued on January 26, 2023 be vacated and further the application herein be dismissed with costs to him.
12. When the matter came up in court on February 15, 2023, the counsel for the applicant/appellant informed the court that the respondent had filed a replying affidavit to the application dated January 25, 2023 and that there was no need to file submissions in reference to the said application for the reason that they are related.
13. I have considered and analyzed the pleadings and the submissions by the parties and it is my view that the main issue for determination is whether the orders sought herein can issue.
14. In my view, the applications herein have raised issues in regard to the best interest of the minors. The Convention on the Rights of the Child and the African Charter on the Rights of the Child have also both emphasized the centrality of the best interest of the child. In part II of the Children's Act 2022 as well as article 53(2) of the Constitution all cited by both Counsel in their submissions, sets this prime principle.
15. The Constitution of Kenya, 2010 in article 53(2) provides as follows:

A child's best interests are of paramount importance in every matter concerning the child.
16. The applicant has urged this court to grant her custody of the minors herein given that the respondent has previously stayed with the minors for a period of four months and therefore she should also enjoy that right. The respondent on the other hand denied the allegations stating that he has been ready to



have a discussion with the applicant before the Children’s Office in order to come out with a plan that would work between them in recognition of the best interest of the minors herein.

17. Given the circumstances of the case herein, what matters to this court is the best interest of the minors. In the case of *MAA v ABS* [2018] eKLR, it was held as follows:-

.....While considering this matter, this court is alert to the welfare of the children herein who are of tender years. The matter is not about the applicant/appellant and the respondent; and their interests are secondary to those of the child. The foregoing provisions require this court to treat the interests of the child as the first and paramount consideration and must do everything to inter alia safeguard, conserve and promote the rights and welfare of the child herein. Acting in the best interest of the children in question. (own emphasis)

18. In my view, the prayers currently sought before the court are similar to the ones in the appeal and therefore, granting the same would dispose the substratum of the appeal currently pending before the court and it will render the appeal nugatory. I am in agreement with the respondent that the appeal and the application dated November 26, 2021 raises the same issues.

19. In regard to the application dated the 25/1/2023 the respondent averred that by the time he received the orders of this honourable court issued on the 26/1/2023, he had already transferred the minors to [Particulars Withheld] Academy at Kiritiri and the children reported to the new school on the 25/1/2023. That he paid school fees and associated costs on the 25/1/2023 as evidenced by the receipts that he has attached to his affidavit.

20. In support of the application, he has further explained that he settled for that school as it is among the best schools in Embu County and when he did so, his intention was not to defeat the ruling of the court which was scheduled for 15/2/2023. However, he admitted that he did not consult the applicant when he made the decision to transfer them as they have been having a criminal case and *vide* a letter dated the 14/9/2022 from FIDA Kenya, he had been warned from making any form of contact or verbal communication with the applicant. That he did that for the best interest of the minors.

21. In view of the deposition by the respondent, it would not be in the best interest to destabilize the children in their new school before the appeal is heard and determined. It is only prudent to have them remain there pending the hearing and determination of the appeal.

22. In the premises, I find that both applications have no merit and they are hereby dismissed. The parties to expediate the hearing of the appeal. The *status quo* as ordered by the trial court to remain pending the hearing and determination of the appeal.

23. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 8TH DAY OF MARCH, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

