



MPL. (Suing As the Mother Andnext friend Of L.L.L. – A Minor) v LL (Children's Case E002 of 2025) [2025] KEMC 162 (KLR) (17 July 2025) (Judgment)

Neutral citation: [2025] KEMC 162 (KLR)

**REPUBLIC OF KENYA
IN THE MARALAL LAW COURTS
CHILDREN'S CASE E002 OF 2025
AT SITATI, SPM
JULY 17, 2025
IN THE MATTER OF LLL (A MINOR)**

BETWEEN

MPL. (SUING AS THE MOTHER AND NEXT FRIEND OF L.L.L. – A MINOR) PLAINTIFF

AND

LL DEFENDANT

JUDGMENT

1. By a plaint dated 11th February, 2025 verified by an affidavit of similar date, the plaintiff prayed for reliefs that:
 - i. The plaintiff be granted actual physical custody of the Minor and the defendant to have supervised access.
 - ii. A permanent maintenance order compelling the defendant to pay for the maintenance of the minor totalling Kenya Shillings Ten Thousand Five Hundred (Kshs 10,500/-)
 - iii. the defendant to cater for the minor’s school fees and school related expenses once the minor attains school going age.
 - iv. The defendant to enrol the minor in a medical scheme in which he is registered or to cater for medical expenses.
 - v. The costs of the suit.
2. Accompanying the plaint were -Plaintiff list of witnesses and the written statement of the plaintiffList and bundle of documents containingChild’ birth certificateSummons from the children’s officer dated 31st January, 2025Plaintiff’s ID Card



3. The Defendant entered appearance person on 19th February, 2025 and opposed the suit by a Statement of Defence dated 19th February, 2025. By it he denied neglect of parental duties and prayed for a dismissal of the suit. His defence was accompanied by: List and bundle of documents containing Mpesa statement Mtiba portal printout Shif portal printout Bundle of receipts for various expenses
4. The firm of Lenkidi Law Advocates represented the plaintiff while D.W. Mbugua & Co. Advocates represented the defendant.

The Plaintiff's Case

5. PW1 adopted her witness statement dated 11th February, 2025 as her testimony. In Summary, she told the court that the plaintiff and the defendant were in a relationship resulting in the birth of the issue herein LLL sometimes in 2023. After the child was born, the defendant chased PW1 from their matrimonial home forcing her to relocate to another town to look for sustenance. She added that despite several pleas to the defendant for child support, the defendant disregarded her pleas. She reported to the Children's Officer for assistance but it was all in vain since the defendant declined to sign the Parental Responsibility Agreement hence this suit. She added that the defendant was to provide maintenance while she retained physical custody and pleaded that she was jobless and had no means to sustain the child. In support of the case, the plaintiff produced the earlier listed exhibits and pleaded that the Kshs 10,500/= was for the following: Food Kshs 3,000/= Rent Kshs 2,000/= Water and electricity Kshs 2,000/= Medication Kshs 2,000/= Clothing Kshs 1,500/=
6. In cross-examination, the following came to light: She had no job at the time of this suit; She admitted that she had joint parental responsibility with the defendant over the minor; She insisted that the defendant had been sending her nothing for the child's maintenance but pointed out that he used to send to his relatives instead of sending it directly to her; On being shown the Mpesa statement, she admitted that the defendant had been sending her money directly; She admitted that the defendant bought clothes for the child whereupon she took photos of the child in the new clothes and sent the defendant as confirmation; She admitted that the defendant bought a bicycle for the child; She denied that she was engaged in the business of selling clothes and stated that she was doing casual jobs as a washerwoman; She admitted that at the time of the suit she had been recruited as a Kenya Prisons Service Recruit Constable was shortly joining the prisons college for training before deployment; She admitted that the Mtiba card was active and operational in Baragoi where she lived but the defendant had not shown her for use;
7. In re-examination, the plaintiff told the court that she was recruited as Prisons Service Constable on 30/04/2025 during the national recruitment and was shortly joining the college for training. She pointed out that during the 9month training, no salary was payable to the recruit.
8. In further questioning, she affirmed that the Mpesa remittance was true but erratic and unreliable. She stated that she did not sign the parental responsibility agreement since the defendant was arrogant during the negotiations. She added that during the negotiations the defendant only wanted to buy toys yet the child had no food. She attacked the receipts for toys produced pointing out that those were for the toys that he had bought for his other children. At that stage, the plaintiff closed her case.

The Defence Case

9. DW1 L.L. adopted his witness statement testifying that he provided regular maintenance.
10. In cross-examination, the following came to light: He admitted that he took out a loan in March 2025 after this case had been filed on 11th February, 2025. He admitted that he was willing to provide child



maintenance;He admitted that when the plaintiff conceived the child after a one-night stand, he was unaware but was later notified of the child's existence;He admitted that the receipts produced did not specify for which child he was making the purchases;He admitted to being summoned to the Children's Office;He admitted that between January 2025 and May 2025 he had made no Mpesa remittance;The last remittance was Kshs 1,000/- on 6th November, 2024

11. In re-examination, he admitted that his last remittance was Kshs 1,000/- on 6th November, 2024 and that he had provided maintenance. He denied cohabitation with the plaintiff but admitted that the plaintiff notified him of the delivery of the child. At that stage, the defendant closed his case whereupon the parties opted to exchange submissions.

The Plaintiff's Submissions dated 27th June, 2025

12. The plaintiff submitted that the defence counsel was improperly on record contrary to Order 9 rule 7 of the Civil Procedure Rules which required that the counsel be appointed formally through a notice of appointment which had not been done. It was pointed out that initially, the defendant was acting in person through his memorandum of appearance but his counsel never lodged any appointment subsequently. The court was urged to strike out the pleadings lodged by an advocate who had not been properly appointed. Reliance was placed on the authority of *Chelule & Another –V- KURIA & Another (Appeal No, E001 of 2022) (2024) KEELC 88 KLR* where the court struck out at para.27 the pleadings filed by an advocate improperly on record terming the error not technical but substantial:

“As per Order 9 Rule 9 the correct procedure to be followed was for the counsel to seek leave to come on record, then file and serve the notice of change of advocates and thereafter file the instant application. Whereas the counsel acknowledges the error on their part to omit the said documents, if at all there were any, the route taken clearly offends the express provisions of Order 9 Rule 9. The procedure set out above is mandatory and thus cannot be termed as a mere technicality...”

13. Further reliance was placed on the authority of *Monica Moraa –vs- Kenindia Assurance Co. Ltd. [2010] eKLR*, where the Court held as follows:

“.....there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant's advocates intend to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court's leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules and instead just 4 gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached.....”

14. On the issue of Custody, the plaintiff urged the court to grant joint legal custody to the parents of the child but physical custody, care and control to the plaintiff only with the defendant being granted the right of access. Reliance was placed on section 101 and section 2 of the Children's Act 2022 as well as the authority of *Martha Olela & another v Jackson Obiera C.A 16 of 1979* explained the general principle that custody of young children should be awarded to the mother unless special circumstances and peculiar circumstances exist to disqualify her for being awarded custody. As per the judges, the exceptional circumstances would include “disgraceful conduct, immoral behaviour, drunken habit, or bad company.”



15. As for the other heads of the claim, the plaintiff submitted, in summary as follows: School fees and related expenses – it was a shared responsibility; Clothing – there was no evidence of purchase of clothes by the defendant; Medication – this was a necessity and the defendant ought to provide medical cover from a reputable insurance company; Water and electricity – the pleaded sums were fair since Baragoi was an arid location where water is bought for cash; Shelter – the plaintiff had been providing shelter after the child was born and that the defendant never supported on this. Therefore, the court ought to order that he provides the pleaded sum for rent payment; Food – this was a basic necessity and should be provided to the child as a matter of right due to its tender age

The Defence Submissions dated 11th June, 2025

16. It was submitted that the plaintiff had not proved her case on a balance of probabilities in compliance with section 107 to 109 of the *Evidence Act*.
17. The defendant submitted that there was no proof of cohabitation by the parties since there was no eyewitness, no receipt of rent payment and no other independent evidence.
18. Further, it was submitted that the defendant was not obligated to provide maintenance since he was unaware of the existence of the child.
19. The defendant argued that the provision of toys was integral to the child's development since a child had a right to play and entertainment. He submitted that he used to send money, clothes and provide food hence responsible as a parent. He pointed out that the plaintiff had been skittish in her commitment to provide joint maintenance to her own child and should not be assisted to escape responsibility. This was proved her refusal to sign the parental responsibility agreement which the defendant had already executed in the presence of the Children's Officer. He argued that the plaintiff was only interested in getting money from him for her own use as opposed to the child's best interest and that was why she declined to sign the parental responsibility agreement which did not provide for monetary stipends to the plaintiff by the defendant.
20. As for the quantum of maintenance, the defendant argued that he had provided more than Kshs 63,000 as upkeep for the child between December, 2023 and 2024 showing that he had been responsible. He submitted that this ought to be a shared responsibility under sections 31 and 32 of the Children's Act. It was argued that under Section 31 (1) of the *Children Act*, 2022, Parental Responsibility is defined as the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child and these duties are defined as follows:
- a) The duty to maintain the child and in particular to provide the child with – Basic nutrition; Shelter; water and sanitation facilities; Clothing; Medicare; Basic education; and General guidance, social conduct and moral values.
 - b) Duty to protect the child from neglect...
 - c) Duty to provide Religious, moral, socio-cultural values; Determine the name of the child; Registration at birth.

it added that under Section 32 (1) subject to the Act, the parents of a child shall have equal parental responsibility over the child on an equal basis, and neither the father nor the mother of the child shall have a superior right of claim against the other in exercise of parental responsibility.



The defendant further submitted that the parties were bound by the parental responsibility agreement and only the court could revoke the same as discussed in RA versus JNO (Suing as the Next Friend and Mother to the Minors IO and MM) [2024]KEHC2557 (KLR) in which Lady Justice Odera observed that a Parental Responsibility Agreement cannot be easily set aside since it was a contract between parties and Courts of Law cannot rewrite a contract for the parties. The court was urged to consider that at paragraph 33, the Learned Judge opined: -

“33. It is trite law the courts cannot re-write agreements between the parties as was held in the case of n National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd [2002] 2 EA 503 [2011] eKLR at 507, “A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved.” See also Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR. It is however unfortunate that the trial court in its judgment disregarded the Parental Responsibility Agreement the parties had entered into on 15th March 2022 in granting actual custody of both minors to the Respondent and made orders which were at variance with the said agreement. In fact, the learned trial Magistrate did not at all comment on the agreement in his analysis of the evidence that was before him.”

21. The court was urged to dismiss the suit with costs.

Issues for Determination

1. Legal representation of the defendant
2. Legality and force of the parental responsibility agreement
3. Share of parental responsibility

Determination

Issue 1: Legal Representation

22. As is borne out of the record, Mr. DW Mbugua Advocate is improperly on record since he did not file any Notice of Appointment. In the result, the court finds that the counsel has no right of audience to address the court. The defendant had already filed his pleadings before the entry of Mr. Mbugua and therefore those pleadings remain unaffected. The only pleadings to be struck out are the written submissions filed by Mr. Mbugua who did not regularize his appearance.

Issue 2: Legality of the Parental Responsibility Agreement

23. The agreement was only signed by one party and therefore not binding on all parties. Nothing flows from the agreement.

Issue 3: Share of Parental Responsibility

24. As correctly submitted by both parties, this is a joint and shared responsibility and neither the father nor the mother had a superior right or claim over the other over the subject herein. While it may be true that the father took out loans to frustrate any possible deductions for the child, his actions did not diminish his legal responsibility to the child since he took out the loan with knowledge of the



subsisting parental duties. In the result, the court orders that the pleaded sum of Kshs 10, 500 which is a reasonable assessment of the monthly needs of the child shall be shared in the ratio 50:50 so that the father is hereby ordered to pay Kshs 5, 250/= per month.

25. The court orders further that: Legal custody shall be joint; Actual physical custody for the minor shall be with the father during the 9 months that the mother shall be undergoing training at the Kenya Prisons Service College where she was recruited in April and was to report in May 2025 -- the court takes judicial notice that infants are not permitted to be with their parents in the prisons college during the training period - the father has other children who will provide good company to the minor. Subsequently actual custody shall revert to the mother once she has completed training and is deployed to a station where she can comfortably take up the physical custody. she did not indicate how she was going to navigate the custody issue while in training. For the reversion of actual custody, the parties have to return to court for the orders to be effected. Joint and equal sharing of the minor's school fees and school related expenses once the minor attains school going age. The father shall retain the child in the Mtiba medical cover. The payment of the Kshs 5,000 is hereby suspended till the plaintiff completes her prison service training and parties return to court for effectuation of the same. Each party to bear his/her own costs.

Right of appeal is 30 days.

DATED, SIGNED AND DELIVERED AT MARALAL THIS 17TH DAY OF JULY, 2025

HON.T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

MARALAL LAW COURTS

Present

Sammy Court Assistant

Mr. Lenkidi Advocate for the Plaintiff

Mr. Mbugua Advocate

