



GLS & DKS (Minors suing through their mother AWK) v JS (Children's Appeal Case E009 of 2022) [2023] KEHC 20593 (KLR) (12 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20593 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CHILDREN'S APPEAL CASE E009 OF 2022**

TA ODERA, J

JULY 12, 2023

BETWEEN

**GLS & DKS (MINORS SUING THROUGH THEIR MOTHER
AWK) APPELLANT**

AND

JS RESPONDENT

RULING

1. The applicant /appellant moved this court by way Notice of Motion dated 22nd March,2023 and brought under Articles 1(3),10(2),20,25,27,48,50(1),7(9), 73,157,159 and 232 of *the Constitution* of Kenya, Rule 5 of the Judicial Service Code of Conduct & Ethics, Sections 1A & 1B, Section 3 A, of the *Civil Procedure Act* and Provisions of the Bangalore Principles of Judicial Conduct, the A seeks for Orders that: -
 1. This Application be heard on priority basis and in the first instance.
 2. The trial Judge Lady Justice T.A Odera be pleased to recuse herself from any further conduct of this matter.
 3. The file be placed before the Honourable Presiding Judge for reallocation before any other court of competent Jurisdiction, for its just and conclusive determination.
 4. The costs for this Application be in the cause.
2. The Application is premised on grounds that this court has exhibited blatant bias against the Applicant's case since the first court appearance by the parties; that the Judge's Bias has affected both the procedural and substantive flow of the suit; and that unless the Application herein is allowed, the Appellant will never have her day before a competent and impartial tribunal for determination of the very pertinent issue of custody and maintenance.



3. The Application is supported by an Affidavit of Anne Wambui Kamau sworn on the even date in which she deponed to the grounds upon which the application is based. The applicant in her affidavit stated a raft of grievances including that when they appeared before this court to take directions on a recusal application on 22nd March, 2023 the court directed that the Application be made by way of a Notice of Motion and not a letter and gave a mention date of 23rd March, 2023 for directions which date was not convenient to the Respondent's counsel and the court indulged him and asked the parties to take another date. It was her contention that such latitude has never been extended to her Advocate every time she requested for another date due to her busy diary.
4. She asserted that in view of the above, the conduct of the this court is by no means expected of a Judicial officer and she believes the actions of this court were openly biased or had been compromised or one whose personal prejudices were so strong so as to inhibit dispensation of justice in a fair hearing.
5. She averred that it is only fair and just that this court recuses it'self to allow another court of competent jurisdiction to take over the conduct of the matter.
6. The Application is opposed by Respondent Jesses Selempo through his replying affidavit sworn on 13th April, 2023. He deposed that this Honourable court directed the appellant to file an application upon raising the issue of bias however the applicants filed a letter dated 16th March 2023 that cannot be equated to an application as it is not supported by an affidavit.
7. He deposed that the court's directive to the appellant to file an application was made within the Honourable Court's authority in line with the provisions of Order 19 Rule 1 of the Civil Procedure Rules 2010 and the same was issued within the law and the compliance thereof was mandatory.
8. He deposed that an advocate can instruct another advocate to hold brief and thus it was not mandatory for the same counsel to appear in matter throughout its life in court.
9. He averred that the Honourable Court does not issue dates to parties at their pleasure but the said dates are guided by the Court's diary.
10. It was his assertion that the instant Application lacks substance, speaks of personal vendetta against the Judicial Officer and is full of vague and unsubstantiated claims.
11. It was his deposition that the Appellant's Affidavit consists of pure hearsay as she does not disclose the source of her averments considering that she was not in court on the specific days she refers to therein.
12. He contended that application is scandalous and vexatious and that the Appellant has allowed herself to be used as a purveyor of falsehoods and defamatory innuendo against a judicial officer of repute.
13. It was his assertion that the Appellant should be punished for perjury for deponing to matters not within her knowledge and whose source has not been disclosed.
14. He averred that the depositions of the Appellant vis a vis the contents of her aforesaid letter are contradictory and expose the Appellant's ill will and vendetta against the proceedings herein and that the appellant is now embroiled in side shows deliberately delaying the proceedings herein and the same is not in the best interest of the Minors.
15. He deposed that this Honourable Court ought to take cognizance of the appellant's counsel demeanor and utterances whilst appearing in this matter as the same borders on unprofessional misconduct and this honourable court must take necessary action to protect its dignity and authority.
16. It was his further deposition that the Appellant's supporting Affidavit offends the mandatory provisions of Order 19 Rule 3(1) of the Civil Procedure Rules 2010.



17. He thus prayed that the Application be disallowed with costs.

APPELLANT'S SUBMISSIONS

18. The Appellant's Counsel submitted that the process of recusal is a matter of judicial discretion which can be initiated by either the Judicial Officer or by a party in a matter before the Judicial officer and that the significance of the doctrine of recusal is to promote a fair process that is impartial and therefore enhances public confidence in the administration of the justice.
19. The Counsel argued that one of the ingredients of the right to fair hearing is the impartiality of the court or tribunal and in that regard she cited the Provisions of Article 50(1) of *the Constitution*.
20. It was submitted that the Judicial Service (Code of Conduct and Ethics) Regulations 2020 provides the manner in which a judicial officer should perform his/her official duties. That Rule 36 requires each judicial officer to, at all times, carry out the duties of the office with impartiality and objectivity in accordance with Articles 10,27,73(2)(b) and 232 of *the Constitution*.
21. The counsel averred that in addition the Judicial Officers in discharge of their duties are expected to uphold and apply the law; observe fairness and impartiality; and perform the duties of judicial office, including administrative duties impartially, competently and diligently, without bias.
22. The Counsel argued that the right to fair hearing is one of the non derogable rights under Article 25 of *the Constitution* and that according to Bangalore Principles of Judicial Conduct,2002 under Value No.2 a judicial officer must uphold impartiality.
23. To buttress her submissions, the Counsel relied on Court of Appeal case of Kaplana H. Rawal v Judicial Service Commission & 2 others [2016] eKLR and invited the court to relook all the instances particularized in the notice of motion application and ask herself whether a reasonable member of the public would consider them as bias and therefore, an impediment to the non-derogable right to a fair trial.
24. According to Appellant's Counsel the five grounds of recusal are: -
 1. Open favourism towards the respondent in allocation of court time and dates- in this regard the counsel contended that this court on 7th March,2023 disallowed her request for a convenient court date and went ahead to give a hearing date that was inconvenient to her but on 22nd March,2023 treated the Respondent differently on the same issue by granting a far date to accommodate him to the prejudice of the Appellant and that during proceedings the court would always and without fail cut her short during oral submissions despite her protestation while allowing the Respondent free will to reign.
 2. Open discrimination in handling the parties- the counsel contended that on 13th February,2023 the court ordered the Respondent to avail DKS in court on 16th March, 2023 but the Respondent did not comply and the court rewarded that disobedience by granting him interim actual custody of DKS whereas when the Appellant was not able to release the minors to the Respondent on 19th February,2021, the court issued warrants of arrest against her exparte on 21st March, 2023 despite her affidavit detailing the reasons for such failure. The Counsel also contended that the court after discharging the aforementioned warrants of arrest on grounds of disqualification of the Respondent's Counsel to practice, it reissued warrants of arrest against the Appellant exparte on 7th March,2023 based on oral application by the Respondent and that as the warrants of arrest were effected on 14th March, 2023,the Children's officer, Nakuru County, sent her representative to pick the minors and hand them over to the respondent in



violation of the Orders of 7th March,2023. In addition, the Counsel averred that when she raised this issue on 15th March, 2023, the judge did not address the infraction but went ahead to vindicate it by granting the Respondent temporary actual custody of the minors herein.

3. Blatant bias in procedure that always elevated respondent's applications above the appellant- in this regard the Counsel submitted that the appellant Application filed under certificate of urgency on 7th February 2023 was not heard to conclusion whereas the Respondent's Application dated 21st February, 2023 was allowed as prayed save for prayers for interim actual custody that was later allowed by the court on 15th March 2023 following an oral application by the Respondent while the same prayers sought in the Application dated 7th February 2023 remains pending if not moot by now.
 4. Conduct during proceedings which does not maintain the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary- Regarding this issue, the Counsel submitted that on 7th March, 2023 during proceedings in Chambers while she was still on her feet addressing the judge, the judge rose and started packing her laptop and personal belongings in a big bag citing an urgent meeting necessitating both Advocates to leave the Chambers unceremoniously. In addition, she also submitted that on 15th March, 2023 the judge kept interrupting her while orally submitting in response to the Respondent's Oral Application for interim Actual custody of the Minors then proceeded to allow the said Application.
 5. Refusal to issue directions on the application for recusal- With respect to this issue, the counsel asserted that pursuant to the Court's directions issued on 15th March,2023 she did file a letter for recusal but the court insisted that she files a formal application. She contended that she undertook to do so by close of business but the court threw the matter for mention on 29th March ,2023 without giving any directions on time lines for filing responses. She stated that on 29th March she had complied and the Respondent sought 7 days to respond. That the court alleged that it did not have a copy of the Application and she sought for the file to be placed aside so that she could avail the same within thirty minutes but the court declined and gave a further mention date of 19th April,2023 again without giving directions on the timelines for filing responses.
25. Based on the above, the Appellant's Counsel submitted that it is clear this court favours the Respondent and cherry picking on which Application to hear and which ones to hold in abeyance, and that the ones picked are always for the Respondent. She thus submitted that the trial court should recuse herself.

RESPONDENT'S SUBMISSIONS

26. The Respondent rehashed the averments contained in his replying affidavit in his submissions. He further faulted the appellant for prosecuting an application for custody in her submissions on an application for recusal and submitted that parties are bound by their pleadings and that any pleadings that are variance with the pleadings must be disregarded. In support of this proposition, reliance was placed on the case of Independent Electoral and Boundaries Commission & another V Stephen Mutinda Mule & 3 others [2014] eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself on the importance and place of pleadings.



27. The Counsel for the Respondent submitted that Judicial Bias test is “reasonable apprehension of bias” and the onus of demonstrating bias lies with the person alleging it. To bolster this position reliance was placed on the case of Kaplana H. Rawal v Judicial Service Commission & 2 others (Supra)
28. It was the Respondent’s submissions that Judges should not recuse themselves on flimsy and baseless allegations as was stated in the case of Locaball (UK) Ltd versus Bayfield Properties Limited [2000] QB 451
29. The counsel submitted that there are no chronological of events referred to in an Affidavit that would render fair minded observer to conclude that the Judge is biased and that the Appellant would not get a fair hearing.
30. He contended that the letter dated 16th February, 2023 have multifaceted issues that do not refer to the events of the said date in particular.
31. He prayed that the instant application be dismissed with costs.

Analysis & Determination

32. Having considered the Application before court and given due regard to the submissions by both counsel, the circumstances of this case the cited authourities and the law, I am of the view that two issues arise for determination. These are:
 1. Whether or not this Court should recuse itself;
 2. Who should bear the costs of the Application?
33. I will start by considering the first issue. Does the Application for recusal have merit? The Black’s Law Dictionary, 8th Edition at page 1303 defines recusal as follows:

“Removal of oneself as Judge or policy-maker in a particular matter because of a conflict of interest.”
34. The same dictionary at page 171 defines the word bias as:

“Inclination; prejudice ... judicial bias. A Judge’s bias towards one or more of the parties to a case over which the judge presides. Judicial bias is usually insufficient to justify disqualifying a judge from presiding over a case. To justify disqualification or recusal, the judge’s bias usually must be personal or based on some extra judicial reason.”
35. Judicial bias is also defined in the same Dictionary as follows: -

“A judge’s bias towards one or more of the parties to a case over which the judge presides. Judicial bias is usually not enough to disqualify a judge from presiding over a case unless the judges’ bias is personal or based on some extra judicial reason”.
36. In the case of Jasbir Singh Rai & 3 Others -vs- Tarlochan Singh Rai & 4 Others (2013) eKLR, Supreme Court of Kenya Petition No. 4 of 2012 Hon. Justices P. K. Tunoi, J. B. Ojwang, N. S. Ndungu, M. K. Ibrahim and S. Wanjala (JJSC) had the following to say;

“(6) Recusal as a general principle, has been much practised in the history of the East African Judiciaries, even though its ethical dimensions have not always



been taken into account. The term, is thus defined in Black's Law Dictionary, 8th Edition (2004) (P. 1303);

'Removal of oneself as Judge or policy maker in a particular matter, (especially) because of conflict of interest'."

- (7) From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised.
- (8) It is an insightful perception in the common law tradition, which the justice of a case does not always rest on the straight lines cut by statutory prescriptions, and the judicial discretion in its delicate profile, is critical to equitable outcomes. This is what Sir David Maxwell Fyfe meant when he attributed to Lord Atkin a "constructive intuition which operates after learning and analysis are exhausted" [in G. Lewis, Lord Atkin (London: Butterworths, 1983), p. 166]. It is precisely such delicate elements of judicial fairness that will also feature in the judgment as to whether or not the recusal of a Judge, particularly in the case of a collegiate Bench, is of any materiality, in a given case.
- (9) Different jurisdictions make provisions, through statute or practice directions, for certain grounds for the recusal or disqualification of Judges hearing matters in Court. The most common examples, in this regard are: where the judicial officer is a party; or related to a party; or is a material witness; or has a financial interest in the outcome of the case; or had previously acted as counsel for a party.

37. In the case of Philip K. Tunoi & another v Judicial Service Commission & another [2016] eKLR, the Court of Appeal held that:

'In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias. In *Taylor v. Lawrence* [2003] QB 528 at page 548, in which an application was made to reopen an appeal on the ground that the Judge was biased, the Judge having instructed the plaintiffs' solicitors many years previously the House of Lords in the judgment of Lord Woolf CJ reiterated:

"... we believe the modest adjustment in *R. V. Gough* is called for which makes it plain that it is, in effect, no different from the test applied in most of the commonwealth and in Scotland."

"The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."The facts of this case would not in our view, on the authority of *Porter v. Magill* (*supra*) lead a fair-minded and



informed observer to conclude that there is real possibility that the Presiding Judge will be biased. It was not shown that circumstances exist that are likely to show that a real possibility exists that the Presiding Judge's integrity or impartiality might reasonably be questioned.

38. In the American case of *Perry v. Schwarzenegger*, 671 F. 3d 1052 (9th Circ. February 7, 2012) it was held that the test for establishing a Judge's impartiality is the perception of a reasonable person, this being a "well-informed, thoughtful observer who understands all the facts", and who has "examined the record and the law"; and thus, "unsubstantiated suspicion of personal bias or prejudice" will not suffice.

39. It is clear that when a judicial officer is handling a matter his or her duty is to fulfil the function of his/her office in the most honest and just manner. Justice Rolston F. Nelson; of the Caribbean Court of Justice in his treatise - "Judicial Continuing Education Workshop: Recusal, Contempt of Court and Judicial Ethics; May 4, 2012; observed:

"A judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason."

40. I will now apply the test set out in the above precedents in the current scenario. But before I address this issue, I note the Applicant in her submissions has addressed the conduct of this court in regards to review of the interim custody orders that has not been mentioned in her Application. It is trite law that parties are bound by their pleadings and evidence which tends to be at variance with the pleadings is for rejection. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

41. The above principle was also re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others* (supra) which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002* where Adereji, JSC expressed himself thus on the importance and place of pleadings:

".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded....."



...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

42. In the instant matter the aforesaid submissions by the Appellant do not support the pleadings and this court will only deal with the issues raised in the instant Application.
43. From the application and the averments contained in the affidavit in support of the application, it is clear that the applicant is aggrieved by the conduct of the proceedings of the court on 16th February,2023, 7th March,2023, 8th March 2023, 15th March, 2023, 22nd March,2023 & 29th March 2023 and the orders issued by this court on the said dates.
44. The Applicant’s application dated 7th February, 2023 brought under certificate of urgency was placed before this court and after considering the same the court directed that the Minor DKS be availed in court on 16th February,2023 by the Respondent and also set the said Application for interpartes hearing on the same date. On 16th February,2023 the Applicant counsel was ready to proceed with the hearing of the Application and also did informed the court that the minor had not been availed contrary to the orders issued on 13th February,2023. The Respondent’s counsel confirmed receipt of those orders and explained that he could not avail the said minor as he was in school and undertook to avail the minor when the school close for mid-term. The court also considered the oral submissions of learned Counsel before issuing its orders interalia that the child remains in school and the ordered that the Appellant to have unlimited access to the Children over the weekend. This orders appear did not sit well with the Applicant as she contended in her Letter dated 16th March,2023 that this court accepted the letter from St Anne Catholic Academy in kiserian stating that DKS was in school and due to school activity on that date he could not attend court which had not been annexed to the Affidavit and that the court granted the Respondent Custody of the DKS. The court has unfettered discretion to issue orders that it deems fit in the best interest of the children
45. It is imperative to note that the Law is very clear on what should happen should a party be dissatisfied with the Orders of the Court. Such a party has a right to seek for review or appeal against the said order. The Applicant did none of the above.
46. On 7th March, 2023 this court ordered the children to be availed in court on 8th March, 2023 as the Appellant’s Counsel informed the court that the children were psychologically affected and the Respondent’s counsel also told the court that orders for access granted on 27.2.2023 had not been complied with. On 8th March, 2023 neither the appellant nor the children were present in court in clear breach of the court orders. The Respondent’s counsel told the court that the whereabouts of the minors and the conditions under which they were living were unknown. Consequently, this court issued warrants of arrest against the Applicant and directed the OCS Kaptembwa to trace the minors and hand them over to the custody of the Children Coordinator Nakuru County. The Applicant’s counsel contention therefore that this court was impartial as it gave a hearing date of 8th March,2023 that was not convenient to her despite her protestation but would grant an adjournment to the Respondent on 22nd March,2023 on the same issue is baseless. These orders were issued in the best interest of the minors at the instance of counsel who told this court that the children were in distress .
47. The Applicant’s Counsel also contended that while orally submitting, this court would always and without fail interrupt her mid-way while allowing the Respondent free reign. This is far from the truth. It is absurd and utterly unprofessional for Counsel to deliberately lie to the Court about this issue. I wonder where the counsel put her oath of office to not only uphold and defend justice but to also be true to the profession and duty. On 15th March,2023, the court on realizing the Counsel for the



Applicant had gone too far in her response to an oral application for interim custody of the minors made by Respondent, directed her to answer to the application and not delve into the issues in her main application for interim custody. This piqued the said Counsel into imputing bias on the Court's part. It was at this point that the court did order the Counsel to file a formal application of recusal.

48. The record herein indicates that instead of counsel for applicant filing a formal application for recusal directed, she did file a letter dated 16th March, 2023 and vide a ruling of 22nd March, 2023 the court ordered her to comply with the orders of 15th March 2023. The applicant also took the children and enrolled them in school against the orders of this court and this stalled the progress of the case. This court could not have given a date for an application which had not been filed and in any event, dates are given as per the court diary and not at the whim of the court or any party. The applicant cannot thus be heard to complain of the delay in this case.
49. Judges have a duty to sit and adjudicate on matters before them. In the case of Gladys Boss Shollei -v- Judicial Service Commission & Another, Petition No 34 of 2014 [2018] eKLR, the Supreme Court described that duty in the following terms at paragraph 25:
- “Though not profound in our jurisdiction, every judge has a duty to sit in a matter which he duly should sit. So that recusal should not be read to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office; to serve impartially; and to protect, administer and defend *the Constitution!* It is a doctrine that recognizes that having taken an oath of office, a judge is capable of raising above any prejudices, save for those rare cases where he has to recuse himself. The doctrine also safeguards the parties right to have their cases heard and determined before a court of law.”
50. Lord Denning stated in Metropolitan Properties Co (fgc) Ltd -v- Lannon 1968 3 All EIR 304:
- “There must be circumstances from which a reasonable man would think it likely or probably that the justice ... would or did favour one side unfairly at the expense of the other. The court will not inquire whether he did in fact favour one side unfairly. Suffice it that reasonable people might think he did.”
51. It is also clear from the application and the submissions of the Applicant that she was dissatisfied with the orders that were issued by the court regarding the Respondent's Application dated 21st February, 2023 and Oral Application made on 15th March, 2023. Dissatisfaction of the court orders by a party does not accord her a right to call for recusal of a Judicial Officer but appeal or review in the appellate court.
52. Even though the Applicant has a right to call for recusal of a Judicial Officer, on apprehension of bias, that apprehension must be a reasonable one and must be supported by valid reasons. I have considered the entire sentiments raised by the Applicant's counsel in the supporting affidavit and the submissions and it clear that the allegations raised therein do not depict any iota of bias whatsoever on the part of this court. The decisions complained of herein were based on the law, facts and in the best interest of the children as per the children officers reports filed herein. The
53. The up-shot of all the above is that the notice of motion dated 22nd March, 2023 is based on mere surmise and conjecture and is bereft of merit and I proceed to dismiss the same.



54. On the issue of costs , the rule of the thumb is that costs follow event .however , there are exceptions to the same as was held by Justice John Mativo in the case of Cecilia Karuru Ngayu (Supra) further opined that: -

“To my mind, in determining the issue of costs, the Court is entitled to look at inter alia (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination, (v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relations hip between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159(2) (c) of the Constitution.”

55. There is no doubt that the Respondent responded to the application herein and application has failed and but since this is a family matter . I will order that each party bears his own costs.

56. I note that application dated 7.2.23 is pending hearing, however considering the acrimonious nature of this appeal , it is important that the main appeal be expedited in the best interest of the children . I order that directions be taken on the main appeal today.

57. On the issue of custody of the child DKS , on 15.3.23 this court had an opportunity to examine the children herein and the child DIS told this court that he preferred to stay with the father while DKS told this court that he wanted to be with the mother. Before this court made a decision of custody that day counsel for the appellant accused this court of bias and so I could not make a decision on the issue then. However issues arose in the reports filed by the County children coordinator Nakuru and Children officers and Kajiado that the childrens education, social and emotional stability had been affected by the hide and seek games played by the parents . This court respects the ascertainable wishes of the children but at the same time, would not want to interfere with their education in the middle of the term . I order that the child DKS be in the custody of the mother from 1st weekend after schools for August 2023 holidays . The mother to enrol him in a school WEF September 2023 and ensure that he goes to school without fail . Children coordinator Nakuru county to supervise the progress of the child. The father to have unlimited access to the child during weekends and half of the school holidays until the appeal is heard and determined. As regards DLS he will remain in the custody of the father till the appeal is heard and determined and the mother will have access to him on weekends and ½ school holidays.

T. A. ODERA - JUDGE

12/7/2023

RULING DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;

Sabaya for Applicant

Onkundi for Respondent

Court Assistant: Cheruiyot

Onkundi: Proceedings of the trial court have not been served on us. The record of appeal we were served with the pleadings but not proceedings of the trial court.

Sabaya: I undertake to regularise the records. I have the proceedings.

Onkundi: We shall be filling a cross-appeal upon receipt of the proceedings.



Sabaya: We shall deal with it once we confirm that the record is in order. We took directions on appeal on 2.2.23.

Order:

Supplementary record of appeal be filed and within 14 days from today. Mention on 18.9.2023.

T. A. ODERA - JUDGE

12/7/2023

