



REPUBLIC OF KENYA



JGM & another (Suing through mother TN) v GM (Family Appeal E04 of 2022) [2023] KEHC 19277 (KLR) (16 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19277 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
FAMILY APPEAL E04 OF 2022
SM MOHOCHI, J
JUNE 16, 2023**

BETWEEN

JGM & LKM (SUING THROUGH MOTHER TN) APPLICANT

AND

GM RESPONDENT

RULING

Introduction

1. The two Applications dated 15th May 2023 and 7th June 2023 are brought pursuant to Articles 159 & 53(2) of *the Constitution* of Kenya; Sections 5, 6, 8 and 32 of the *Children Act* No. 29 of 2022; Sections 1A, IB, 3A & 63 of the *Civil Procedure Act* Cap 21 Laws of Kenya; Order 42, Rule 6 of the Civil Procedure Rules; and all other enabling provisions of the law, seeking the following reliefs; 15th May, 2023
 - i. That this application be certified urgent and be heard ex-parte in the 1st instance; Spent.
 - ii. That pending the hearing and determination of this Application inter-partes or further orders of the court; this court be pleased to grant the Applicant.
 - iii. an order of stay of execution of the Ruling and order made on 11th May, 2023 in Nakuru Children's Case No. E030 of 2023;
 - Iv. That pending the hearing and determination of this Application inter-partes or further orders of the court; this court be pleased to call for and examine the Record of proceedings in Nakuru Children's Case No. E030 of 2023 for purposes of Satisfying itself on the correctness, legality and propriety of the Court's Ruling and directions issued on 17/04/2023 and 11/05/2023 by Honourable R. Ombata (PM); Spent.



- v. That pending the hearing and determination of the Intended Appeal or further orders of the court; this court be pleased to grant the Applicant an order of stay of execution of the Ruling and order made on 11th May, 2023 in Nakuru Children's Case No. E030 of 2023;
 - vi. That Costs of this Application be provided for 7th June, 2023
 - vii. That this application be certified urgent and be heard ex-parte at the first instance:Spent
 - viii. That pending the hearing and determination of this Contempt of court Application inter-paries or further orders of the court; this court be pleased to grant temporary custody of the minor JGM to the Applicant herein, who is her mother.
 - ix. That the court be please to Order the Respondent herein to appear in court on the earliest date convenient to the court and to bring the minor JGM to court for the court to assess the situation and issue directions as to custody of the minor pending hearing determination of the appeal filed herein:
 - x. That Order 3 above to be executed by the OCs, Mirangine Police Station through the head teacher [Particulars withheld] Secondary, [Particulars withheld], Center, where the respondent is a teacher.
 - xi. That the OCS central Police station be summoned before this honorable court to explain the actions of rampant use of police powers in assisting the Respondent kidnap the minor from school despite having been served with Orders of this honorable court as well as the lower court on stay of execution of Orders of 11/OS/2023 as well as stay of warrants issued by the lower court on 18th May, 2023.
 - xii. That the Respondent be found to be in contempt of Court Orders issued by this court on 17 May 2023 as well as stay directed by the court vide Ruling delivered on 5th June, 2023
2. The Applications are supported by the sworn affidavits of TN, the Applicant and biological mother of the minors JGM a female child aged 4 years and LKM a male child aged I year 3 months and grounded on the following consolidated grounds: -
- a. That the Applicant herein being dissatisfied with the Ruling of the lower court has filed an appeal against the said Ruling.
 - b. That save for the Order issued on 11 May, 2023, the Appellant has not been served with the application from which the Order emanates to date.
 - c. That the Applicant has an arguable appeal with a high probability of success.
 - d. That the Applicant was appearing in person in the first instance and was surprised to learn that the court had given directions that one of the minors JGM be given to the custody of her father, the Respondent herein, and that the Applicant be coming to Nyayo gardens every Saturday, to bring the toddler with the respondent sending Kshs. 200/- as fare to Nyayo gardens.
 - e. That the Applicant did not understand how the matter turned against her, whereas it was an application dated 1st February 2023 filed under a certificate of urgency on 2nd February 2023 and given a far-off hearing date of 5th June, 2023.
 - f. That if the Order for Stay is not granted, the Applicant's Appeal shall be rendered nugatory and the minor JGM herein will suffer grave and irreparable injustice.
 - g. That this application has been made without unreasonable delay.



- h. That this application has been made with utmost good faith and purely hinges on the best interest of the minors herein.
- i. That the Respondent has today kidnapped the Minor JGM from School today with the help of heavy presence of Police Officers allegedly enforcing the Lower Court Orders of 11th May, 2023 in Nakuru Children's Case E030 of 2028.
- j. That the Applicant herein has been rendered helpless as the Respondent has incessantly used police officers from Central Police Station, Bahati Police Station as well as Maili Kumi Police Stations to intimidate her and her parents at all hours of day and night in a bid to intimidate and harass her into surrendering the Child to the Respondent.
- k. That the situation has been so bad as to cause the Applicant to constantly stay in hiding for fear of extra Judicial activities.

Applicant's Case

- 3. That the trial Court on its own Motion issued Orders dated 11 May, 2023 without giving her a chance to canvass her Application filed on 2nd February 2023 that is still pending to date, without any orders as to the maintenance of the minors.
- 4. Which application came up 17th April, 2023 and the directions by the Court did not grant any interim reliefs as to the maintenance of the minors despite repeated ignored summons by the County Children's Department.
- 5. On the 17th April 2023 she was appearing in person and did not understand the proceedings at all, save for being told to be coming to Nyayo Gardens.
- 6. That the Applicant had not received any response to the application on the subordinate court, and it was only sent to her upon request by her advocates on 24th April, 2023 when she sought legal service to understand what had transpired on 17th April, 2023, she then learnt that the Court had directed that she come to Nyayo Gardens every Saturday with the toddler and for the Respondent to be sending her fare for such trips.
- 7. That she was shocked at those directions as that was not what had been prayed for and in essence granted custody of one of the minors JGM to the Respondent, separating her from her younger brother, without any basis whatsoever, placing reliance on the averments of the Replying Affidavit which she had not seen at the time.
- 8. That she later learnt that the Replying Affidavit raised some serious allegations as to her fitness to have custody of the minors, and relied on such assertions to vest custody of JGM to her father and custody of LKM to her, without any hearing whatsoever.
- 9. That the Court order to the Respondent to send Kshs 200/- every week was too meager to get her to Nyayo Gardens let alone take care of the two minors.
- 10. That the Respondent completely separated and alienated the Applicant from JGM, on 20th April, 2023 when she was arrested at the instigation of the Respondent that she wanted to kidnap the minor and she was kept at Githioro Police Station the whole day without being booked or charged with anything and that was how she was separated from JGM.
- 11. That the Respondent has taken to using police to intimidate her at every turn, which is causing her apprehension, and causing the minors mental unrest.



12. The Applicant wondered how she can be fit for one minor, but unfit for the other, as the Respondent seems to purport, whereas I have been raising the minors since birth to date.
13. The Applicant asserts that the allegations of unfitness were serious allegations that should have prompted the Court to order a probe by a children's officer, other than installing custody of a girl child of tender years upon her father without considering the living arrangements and conditions, as the Respondent at the time lived in a two-roomed with a girl child completely unsupervised and without considering the wishes of the child, who appears traumatized to date.
14. The Applicant faults the Court Orders divesting her of custody and placing the minor JGM in custody of her mother were one-sided, yet the Respondent has not demonstrated to Court where the minor would live, including the living situation and conditions, what she will eat and whether she will be continue schooling at her current school, Silverbridge Schools.
15. That the minor JGM has expressed her wish before and the wish is that she should not be compelled to live with the Respondent, which in any event supersedes her best interest as a girl child of tender years, whose best interest lies with the Applicant who also has the custody of the other minor, who requires the warmth and affection offered by her mother and her younger brother.
16. The Applicant asserts that, it is not in the best interest of the children to be separated.
17. The Applicant claims that a Court Order has taken away JGM and placed her in the Respondent's custody without establishing the Respondent's place of abode and there is nothing on record showing it is habitable and safe for children, especially a girl child of a very tender age. The Applicant further faults the Court for disregarding this key element, without any additional evidence in rebuttal.
18. The Applicant claims that on 17th April 2023, she was in Court ready to proceed with the hearing of her application and faults the trial Court for making a substantive and unsought ruling on custody.
19. The Applicant urges that, *the Constitution* of Kenya Under Article 53 as well as the Children's Act under Section 4 (2) provide that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
20. The Applicant's appeal that, it is indeed in the best interest of these children that they stay with her till they attain the age of majority.
21. She asserts that, the law frowns on the separation of siblings. It is, therefore, necessary for the welfare of the children and in the wider public interest that the children be allowed to live together with her.
22. The Applicant prayed for review of the review of the Orders of Hon. Ombata (PM) issued on 11th May 2023 with regards to the Custody of the minor JGM, urging that the Children's matter go for full hearing before making substantive orders.
23. That the Application was made without delay and purely in the best interest of the minors herein and the intended Appeal has a high probability of success and if Stay Orders are not issued, the minors will suffer great and irreparable injustice.
24. That she approached this Court on 15th May, 2023 seeking for stay of Orders issued on 11th May 2023 in Nakuru Children's Case E030 of 2023 and further went back to the Lower Court and obtained orders of stay of warrants issued by the same Court on 17th May 2023 owing to a High Court temporary stay order both sets of Orders were accordingly served upon the OCS, Central Police Station, Nakuru, who had taken to harassing the Applicant incessantly by the strength of the stated Orders causing the arrest



- of her father who was detained first at Bahati Police Station for extended hours then at Central Police Station for 3 days before finally being released without being charged.
25. That it has been a game of push and pull, in an apparent show of might, leaving her completely defeated and helpless and they have for close to one month now been at the mercy of police officers, either from Central, Bahati and Maili Kumi Police Stations, causing them to live in constant apprehension, to a level that she has had to escape and live in hiding.
 26. That the minor JGM has now been caught in the center of the chaos, and was kidnapped from school on 7 June, 2023 by the Respondent, once again accompanied by heavy police presence and the matter was reported at Kayole Police Station.
 27. The Applicant and her family are in distress owing to the Respondent's constant harassment and in seeking to have the minor JGM by force.

Respondents Case

28. The Applications are opposed by Respondent Gilbert Mwangi, who confirms that the orders issued in the Subordinate Court were temporary orders to protect the minor JGM from the antics of the Applicant and her father who had kidnapped her from his place of residence and hidden her in an unknown location. The Court issued temporary orders pending hearing of the application inter-partes.
29. The Respondent was never served with the Court Orders of 17th May 2023 and that the Applicant served the orders upon the OCS, Central Police Station and only became aware when he was served with all the pleadings that have been filed in this Court being: - appeal, application for stay and the instant contempt application on the 8th June 2023. He declined to receive the previously filed application and appeal as they were served way out of time together with the orders emanating therefrom and only received the instant application by endorsing it and writing thereon the date on which he was served.
30. That any allegations against the police should be responded to by the police.
31. That the only push and pull in this case has been from the applicant who is a dramatic woman with utter disregard to the law, court orders or the best interests of the minors in this suit.
32. That in fact the Applicant and her counsel on record have extended their drama to the school where he is a teacher where counsel for the applicant, called his head-teacher and told her that she was harboring a dangerous criminal and kidnapper who should be handed over to the police.
33. That what the Applicant is keeping from the Court is that, the Respondent first came to have custody of the minor JGM after the Applicant and her father physically brought her to his place of work and dumped JGM with the claim that, the Respondent should also take care of JGM while the Applicant and her family take care of the minor LKM.
34. The Respondent took care of JGM and enrolled her in an international school with good facilities. The Court maintained status quo on 11th May 2023 when the suit in the Lower Court was filed by the applicant. However, the applicant, again accompanied by her father, disregarded the status quo orders and stole the minor from the Respondent's home and took her with them. The Applicant's father later called the Respondent and threatened him with death should he dare follow up on the minor as she was their child. He opted to follow the legal route and filed an application for return of the minor the schools had re-opened and she needed to go back to school.



35. That he has not sought the use of police as alleged and the only time the Respondent sought help from the officers from Central Police Station was in enforcing the first order dated 11th May 2023 where despite the drama that ensued, he discovered that the Applicant was not living with the minor JGM but had spirited her away to a slum in Nairobi to live with her relatives.
36. That Respondent went alone to the alleged school in Kayole and took his daughter, this even after he had called the school and the headteacher, in cahoots with the Applicant and her sister lied that the JGM was not enrolled in that school.
37. He however did his own investigations and discovered that the minor JGM was in the said school.
38. That the minor JGM has been exposed to violence and the constant chaos by the Applicant and her family's daily lives and when he took over custody of the minor JGM on the 7th June 2023, she was ill but had not been taken to any hospital for medication and took her to Medicross Hospital in Nakuru town where she was treated
39. That Applicant can thus not claim contempt where there was no personal service of the alleged court orders. Further, the Applicant cannot seek for protection of the High Court and claim contempt when she herself was in contempt of the Lower Court Orders before they were stayed and that Orders emanating from the Courts, be it a High Court or a Subordinate Court should be obeyed by all parties.
40. That this Court in its ruling found that the Subordinate Court did not act improperly or abused its jurisdiction thus the orders that the applicant was disobeying, which orders were served upon her physically in front of her family members and officers from Central Police Station were valid Court Orders which ought to have been complied with.
41. That the Respondent is best placed to take care of the interests of JGM. The Applicant took JGM to her sister's home in Kayole where the minor lacked the love that a parent could give her. By the time he took over custody of the minor JGM from the school in Kayole, she was in a distressed and sick state.
42. The Applicant is attempting to subvert the best interests of the minor JGM and the good life that the Respondent has placed her in, he described the school in Kayole is as short of a dumpster where waste and sewage flow through the school which is merely a "mabati" structure.
43. On the contrary the Respondent offers JGM an international school that has appropriate facilities, is well built and has a safe and clean environment which ensures the peace of mind for a child to study in.
44. That in fact by taking the minor JGM to Kayole to live with relatives, the Applicant has demonstrated that the Applicant does not have the good will or the capacity to care for and live with the minor. This is the same reason that she had when her father and her dumped the minor JGM at his place of residence and told him to take care of her.
45. That it is in the best interests of the minor JGM, the application herein be dismissed, status quo be maintained with regard to physical custody of JGM and the appeal filed herein be heard expeditiously.
46. That the Court should extend a warning to the applicant's father to cease interfering with the custody and well-being of the minor JGM until the applications herein, the appeal and the main suit have been heard and determined.
47. That, the applicant's father has no interest in the suit herein as he is a grandparent, while the minor still has two living parents who can take care of the minor. His interference is therefore just a nuisance.
48. That it is in the best interests of JGM that she continues to reside with the Respondent and continues her education in her current school.



49. That the contempt application filed herein should be dismissed as the said orders were never served upon him until the 8th June 2023, and only after the Court had issued an order for the Applicant to prove service of the alleged stay orders.
50. That in fact the Applicant filed an application for stay and when the Court called for the Lower Court file, the Applicant went underground and did not avail the file. He became aware of the application when he visited the Children's Registry seeking further help on tracing the minor JGM and was informed by the registry clerk of the said orders.
51. That he wrote to the Deputy Registrar for assistance since the pendency of the matter in the High Court without determination meant that the minor's rights were continuously being prejudiced and the file was availed and the orders stating that the Lower Court had acted within the legal limits were issued.
52. That the Applicant has filed her applications based on lies and in the interest of justice and the best interests of the application herein ought to be dismissed and the appeal heard expeditiously.

Analysis and Determination

53. The proper place of jurisdiction and the necessity to deal with it as the first order of business before an enquiry into merits of a cause was best captured in the timeless words of Nyarangi J.A in *The Owners Of The Motor Vessel Lillian 's' Vs. Caltex Kenya Ltd* [1989] KLR 1: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority;

‘By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist, where a court takes it upon itself to exercise a jurisdiction which it does not possess, its acquired before judgment is given.’

See Words and Phrases Legally defined – Volume 3: 1 – N Page 113.”

54. The jurisdictional quandary that confronts this appeal emanates from the fact that it is an interlocutory appeal. It seeks to challenge and overturn a decision made by trial Court, not of the end of a hearing in which a final pronouncement is made on the action itself, but rather, on only an aspect,



doubtless an important aspect, of the adjudicative process before that Court, but before the final judgment and decree. It is an appeal against a ruling and order.

55. The Applicant separated from Gilbert Mwangi the Respondent and biological father of the minors, on or about October 2022 and the said separation has resulted vicious litigation, allegations and counter allegation of kidnapping by both parties, deliberate material non-disclosure to the Court by the Applicant and a toxic engagement by the parties and their relatives with minor JGM and minor LKM being used in the bidding war, this Court thus considers the Applications with the best interest of the children as the compass.
56. Upon separation the Applicant left her matrimonial home with both minors under her custody and care in December and filed an application for maintenance of her two minors in February 2, 2023, which is still pending without any orders.
57. It is noteworthy that the Applicant while accompanied by her father delivered minor JGM to the Respondent's place of work in February 2023 to take care of her, while she took care of minor LKM. The same was done in spite. The Applicant's pleadings portrayed a mother with custody of both minors. The Applicant failed to disclose the fact that minor JGM was in fact in the custody of the Respondent, to the Trial Court.
58. The Respondent's Defence filed indicates had the custody of minor JGM' and counterclaimed a custody care and control order of minor LKM.
59. The Applicant, unfortunately, sought equitable reliefs with unclean hands and has thus attempted what one would term as legal acrobatism and attempted to litigate child custody before the High Court.
60. Section 75(1) of the *Civil Procedure Act* provides for the orders against which an appeal would lie as of right and/or with the leave of the Court. It provides thus: -

“75(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-

- (a) An order superseding an arbitration where the award has not been completed within the period allowed by the court;
- (b) An order on an award stated in the form of a special case;
- (c) An order modifying or correcting an award;
- (d) An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- (e) An order filing or refusing to file an award in an arbitration without the intervention of the court;
- (f) An order under section 64;
- (g) An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;



(h) Any order made under rules from which an appeal is expressly allowed by rules.”

61. Order 43 Rule (1) of the Civil Procedure Rules sets out the orders and rules in respect of which appeals would lie as of right. Under Order 43(2) it is provided that an appeal shall lie with the leave of the Court from any other order made under the Rules. This means that unless the order sought to be appealed against falls under the orders which are appealable as of right under Order 43(1) leave to appeal must be obtained before such an appeal can be preferred. The procedure for obtaining leave is provided under Order 43(3) which states as follows: -

“(3) An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.”

62. No leave was sought by the Applicant before the Trial Court, to appeal against the impugned Orders dated 17th April, 2023, or the Orders of 11th May 2023. The Appellant directly moved this Court by filing a memorandum of appeal and a certificate of urgency seeking a stay of execution.

63. In the instant matter the Notice of Motion dated 15th May 2023 pursuant to which the learned magistrate granted the orders of the same date, sought to be appealed by the applicant did not fall under any of the Orders set out under Order 43 Rule (1) in respect of which an appeal lies as of right.

64. Section 80 provides for any person who considers himself aggrieved: –

“(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

65. Order 45 rule 1(a) and (b) in addition to setting out the conditions that an applicant in an application for review must satisfy in order to get the application granted, reiterates the proviso of Section 80(a) and (b) which makes it plainly clear that the options of a review and an appeal are not simultaneously available to an aggrieved party. Once a party has opted for a review the option of an appeal cannot at the same time be available to the party. Sub-rule (2) of Order 45 of the Civil Procedure Rules further makes the matter clearer. It provides: - Order 45 (2): -

“A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review.”

66. The legal principle that, primary custody of a child of tender years is usually awarded to the mother assumes that young children require a primary caregiver, who can provide the necessary nurturing, emotional support, and stability. Historically, mothers have been seen as the primary caregivers for young children and have been more likely to stay at home to care for them. Therefore, in cases of divorce or separation, the Court tends to award primary custody to the mother, unless there are compelling reasons to do otherwise.



67. However, it is important to note that, this legal principle is not a hard-and-fast rule, and each case is evaluated based on its unique circumstances. The best interests of the child are always the primary consideration in custody decisions, and the Court will consider factors such as the child's age, health, well-being, and relationship with each parent before deciding.
68. In cases where the father can demonstrate that he is the better primary caregiver, he may be awarded primary custody of the child of tender years. In the Case of Noordin v Karim [1990] eKLR the Applicant claimed that her two children also lived with her but a report by the Provincial Children's Officer stated that the children had been living with their maternal grandmother. The Applicant had no source of income and her husband's income was not disclosed to the court.
69. The Court held: -
1. The paramount consideration in this type of case is the welfare of the children. To deprive a parent of access is to deprive a child of an important contribution to his emotional and material growing up in the long run.
 2. In cases involving very young female children, there is a rule in favour of the mother in the absence of exceptional circumstances.
 3. The applicant's house was not a suitable place for the two children to live.
 4. The Respondent was a suitable parent and he was possessed of sufficient means to guarantee the children a good life, better education and a sense of belonging.
 5. The children were boys and were big enough. It was not for their long-term well-being that they should be alienated from their father.
70. One significant primary child custody case heard by the UK High Court of Justice is Re H (A Child) [2014] EWHC 1164 (Fam). In this case, the parents were in dispute over the primary care of their child, with the father seeking to relocate with the child to the United States. The Court ultimately ruled in favor of the mother, finding that it was in the child's best interests to remain in the UK and primarily reside with her.
71. The case is notable because it established important principles around the welfare and best interests of the child in custody disputes, including the importance of maintaining relationships with both parents, the child's needs for stability and continuity, and the role of the Court in determining what is in the child's best interests.
72. One significant primary child custody case heard in South Africa is M v M 2012 (2) SA 208 (GSJ). In this case, the parents were in dispute over the primary care of their child, with the mother seeking sole custody and the father seeking joint custody. The Court ultimately ruled in favor of the mother, finding that it was in the child's best interests to remain in her primary care.
73. The case is notable because it established important principles around the best interests of the child in custody disputes, including the importance of considering the child's views, needs, and circumstances, as well as the parent's capacity to provide for the child's physical, emotional, and psychological needs. The Court also emphasized the need for parents to cooperate and communicate effectively in making decisions about the child's care.
74. However, Section 83 of the Children's Act sets out the following principles guiding the Court in making a custody order. The Court must consider the following: -
- i. The conduct and wishes of the parent or guardian of the child.



- ii. The ascertainable wishes of the relatives of the child.
 - iii. 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/her home in the last 3 years before the application to the court.
 - iv. The ascertainable wishes of the child.
 - v. Whether the child has suffered any harm, or is likely to suffer any harm if the order is not made,
 - vi. The customs of the community to which the child belongs.
 - vii. The religious persuasions of the child
 - viii. Whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether or not those orders remain in force.
 - ix. The circumstances of any sibling of the child concerned; and of any other children of the home, if any.
 - x. The best interest of the child.
75. The Applicant has been economical with the truth but should by now be aware that the Respondent wants custody of both minors and that she has then to defend her case. The Respondent has equally demonstrated he is of means capable of providing a better life to minor JGM, however, this Court is still persuaded that JGM needs motherly love and affection at this crucial juncture of her life.
76. The Jurisdiction to make a determination on the custody of the minors JGM and LKM under Section 83 of the Children's Act is before the Trial Court in Nakuru Children's Case No. E030 of 2023.
77. The Court find the Applications dated 15th May, 2023 and 7th June, 2023 to be without merit and the same are hereby dismissed.
78. The Court orders and directs the parties to appear before the learned magistrate in Nakuru Children's Case No. E030 of 2023 for directions relating to disposal of the child custody and maintenance case.
79. An order is hereby issued directing the expedited hearing and determination of Nakuru Children's Case No. E030 of 2023 and any applications thereon.
80. The Court further exercises its inherent jurisdiction and in the best interests of Minor JGM to Order, a temporary custody care and control order, to the Applicant, pending hearing and determination of Nakuru Children's Case No. E030 of 2023.
81. The Applicant shall enroll the minor at a school in Nakuru acceptable to the Respondent and shall not transfer the custody of Minor JGM to any other third party without the orders of the Court.
82. The Respondent shall access minor JGM to be availed by the Applicant at Nyayo Gardens in Nakuru every Saturday from 9.00am to 6.00pm

It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 16TH JUNE 2023

MOHOCHI S.M



JUDGE

