



REPUBLIC OF KENYA



KENYA LAW
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**JNG v JMM (Civil Appeal E031 of 2022)
[2023] KEHC 20588 (KLR) (Family) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20588 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

CIVIL APPEAL E031 OF 2022

MA ODERO, J

JULY 14, 2023

BETWEEN

JNG APPELLANT

AND

JMM RESPONDENT

*(Being an Appeal against the Judgement and Decree of the Children's Court at Nairobi
Hon. F. Terer (Mr.) dated 4th March, 2022 in Children case number E458 of 2021)*

JUDGMENT

1. The appellant herein JNG filed the memorandum of appeal dated March 16, 2022 seeking the following orders:-
 1. This appeal be and is hereby allowed and consequently order 4 of the decree issued in the judgement of the Children's Court at Nairobi by Hon Terer (mr) dated March 4, 2022 in Children's Court Case No E458 of 2021 be and is hereby set aside.
 2. The appellant be and is hereby granted costs of this appeal.
 3. This honourable court be pleased to make any further orders and directions that it may deem fit and just in the circumstances and in the best interest of the minors."
2. The respondent JMM opposed the appeal through his response dated June 17, 2022. The matter was canvassed by way of written submissions. The appellant filed the written submissions dated April 3, 2023 whilst the respondent relied upon his submissions dated March 29, 2023.



Background

3. The respondent is the biological father of the child SW whom he raised together with the child CK. The children's biological mother one MWG passed away in the year 2010 when the two (2) children were aged nine (9) and two (2) years old respectively.
4. The appellant is the maternal aunt of the two (2) minors.
5. The appellant filed a suit in the Children Court *vide* the amended plaint dated July 23, 2021 in which she sought the following orders:-
 1. That the plaintiff be appointed as the legal guardian of the minors SW and CK;
 2. A declaration that the defendant has parental responsibility over SW;
 3. A declaration that the defendant has acquired parental responsibility over CK;
 4. An order extending the defendant's parental responsibility over SW beyond her 18th birthday;
 5. An order directing the defendant to provide for the children as follows:-
 - a) Rent Kshs 35,000.00
 - b) Food and shopping Kshs 40,000.00
 - c) Clothing..... Kshs 20,000.00
 - d) Salon..... Kshs 4,000.00
 - e) School fees and school-related expenses;
 - f) Medical cover;
 - g) Entertainment..... Kshs 15,000.00
 - h) Utilities;
 - Water..... Kshs 8,000.00
 - Electricity Kshs 5,000.00
 - Wifi Kshs 3,000.00
 - DSTV Kshs 2,000.00
 - Total Kshs 100,000.00
6. The suit was heard inter parties and the learned trial magistrate delivered his judgement on March 4, 2022 in which he made the following orders:-
 1. That the plaintiff is appointed as the legal guardian of SW and CK;
 2. That the said guardianship shall jointly vest in her and the defendant;
 3. That the defendant's parental responsibility over SW is extended beyond her eighteenth birthday on account of her college education;
 4. Parental responsibility between parties is apportioned as follows;
Defendant



- a. Shelter; and
 - b. Education and upkeep through proceeds from the rental house in Kayole.
- Plaintiff
- a. Clothing;
 - b. Utilities;
 - c. Other needs.
5. Each party to bear their own costs.
7. Being dissatisfied with the orders made by the trial court the appellant filed the memorandum of appeal dated March 16, 2022 which appeal is premised on the following grounds:-
 1. That the learned magistrate erred in law and in fact by proceeding to apportion parental responsibility as follows;

Defendant

 - a. Shelter; and
 - b. Education and upkeep through proceeds from the rental house in Kayole.

Plaintiff

 - c. Clothing;
 - d. Utilities;
 - e. Other needs.
 2. That the learned magistrate erred in law and in fact by failing to appreciate that the defendant has high parental responsibility over the minors being their only surviving parent.
 3. That the learned magistrate erred in law and in fact and in law by directing that the education and upkeep of the minors should come from proceeds from the rental house in Kayole, while as the documents produced in court proved that the defendant had no share in the property.
 4. That the learned magistrate erred in law and in fact by failing to appreciate that the defendant was a man of means whose investments would assist in providing for the minors needs.
 5. That the learned magistrate erred in law and in fact by failing not to pronounce himself on acquisition of parental responsibility by the respondent over the minor CK.

Analysis and Determination

8. I have carefully considered the memorandum of appeal before this court, the response filed thereto as well as the written submissions filed by both parties.
9. This being a first appeal, it is the duty of the court to review the evidence adduced before the lower court and draw its own conclusions on the same. This principle was well articulated by the Court of Appeal in *Selle & another v Associated Motor Boat Company Ltd & others* [1968] 1EA 123 that:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this



court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally." [own emphasis]

10. Likewise in *Kiruga v Kiruga & another* (1988) KLR 348 the court observed as follows:-

"An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."

11. The applicant is mainly aggrieved by the orders made by the trial court directing her to provide for the clothing, utilities and other needs of the children.

12. The impugned orders were made in relation to the custody and maintenance of the minors. It is trite law that in matters concerning the welfare of children courts are required to give priority to the best interest of the child.

13. The *Constitution* of Kenya 2010 provides at article 53 (2) that:-

(2) 2) A child's best interest are of paramount importance in every matter concerning the child."

14. Likewise *Children Act* 2022 at section 8(1) provides as follows:-

"(8)(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies-

(a) The best interests of the child shall be the primary consideration;" [own emphasis]

15. The applicant is the maternal aunt of the two (2) minors. She told the court that upon the demise of her sister who was the biological mother of the minors she took up the responsibility for the minors.

16. The applicant claimed that although the respondent was a man of means he has not been making any financial provisions for the children.

17. On his part the respondent conceded that he was the biological father of the elder child SW. However, after a DNA test was conducted the respondent learnt that he was not the biological father of the younger child CK. Nevertheless the respondent states that he has always provided for both children.

18. The applicant alleged during the trial that the respondent had abdicated his parental responsibility towards the minors. However in disagreeing with her the learned trial magistrate found as follows:-

".... The minors and herself stay and/or reside in his plot in Kiambu. It follows therefore that the plaintiff has provided shelter to the children and by extension, herself.

Further, and though its propriety is subject of contestation, the plaintiff collects rental income from the property located in Kayole. Whereas the plaintiff contends that the said property is registered in her name and that of the brother, the court has reason to believe that the defendant has a direct interest in the property. If this were not the case, then how would he have been one of the signatories to the



account where the rental income was deposited?..... the court has reason to believe that the defendant was edged out of the account for reasons best known to the parties.

At this point, the court believes the evidence of the defendant that the rental income from the disputed house in Kayole should be applied towards the welfare of the children herein. Though the plaintiff has not disclosed the amount of rent collected monthly from the said properties, and if the figure given by the defendant is anything to go by, then the said income is well enough to cater for all the other needs of the minors.”

19. The evidence revealed that after the death of the children’s biological mother, it was agreed that the rental property a Kayole be utilized to provide for the minors. The respondent stated that the Kayole property was jointly owned by himself and the biological mother of the children whilst the appellant denied this and insisted that said property actually belonged to herself and her brother.
20. During the trial documents were availed to prove that the property known as Nairobi/block xxx/xx (the ‘Kayole property’) was actually registered in the names of HKG and JNG. The property was not jointly owned by the respondent as he alleged. Under cross-examination the respondent conceded that the Kayole property belongs to ‘HW’. Therefore, any rental income derived from (the Kayole property) cannot be assigned as a contribution from the respondent.
21. Therefore, I find that the trial magistrate erred in finding that the rental income from the Kayole property amounted to a contribution from the respondent, toward the maintenance of the minors. The rental income from that Kayole property actually belonged to the appellant and her brother who was the co-owner of the property.
22. The respondent informed the trial court that he was sickly and as a result had been unable to take up gainful employment for a long time. Indeed the learned trial magistrate in his judgement observed as follows:-

“Further, the court notes that the defendant is sickly person. This matter was adjourned on several occasions on account of his illness. At one point, online proceedings had to be suspended since the defendant could not be heard at all. When he appeared in court on November 25, 2021, he appeared weak and emaciated. From the eyes of the court the defendant is a person who needs to be provided for and not vice versa”
23. The above were the observations made by the trial magistrate who saw and heard the parties testify. The physical ailment and its effect on his earning capacity is a factor which the learned trial magistrate rightly took into account in determining the maintenance due from the respondent.
24. Maintenance orders ought not be used to unfairly punish a party. It is not in dispute that the children and indeed the appellant herself reside in a property owned by the respondent in Kiambu. Therefore the respondent is effectively providing shelter for the minors as well as for their aunt who is the children’s legal guardian.
25. The appellant claims that the learned trial magistrate failed to make any orders relating to the extension of parental responsibility in respect of the child SW. This is not correct.



26. The trial magistrate did at page 21 paragraph 8 of the judgement identify this as one of the issues to be determined. At page 22 line 12 the trial court stated thus:-

“It is the plaintiff’s case that SW is still in need of provisions as she joined the Kenya Medical Training College in September, 2021 and that is this is special circumstance to warrant the extension of the defendant’s parental responsibility towards her.

I wholly agree with the plaintiff SW falls within the persons contemplated by the foregoing sections and the defendant has a continuous responsibility to provide education beyond her eighteenth birthday. I thus agree with her that his parental responsibility towards her should be extended.”

27. In so saying the trial court made a conclusive determination that the parental responsibility of the respondent would be extended beyond the eighteenth (18th) birthday of the child SW. I therefore find no merit in this ground of the appeal.

28. Finally, I note that the respondent is providing accommodation for the two minors and their aunt (the appellant) in his house in Kiambu. The respondent was also ordered to provide for the education of the children. However, it was erroneous of the trial court to assign the rental income from the Kayole property for the education of the minors as this rental income does not belong to the respondent and cannot be taken to be the respondents contribution towards the education of the minors.

29. The reasoning by the trial court that the inclusion of the respondent as a signatory to an account into the which the rental income was deposited amounted to proof that the respondent had a share in this Kayole property was erroneous. Ownership of a property can only be conclusively proved by a title document. The respondent’s name does not appear as an owner in the title document for this Kayole property.

30. In the circumstances I set aside the order of the lower court on maintenance only and instead direct that the maintenance of the minors will be apportioned as follows:-

Defendant

- a. Shelter
- b. Educational costs for both children at Kenya shillings fifty thousand (Kshs 50,000/=) monthly.

Plaintiff

- a. Clothing
- b. Utilities
- (c) Other needs.

Each party to meet their own costs. It is so ordered.

DATED IN NAIROBI THIS 14TH DAY OF JULY, 2023.

.....

MAUREEN A. ODERO

JUDGE

