



REPUBLIC OF KENYA



**JM v AKM (Civil Appeal E007 of 2022)
[2023] KEHC 22640 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22640 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL E007 OF 2022
JN ONYIEGO, J
SEPTEMBER 22, 2023**

BETWEEN

JM APPELLANT

AND

AKM RESPONDENT

(Being an appeal from the ruling and orders of Hon. T.L.Tanchu (SRM) delivered on 17.08.2022 in Children's Case No. E049 of 2022 in CM's Court at Garissa)

JUDGMENT

1. By a plaint dated August 2, 2022, the respondent moved Garissa Children's Court averring that the appellant had abdicated his parental duties towards their children and therefore sought inter alia; orders compelling the appellant to make a monthly contribution of Kes. 50,000/-, to cater for medical expenses and school fees for the minors' subject of these proceedings.
2. In response, the appellant entered appearance on August 4, 2022 and further filed a response to the plaint in form of a replying affidavit sworn on August 4, 2022 thus denying that he had neglected his parental duties as he had been faithfully paying school fees for the two minors. That he had built a rental house for the respondent from which an amount of Kshs. 30,000 was being realized in form of rent. He urged this court to dismiss the suit for want of merit.
3. The respondent's case was premised on the fact that the parties previously were husband and wife and that they were blessed with two issues of marriage namely; GM and EMK aged 11 and 9 years respectively. That the appellant started abdicating his duties upon marrying another wife with whom they lived a lavish life at the expense of the children subject of these proceedings. She averred that she was unable to settle the school fees of the children and therefore sought for the orders in the plaint. Further, it was her case that the Children's Department at Garissa had granted her custody of the minors in a parental responsibility agreement signed by the parties to this suit.



4. The trial court gave both parties an opportunity to ventilate their views. The plaintiff/respondent reiterated the facts in her plaint and affidavit in support of her application. She informed the court that the balance due in terms of school fees for the children was Kshs 23,000/- and that an order for maintenance was necessary. The defendant/appellant on the other hand stated that indeed the children herein were fruits of their relationship and that he had been educating and buying them clothes as is required. He further contended that they had jointly bought a plot together but after one year of staying there, the plaintiff's relatives forced him to vacate the said same.
5. Upon hearing the application, the trial magistrate made a ruling delivered on August 17, 2022 to wit that:
 - i. The defendant to continue to pay school fees for the minors and endeavour to clear the school fees balance.
 - ii. The defendant to cater for the medical needs of the children.
 - iii. The defendant to pay Kes. 5,000/- for maintenance of the children every month with effect from October, 2022 on or before October 5, 2022 and or before 5th of every subsequent month.
 - iv. The plaintiff to cater for any other needs for the children.
 - v. Payment of the Kes. 5,000/- be paid through Garissa Children's office.
 - vi. Either party at liberty to apply.
 - vii. Each party to bear its own costs.
6. Aggrieved by the said ruling, the defendant/appellant proffered an appeal dated August 22, 2022 citing 7 grounds of appeal summarized as hereunder:
 - i. The learned magistrate erred in law and fact by awarding the respondent an amount of money to the tune of Kes. 5,000/- without considering the evidence of the defendant which raised triable issues.
 - ii. The learned magistrate erred in law and fact by failing to take cognizance of the fact that the appellant has other dependents including his late brother's children and children from his new family.
 - iii. The learned magistrate erred in law and fact by giving orders in favour of the children of the respondent who school in a private school without proof of his ability to cater for the school fees and school related expenses.
 - iv. The learned magistrate erred in law and fact by issuing orders that suggests that parental responsibility is solely and largely the father's duty
7. He sought for orders that:
 - i. The appeal be allowed.
 - ii. This honourable court substitutes the orders of August 17, 2022 with orders fair to both parties.
 - iii. Costs of the appeal.
8. The court directed that the appeal be canvassed by way of written submissions to which the appellant submitted that the trial magistrate misapprehended the law in regards to parental responsibility to



mean that he was solely responsible for the children. He contended that the law anticipated a joint parental responsibility involving both parents of the minors to ensure their best interests are realized. He relied on article 53 of the Constitution and section 94(1) of the Children's Act to buttress the point that indeed the said responsibilities over a child and /or children ought to be shared jointly by the respective parents. He further relied on the case of *MOO v HAO* [2011] eKLR where the court stated that:

"...to overburden a parent at the comfort of another will be tantamount to punishing the overburdened parent and to some extent perpetuating irresponsibility or laxity on a parent who is duty bound to contribute towards a child's welfare."

9. It was further urged that by being ordered to pay Kes. 5,000/- every month as maintenance, the same was tantamount to being condemned to solely provide for the children without the court having due regard to his financial state. He submitted that apart from the children herein, he has since married thus having another family which looks unto him in terms of providing their daily needs. He urged this court to review the said amount downwards.
10. The respondent on the other hand orally submitted reiterating the content of her pleadings to wit that the appellant upon marrying again, reneged from his parental responsibilities. She urged this court to direct the appellant to honour his parental duties to their children.
11. This being the first appellate court, it is thus bound to reconsider, re-evaluate and re-assess the evidence tendered before the trial court and arrive at an independent determination and or conclusion without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses to be able to assess their demeanour. See *Selle and another v Associated Motor Boat Co Ltd and others* (1968) EA 123 and *Peters v Sunday Post Limited* (1958) EA 424.
12. I have considered the record of appeal, grounds of appeal and submissions by both parties. It is not controverted that the parties herein are the biological parents of the minors' subject of these proceedings.
13. In my view, the grounds raised in the appeal have raised issues in regard to the best interests of the minors involved. 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. The same has also been captured under the 2010 Constitution article 53(2) as follows:

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

14. From the onset, it follows that what matters to this court is the best interest of the minors and the same was well pronounced in the case of *MAA v ABS* [2018] eKLR, where 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."

15. In the same breadth, it is trite law that parental responsibility is an equal joint responsibility of the parents to a child and no parent shall be treated specially as having a superior right over the child than



the other. See section 32(1) of the Children Act and the case of PKM v ANM (2020) e KLR where Aroni J stated that;

“in my view therefore one need not go further to look at what parents need to do for a child and to what extent. In this instance the parties have joint responsibility towards their son and no one is superior to the other...”

16. As to what constitutes parental responsibility, section 31 of the Children's Act defines parental responsibility to mean all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child. Fortunately, in this case, both parents are in agreement that they have equal joint parental responsibility in respect to their children.
17. Basically, the appellant conceded that the minors herein were fruits of their marriage and that he was ready to provide for them. In my humble view, the trial magistrate fairly in the interim apportioned the responsibilities between the parties. I say so for the reason that the cost of living has since shot up and the said amount might not even be sufficient to meet the basic needs of the minors. Be it as it may, I find the claim by the appellant as fallacious and untenable as the appellant did not convince this court that he was solely directed to provide for the minors herein. Further, it is my honest view that the appellant cannot be heard to complain that the court did not take into account his evidence and presentation noting that his other family members' rights are not superior to the rights of the children's subject of these proceedings.
18. The appellant being a parent to the children cannot abdicate his responsibilities by claiming that he has since married and further caters for his late brother's children and children from his new family. A sum of kshs 5000 per month translates to kshs 2,500 per month per child which is not much given the current cost of living. In any event, this was a temporary or interim order which could change upon canvassing the main suit where all parties will present their evidence and their current financial status considered. Unfortunately, from the tone and wording of the short ruling, one would be forgiven for concluding that the orders more of final than interim which is a misconception.
19. For the above reasons stated, I am satisfied that the trial court reached a fair determination having in mind the capabilities of the parties herein at that very moment when the matter was presented before him. It is my belief that at the opportune time, the parties shall be granted an opportunity to fully present their evidence that will lead to an amicable determination of the matter herein.
20. In view of the above finding, it is my holding that the appeal is devoid of merit and the same is dismissed with no order as to costs. Parties to expedite the hearing of the main suit before the lower court. Deputy Registrar to submit back the lower court file.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 22ND DAY OF SEPTEMBER 2023

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J. N. ONYIEGO

JUDGE

