



REPUBLIC OF KENYA



AS v NB (Divorce Cause E468 of 2024) [2025] KEKC 1 (KLR) (13 January 2025) (Ruling)

Neutral citation: [2025] KEKC 1 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOMBASA
DIVORCE CAUSE E468 OF 2024
AH ATHMAN, CK
JANUARY 13, 2025**

BETWEEN

AS PETITIONER

AND

NB RESPONDENT

RULING

1. The petitioner's Notice of motion dated 24th December, 2024 seeks prayers:
 1. Spent
 2. That pending hearing and determination of the applicant be allowed to transfer the minors from the school in Nairobi to Mombasa where she is residing
 3. That pending hearing and determination of this cause the applicant be granted temporary actual custody of the two minors
 4. That the respondent be ordered to cooperate, facilitate and ensure the minors are transferred to another school in Mombasa and thereafter proceed to pay for their school fees and other related expenses, provide for shelter, food, clothing and medication for the said minors.
 5. Spent.
2. The applicant averred that she left the matrimonial home in Nairobi and currently lives in Mombasa with the children of the marriage. She stated that the schools are about to open and if the respondent pays for their school fees in Nairobi it will complicate their transfer. She deposed that she can take better care of the minors than the respondent who is a very busy person.
3. The application is opposed through respondent's replying affidavit dated 6th January, 2025. The respondent averred that there had been no dispute between the parties and that he had allowed her to visit her parents in Mombasa with the children. He averred further that schools reopen on 6th January,



2025 but the children have been denied permission to travel to attend school by the applicant, despite absence of a court order. He argued the prayer to abruptly transfer the minors to a school in Mombasa will disrupt their education and will put potential financial burden of relocation, education, shelter, food on him. He stated he has always been available for his children and is ready to take care of the children in early 2025 when he is on his annual leave. He proposes that the applicant return to the matrimonial home in Nairobi or choose where she wants to stay with the children in Nairobi in the interest of the children pending hearing and determination of the cause. He further requests the court to grant parties six months to settle the issues in dispute between them amicably.

4. The parties married under Islamic Law on 15th July, 2012. They are blessed with two issues from their legal wedlock, both boys ages 6 and 7 years. The parties' matrimonial home is in Westlands in Nairobi. The children do IGCSE curriculum in an international School. The academic year ends in August. The parties are still legally married. The applicant has filed for divorce and has returned to her parents in Bamburi Mombasa with the children.
5. The application was canvassed through oral submissions. The applicant appeared in person while the respondent is represented by Ms. Mohamed of Khatib & Company advocates.
6. The applicant submitted she is better placed to take care of the children as the respondent has no time for the children. She submitted further that the children do not get Madrasa (religious education) in Nairobi. She argued that she is unemployed and the respondent is able to provide for the children's education.
7. It was submitted for the respondent that transferring the children to Mombasa will prejudice the children and the respondent as new funds will be needed for enrollment and relocation. It was submitted that the children can get and he is willing to pay for their religious education in Nairobi.
8. It is noted that the parties are still married and that the parties have a marital dispute which can potentially affect the children's right to education. It is further noted from the proceedings that the schools have already re-opened and the children are in their second term in school. Their school year ends in August. The children are currently not in school. They are with the applicant at Mombasa.
9. In all matters involving issues of children, the best interests of the children not of the parents take precedence. Article 3(1) of the United Nations Convention on the Rights of the Child, Article 53 of *the Constitution* of Kenya (2010), section 4 of the Children's Act, Cap 141 laws of Kenya and article 120 of the Islamic Charter on Family all provide:

‘the best interests of the child shall be a primary consideration in all actions concerning children’

10. The right to education is a fundamental and constitutional right to children that forms a strong foundation for their future. All efforts must be made to ensure children get the best education. Article 28 of the UNCRC, section 7 of the Children's Act, Cap 141 Laws of Kenya provides every child has a right to free basic education. Article 114 of the Islamic Charter on Family, ICF emphasize the same stating every child is entitled to a comprehensive balanced education.
11. Any act that denies or negatively affects children's enjoyment of the right to education is harmful and detrimental to children and therefore illegal and unconstitutional. Children must be protected from all forms of harm, abuse and neglect under article 116 of the ICF.
12. In the instant case, the applicant has already moved with the children to Mombasa and is still living there with the children while schools have re-opened. The application was filed on 27th December, 2024 only about 9 days to the re-opening of schools. Moving the children from their current school



in the middle of the school year will certainly affect their education and put financial burden on their father. The time and logistics needed for transfer of schools in such a short time is unreasonable. Apart from the parties' dispute which facts can only be tested at trial, no apprehension of the children's safety has been alluded during hearing of the application. Considering the parties have an unresolved marital dispute, the court cannot compel the applicant to live at the matrimonial home. If she feels safe, she may live at the matrimonial home, otherwise she is at liberty, in consultation with the applicant who has no objection to provide accommodation for her and the children in Nairobi, she should get an apartment in Nairobi to live with the children pending hearing and determination of this cause. In any case, the applicant is hereby ordered to return and / or release the children to live in Nairobi to continue with their education in any case but within (72) hours from delivery of this ruling.

13. The main prayers of the application relating to the children's education fails. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 13TH JANUARY, 2025.

HON. ABDULHALIM H. ATHMAN

CHIEF KADHI.

In the presence of-

Applicant

Ms. Mohamed for the Respondent

