



**PLS v HAO (Civil Appeal E073 of 2023) [2024] KEHC 14585 (KLR)
(Family) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14585 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E073 OF 2023
PM NYAUNDI, J
NOVEMBER 14, 2024**

BETWEEN

PLS APPELLANT

AND

HAO RESPONDENT

*(Being an appeal from the Ruling of Hon Jackie Kibosia, Principle Magistrate
at Nairobi Children’s Case No.1264 of 2013 delivered on 21st July 2023)*

JUDGMENT

1. Before this court for determination is the Appeal filed by PLS (the Appellant) through a Memorandum of Appeal dated 18th August 2023. The Appeal arises out of a Ruling delivered on 21st July 2023 by Hon. Jackie Kibosia ,Principal Magistrate in Nairobi Children’s Case No.1264 of 2013.
2. The Appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 2nd August 2024. The Respondent did respond to the appeal or file submissions.

Background

3. The Respondent herein filed a suit (as Plaintiff) in the Children’s Court in Nairobi being Suit No. 1264 of 2013 seeking custody, maintenance, school fees and related expenses, medical care, costs of the suit and any other relief this Honourable Court deems just in the circumstances of this case. The Appellant who was the Defendant filed a defence and a counter claim seeking joint legal custody and equal parental responsibility for the minors but separate provision of shelter by each party. He also prayed for access to the minors during holidays and weekends.



4. The matter went for full hearing and the court delivered a judgement on 11th January 2018. The orders that were extracted from the impugned lower court's judgment read:
 1. Both parties shall have joint legal custody of the minors.
 2. The Plaintiff shall have actual custody, care and control of the minors. The Defendant shall continue accessing the children who are not in boarding school on alternate weekends. In addition, school holidays shall be shared equally with the Defendant having the second half.
 3. The Plaintiff shall provide shelter and clothing for the minors.
 4. The Defendant shall provide school fees for all the children at their present schools. In the event of a transfer, both parties must discuss and agree on the school(s). I hereby extend Parental Responsibility for I.S on my own motion as provided in Section 28(1) of the Children Act.
 5. The Plaintiff shall utilize the education allowance of Kshs. 80,000/= per child to cater for school related expenses.
 6. Due to the fact that both parties currently provide a medical cover for the minors herein courtesy of their employment; the Defendant is relieved of his duty so that he can include his four other biological children in the medical cover provided by his employer. It follows therefore, that the Plaintiff shall maintain the minors in the medical cover provided by her employer.
 7. The Defendant shall provide food for the two young minors who attend a day school at the rate of Kshs. 200 per child per day because they only have breakfast and supper at home. This amounts to Kshs. 12,000/= per month. During the holidays when all the children shall be at home, the Defendant shall remit Kshs. 24,000/= in the month of April, August, November and December. These amounts shall reach the Plaintiff by the 5th of every month.
5. The Defendant thereafter filed an application dated 7th March 2023 seeking the orders that the court varies, reviews and or set aside its orders issued on 11th January 2018 in the following terms:
 - (a) Kshs. 6000 per month towards IS be halted;
 - (b) Kshs. 6,000 per month towards maintenance of Mark Osengo be reviewed to zero during schooling days and Kshs. 3,000 during school holidays;
 - (c) Kshs. 6000 paid for CJ during holidays be reviewed to Kshs. 3,000 per month; and
 - (d) Kshs. 6000 per month paid for EL be reviewed to Kshs. 6,000 during school days and Kshs. 3,000 during school holidays.
6. The Plaintiff did not respond to the application despite being served with a notice. On 21st July 2023, the trial court issued the following directions;
 1. The maintenance payment made towards I.S is hereby noted by virtue of her completion of school..
 2. Maintenance orders earlier issued towards the remaining children remain unaltered.
 3. Any amounts paid towards I.S after completion of school be refunded to the Defendant/ Applicant.
 4. Orders accordingly.



7. The appellant dissatisfied with the above orders filed a Memorandum of Appeal dated 18th August 2023 in which he listed six (6) grounds of appeal as follows:
 1. That the learned Magistrate erred in Law and fact when she failed to consider the evidence in all of the appellant's annexures.
 2. That the learned magistrate erred in fact and in law in proceeding to draft and deliver her ruling without giving a lot of weight to the Children's Officer's Social inquiry report as ordered by her on the 14th of April 2023.
 3. That the learned Magistrate erred in law and in fact by taking into account issues not pleaded by framing her own issues and failing to take into account relevant factors thereby arriving at an erroneous ruling.
 4. That the learned trial Magistrate misdirected herself by failing to apply or applying wrong principles on the assessment of the quantum of maintenance awardable to the Respondent thus maintaining monthly maintenance which was manifestly excessive in the circumstances.
 5. That the learned Magistrate ignored the fact that the appellant had lost his job in Uganda.
 6. The learned magistrate ignored the fact that the appellant now had more child responsibilities than his other children.
 7. custody of the children to the Respondent.
8. The Appellant prayed that this honorable Court does vacate the court decision dated the 21st of July of 2023 by allowing the appeal as prayed by the appellant; this Honorable Court does allow the appellant's application dated 7th March 2023; the Costs of this Appeal be granted to the Appellant.

Appellant's Submissions.

9. The Appellant submitted that the circumstances surrounding the maintenance of the children has since changed. IS is now at the university and lives on her own; CJ has also joined university, stays on her own, the appellant pays school fees while the Respondent pays school related expenses; MO joined high school, resides with the appellant for half of the holidays, the appellant pays school fees while the Respondent pays school related expenses; for E.L, the appellant pays school fees and school related costs. Also, that he had lost his job in Uganda and is supporting eight other children. He sought to rely on the decision of *[JKW v AWM](#)* [2018] eKLR on this ground.
10. He further submitted that the review is in the best interest of the three children so that he continues to discharge his responsibilities towards the children in terms of paying their school fees.

Analysis And Determination.

11. The Appellant claims that circumstances have since changed from the time the judgment was delivered. He stated that the first and the second borns are already in university and living on their own and that the third born is in boarding school and that they have gone to boarding school.
12. The Appellant/Applicant has prayed for a review of the maintenance order. The Court did order that a social inquiry be done and a report was duly filed. The *[Children Act](#)* empowers the Court to review a maintenance order made under Section 98 of the Act. Section 99 provides:

“The court shall have power to impose such conditions as it thinks fit to an order made under this section and shall have power to vary, modify or discharge any order made under section



98 with respect to the making of any financial provision, by altering the times of payments or by increasing or diminishing the amount payable or may temporarily suspend the order as to the whole or any part of the money paid and subsequently revive it wholly or in part as the court thinks fit.

13. The Appellant/Applicant asserts that his circumstances have changed as he has also lost his job. The record shows that the court declined to review the ruling of 21st July 2023.
14. Article 53 of the Constitution provides that every child is entitled to parental care and protection of both parents. Parental care is an equal responsibility of both parents whether they are married to each other or not.

“ 53.

- (1) Every child has the right--
 - (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not;”

15. The children herein require inter alia, adequate diet, shelter, clothing, medical care, education and guidance. These needs are to be provided by both parents who are the parties herein. Effort must be made by both parents to provide for the child. This responsibility is shared. The Court observed correctly that over time, the circumstances of the children may vary and this will require a review of maintenance orders
16. The Court is seized with jurisdiction & discretion to vary the orders made to suit the expediencies currently obtaining. Section 99 of the Children’s Act provides;

“The court shall have the power to impose such conditions as it thinks fit to an order made under this section and shall have the power to vary, modify or discharge any order made under Section 98 concerning the making of any financial provisions, by altering the times of payments or by increasing or diminishing the amount payable or may temporarily suspend the order as to the whole or any part of the money paid and subsequently revive it wholly or in part as the court thinks fit.”

17. In *LAO v OK Arap M* [2019] eKLR the court moved to vary a maintenance order and observed as follows:-

The court in the exercise of its power may impose conditions, vary modify or even discharge a maintenance order for the making of a financial provision. The Court may also increase or decrease or change the times of payments of the amount payable under a maintenance order. Additionally, the court has the power and discretion to temporarily suspend the whole or any part of the maintenance amount and subsequently revive it wholly or in part as it deems fit. For a party to be deserving of an order of variation of a maintenance order, it must be demonstrated that such variation is in the best interest of the child.

18. Both at the trial court and at the appeal the respondent did not challenge the assertion that the circumstances of the children had changed. Accordingly I will allow the appeal and review the orders of the Court issued on 11th January 2018 further as hereunder
 - a. The Kshs 6000 per month payable towards IS is halted effective 21st July 2023



- b. Kshs 6000 per moth paid towards the maintenance of MO is reviewed to Kshs 3000 only payable during school holidays effective 21st July 2023.
- c. Kshs 6000 paid for CJ during holidays is revised to Kshs 3000 per month effective 21st July 2023.
- d. Kshs 6000 per moth paid for EL is reviewed to Kshs 6000 during the school term and Kshs 3000 during school holidays effective 21st July 2023

19. As the Respondent did not appear there shall be no order as to costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2024.

PM NYAUNDI

JUDGE

In the Presence of

Fardosa Court Assistant

