



ZN (Suing as mother and next friend of the Minors) v FB (Children's Case 266 of 2019) [2024] KEMC 79 (KLR) (9 July 2024) (Ruling)

Neutral citation: [2024] KEMC 79 (KLR)

**REPUBLIC OF KENYA
IN THE NAIROBI CHILDREN'S COURT
CHILDREN'S CASE 266 OF 2019
JC KIBOSIA, PM
JULY 9, 2024**

BETWEEN

ZN (SUING AS MOTHER AND NEXT FRIEND OF THE MINORS) PLAINTIFF

AND

FB DEFENDANT

Out of jurisdiction powers of the Children Court where children are situated abroad.

In an application for various orders, including interim custody, by a father whose children were in the United States after their mother successfully applied for relocation orders, the court made determinations on its jurisdiction with respect to children that were outside its jurisdiction. The court noted that it had limited out of jurisdiction powers but that a reciprocity agreement with the United States, that would allow for the enforcement of its orders, was not in place. The court held that the children were of tender years and should remain in their mother's custody with the father having unlimited but reasonable access to them. The court also considered the applicability of the doctrine of res judicata in children matters and found that it was inapplicable. It held that naturally issues would come up during the growth and development of children and it was necessary to safeguard their interests.

Reported by Diana Mutunga

Jurisdiction - jurisdiction of the Children Court - applicability of res judicata doctrine in children matters - out of jurisdiction powers of the Children Court where children were situated abroad - Constitution of Kenya, 2010, Article 53 (2); Children Act, 2022, sections 8 (1) and 103.

Brief facts

On July 23 2021, Hon. Gitonga rendered judgment in this matter granting the plaintiff/mother actual custody, care, and control of the minors as the primary caregiver, while the defendant/father was granted unsupervised access on alternate weekends without sleepovers. The father was allowed to make sleepover arrangements and apply for variation of access after three months. Shared custody was to be considered on a 50:50 basis subject to proof of adequate caregiving arrangements by the father. He was also directed to submit a list of affordable schools and pay KES 50,000 monthly for food. The orders remained in force, having neither been reviewed nor appealed.



Subsequently, the father filed an application seeking unlimited access, interim custody, permission to take the children to school, and for the plaintiff to be cited for contempt of orders issued on July 26 and October 11 2023. He also sought a warrant of arrest and committal to civil jail against the plaintiff and referral of the matter to the DCI Nairobi Central Bureau Interpol for the plaintiff's presentation in court.

In response, the plaintiff raised a preliminary objection contending that the application was legally flawed, *res judicata*, and an abuse of court process. She argued that the court had already determined the issues raised, rendering it *functus officio*, and further asserted that the orders sought would be futile given the minors' relocation to a different geographical area.

Issues

- i. Whether the *res judicata* doctrine was applicable in children matters.
- ii. Whether the Children Court had powers outside its territorial jurisdiction where children were situated abroad.

Relevant provisions of the Law

Constitution of Kenya, 2010, Article 53(2)

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

Children Act 2022, Section 8 (1)

(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;

(b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.

Children Act, 2022, Section 103

provides a guide to the considerations by the Court in making custody order, in this case relocation order:

(a) the conduct and wishes of the parent or guardian of the child;

(b) the ascertainable wishes of the relatives of the child;

(c) the ascertainable wishes of the child taking into account the child's evolving capacity;

(d) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;

(e) the customs of the community to which the child belongs;

(f) the religious persuasion of the child;

(g) whether a care order, supervision order, personal protection order or an exclusion order has been made in relation to the child concerned, and whether those orders remain in force;

(i) any of the matters specified in section 95(2) where the court considers such matters to be relevant in the making of an order under this section; and

(j) the best interest of the child.

Held

1. In matters affecting children, the doctrine of *res judicata* did not apply as it was not expressly provided for in the Children Act. Practically, it behooved parents, the family, community and society to support the child in growth and development up to the stage where they had ability to fend for themselves. Therefore, naturally there would be upcoming issues with regard to the child to safeguard their interest. On that basis alone, the Court could not be *functus officio*.

2. The Magistrate Court had already granted actual custody of the children to the mother (as a primary caregiver). All she did was move the court for relocation orders. Section 103 of the Children Act, 2022 provided a guide to the considerations by the court in making a custody order, in this case relocation order. The High Court affirmed the court's decision to have the children leave with their mother.



3. Out of jurisdiction powers of the Children Court were not well settled. The Foreign Judgments (Reciprocal Enforcement) Act did not provide for custody and guardianship orders. The court could not exercise its quasi – parental powers in relation to a child unless effect could be given to its orders and it could not enforce its orders if the child was taken abroad. Once a child was removed from the jurisdiction, no satisfactory means had ever been devised of ensuring or enforcing its return. Therefore, applications for leave to take an infant even temporarily out of the country were jealously scrutinized and were only granted subject to every guarantee that was reasonable being exacted for the return of the child at the end of the authorized period.

4. Knowing that the court had limited out of jurisdiction powers, safeguards were put in place to secure the children’s safe return, including involvement of Interpol on “just in case” basis. The defendant was able to visit the children at will and the children in turn visited him during school recess.

5. The court took judicial notice that the Cabinet Secretary (as defined by the Children Act) had not signed any reciprocity agreement with the United States. Therefore, the paramountcy principle in article 53 of the Constitution was the guiding principle the court reclined to in case of a *lacunae* in child law practice. Further, the minors herein were of tender years and it was in their best interest to have their mother remain as primary care giver.

6. Therefore, for a court of law to depart from the general rule on custody of children of tender years, there had to be exceptional circumstances which warranted the mother to be denied custody of children of tender age. Such factors were those that affected the welfare and best interests of the child including; the mother’s mental instability or insanity; disgraceful conduct, say her immoral behavior, drunken habit, abandoning the children; cruelty to children; and the company she kept.

7. The minors were both below 10 years. The Children Act did not expressly define tender years, but there was a plethora of authorities defining children of tender years as children below 10 years of age. And although there were no exceptional circumstances to warrant a departure from the general rule, it was also previously held by the Court of Appeal in *SMM v ANK* [2022] eKLR that the tender years doctrine had to be explicitly subjected to the paramountcy principle in determining custody cases. Differently put, the welfare of the children was the primary factor of consideration when deciding custody cases. In the parties’ case, there was a convergence between the tender year doctrine and best interest principle. Especially in the absence of a reciprocal agreement.

Application partly allowed.

Orders

i. That the objection based on res judicata failed.

ii. That the children should remain domiciled in the United States with the plaintiff/ mother in the meantime.

iii. That the defendant/father was granted unlimited but reasonable access in the United States.

iv. That the defendant/father was granted unlimited but reasonable audio visual contact (at US time)

v. That the parties to enroll in co-parenting coaching (virtually) within 30 days from the date of the Ruling to enable a proper co-parenting plan. Parties to agree on choice of therapist and in the event they failed to agree, to contact the court for appointment.

vi. That the children to undergo transition counselling as previously ordered by the court within 30 days from the date of the ruling.

vii. That the defendant/father to file a current affidavit of means and file proof of 50,000/- monthly deposits (from the day judgment was rendered to the date of the ruling)

viii. That summons to issue to the in charge DCI child protection unit to update the court on the status of the expunging order. Content on the minors was still circulating on social media despite expunge and gag orders.

ix. That mention on 6th August, 2024 (for DCI follow up)

x. That this being a family matter, there was no order as to costs.

Citations

Cases



Kenya

1. *EM v AM* Civil Appeal 152 of 2018; [2020] KEHC 8406 (KLR) - (Explained)
2. *HGG v YP* Civil Appeal 46 of 2016; [2017] KEHC 2711 (KLR) - (Explained)
3. *In re RAA (Child)* Children's Case 5 of 2014; [2015] KEHC 1523 (KLR) - (Explained)
4. *MAA v ABS* Civil Appeal 32 of 2017; [2018] KEHC 8340 (KLR) - (Explained)
5. *MAK v RMAA & 4 others* Petition 2 (E003) of 2022; [2023] KESC 21 (KLR) - (Explained)
6. *Owners of the Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1 - (Explained)

United Kingdom

Hadkinson v Hadkinson [1952] 2 All ER 567 - (Explained)

Statutes

Kenya

1. Children Act (cap 141) sections 95(5); 103; 168 — (Interpreted)
2. Civil Procedure Act (cap 21) section 7 — (Interpreted)
3. Constitution of Kenya article 53(2) — (Interpreted)
4. Foreign Judgments (Reciprocal Enforcement) Act (cap 43) sections 2, 3 — (Interpreted)
5. Sexual Offences Act (cap 63A) In general — (Cited)

Advocates

Mr Malenya for the plaintiff

Mr Omuyoma h/b for *Mr Wachira* for the defendant

RULING

1. This is the ruling of the court on the defendant/applicant's application dated January 26, 2024 and plaintiff/ respondent's preliminary objection dated February 27, 2024.

The defendant's application sought the following orders:

- i. Unlimited access to the minors
- ii. Interim custody of the minors
- iii. To take the children to school
- iv. Citing the plaintiff for contempt for orders issued on 26th July and October 11, 2023
- v. Warrant of arrest and committal to civil jail
- vi. Matter to be referred to DCI Headquarters Nairobi Central Bureau Interpol for the plaintiff's presentation to court

Preliminary Objection dated February 27, 2024

2. The plaintiff's preliminary objection raised the following issues:
 - i. That the application dated January 27, 2024 is misconceived, bad in law and an abuse of the court process and therefore should be struck out
 - ii. That the application is res-judicata since the court already determined the issue of custody and access



- iii. That since the issues raised in the application have been heard and determined, the court is functus officio
- iv. That the court is being asked to issue orders in vain since the children currently habituate in a different geographical location
- v. That the application be dismissed

Plaintiff's Replying Affidavit and Grounds of Opposition

3. In a reply affidavit dated February 27, 2024 and subsequent grounds of opposition, the plaintiff stated that the defendant was able to access the children in December, 2022, and March, 2023 in Kenya. She further averred that the defendant was able to visit the children in Washington DC between 16th and November 27, 2023. In her grounds of opposition, she states that the court has already rendered its decision on the access and custody of the child and is now functus officio. Further that the children are no longer within the court's jurisdiction and the orders sought will be issued in vain.

Defendant's Written Submissions

4. The defendant on the other hand stated that the application was not an abuse of the process of the court and that the court is ceased of the matter since the doctrine of *res judicata* does not apply to children matters. that the plaintiff is in contempt of court orders and should relinquish custody to the defendant.

Judgement of the Court Dated July 23, 2021

5. Hon Gitonga rendered judgement in this matter on July 23, 2021. He subsequently issued the following orders (in summary):
 - i. That the plaintiff/mother was granted actual custody, care and control as the primary caregiver
 - ii. That the defendant/father was granted unsupervised access alternate weekends with no sleep overs
 - iii. That the defendant/father was to make sleepover arrangements for the children and move the court after 3 months of such arrangements
 - iv. That Shared custody was pegged at 50:50 basis with the defendant providing evidence of caregiver
 - v. That the defendant/father was to remit school names in court, a list of school he could afford
 - vi. That the defendant/father was to remit 50,000/- pm towards food

These orders have not been reviewed or appealed against. They are still in existence

6. As I consider this the matter, i am mindful of the constitutional and statutory imperative that the best interest of the children is paramount. article 53(2) of the [Constitution of Kenya, 2010](#) provides:

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

And section 8(1) of the [Children Act 2022](#) (herein referred to as the new Act):

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;
 - (b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.
- (2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—
- (a) safeguard and promote the rights and welfare of the child;
 - (b) conserve and promote the welfare of the child; and
 - (c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.

7. Having considered the issues before me, the submissions filed by the parties – I do find the issues for determination to be as follows:

- a. Whether or not the plaintiff is entitled to the orders sought
- b. Costs

i. *res judicata* and the *functus officio* doctrine

8. Section 7 of the [Civil Procedure Act](#) on *res judicata* doctrine:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.



Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

9. Odunga J (as he then was) stated as follows in the case of *EM v AM* [2020] eKLR , on the *res judicata* doctrine in children matters:

“I must however state that in matters affecting children the doctrine of *res judicata* does not apply. As noted by Muigai, J in *ANM v PMN* [2016] eKLR:

“*res judicata* is not applicable to children matters as it is not expressly provided for in Children's Act 2001. Practically, it behoves, parents, family community and society to support the child in growth and development up to the stage the child or young adult has ability to fend for himself/herself. Therefore, naturally there will be upcoming issues with regard to the child to safeguard the child's interest.”

And on this basis alone, the court cannot be *functus officio*

ii. Power of the court to remove a child from its jurisdiction

10. The grounds of opposition raised a pertinent issue. That of jurisdiction when the children are situated elsewhere.

I will first handle the issue pertaining the power of the court to grant out of jurisdiction orders.

Jurisdiction is primordial in every suit. In the locus classicus in this subject, the court pronounced itself;

Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989):

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

11. The magistrate before me had already granted actual custody of the children to the mother (as a primary caregiver). All she did was move the court for relocation orders

Section 103 of the *Children Act, 2022* provides a guide to the considerations by the court in making custody order, in this case relocation order:

- “(a) the conduct and wishes of the parent or guardian of the child;
- (b) the ascertainable wishes of the relatives of the child;
- (c) the ascertainable wishes of the child taking into account the child's evolving capacity;
- (d) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;
- (e) the customs of the community to which the child belongs;
- (f) the religious persuasion of the child;



- (g) whether a care order, supervision order, personal protection order or an exclusion order has been made in relation to the child concerned, and whether those orders remain in force;
- (i) any of the matters specified in section 95(2) where the court considers such matters to be relevant in the making of an order under this section; and
- (j) the best interest of the child.”

12. In the case of *MAA v ABS* [2018] eKLR the Court had this to say on relocation orders:

“This court being mindful of the welfare of the child as the paramount consideration, is of the view declining to allow the respondent to travel with the child to Oman would militate against the child’s best interest and would impact detrimentally on the welfare of the child. The intention of the respondent to relocate with the child to Oman to be with her husband is a genuine and reasonable and this court should not be a hindrance. As was stated Kerr LJ in *Tyler v Tyler* [1989] 2 FLR 158:

“I also accept that this line of authority shows that where the custodial parent herself, it was the mother in all those cases, has a genuine and reasonable desire to emigrate then the court should hesitate long before refusing permission to take the children. section 83(1)(d) requires the court to take into account the ascertainable wishes of the child. The court did have occasion to hear the child and he expressed the wish to stay with his mother.”

In the English case of *Payne v Payne* [2001] EWCA Civ 166 the court stated:

“In summary a review of the decisions of this Court over the course of the last thirty years demonstrates that relocation cases have been consistently decided upon the application of the following two propositions:

- (a) The welfare of the child is the paramount consideration; and
- (b) Refusing the primary carer’s reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children”.

13. I wish to state that after the court rendered its decision on July 22, 2022, the defendant proceeded to the High Court for stay orders. Muchelule J (as he then was) in HC Civil Appeal No, E072 of 2022 stated as follows on the court’s power to issue relocation orders:

“It is also material to point out that the Children Court has the primary responsibility to oversee and regulate all matters relating to the custody, maintenance, education and well-being of a child. It is the court that is at the forefront of seeking to realise the best interests of a child brought before it. I do not want to go into the merits of the appeal but, having looked at the facts and the written submissions by the counsel, I am unable to order the stay orders of the Children Court”

The High Court affirmed this court’s decision to have the children leave with their mother



iii. Power of the court: Where children are habituated elsewhere

14. As indicated earlier out of jurisdiction powers of the Children Court has not been well settled *Foreign Judgments (Reciprocal Enforcement) Act* defines a "designated court" as follows—

- (a) a superior court of a reciprocating country which is a Commonwealth country;
- (b) a superior court of any other reciprocating country which is specified in an order made under section 13;
- (c) a subordinate court of a reciprocating country which is specified in an order made under section 13;

Section 3:

This Act does not apply to a judgment or order

- a.
- b.
- c.
- d.
- e. in proceedings in connection with the custody or guardianship of children;

This Act does not provide for custody and guardianship orders...

In re RAA (Child) [2015] eKLR citing *Hadkinson v Hadkinson* [1952] All ER vol 2 P 5 & 7 at 56 the court laid the basis for the out of jurisdiction return principle:

“..... The court cannot exercise its quasi – parental powers in relation to a child unless effect can be given to its orders and it cannot enforce its orders if the child is taken abroad. Once a child is removed from the jurisdiction no satisfactory means have ever been devised of ensuring or enforcing its return. It is because of this that applications for leave to take an infant even temporarily out of the country are jealously scrutinized and are only granted subject to every guarantee that is reasonable being exacted for the return of the child at the end of the authorized period.”

Knowing that the court had limited out of jurisdiction powers, safeguards were put in place to secure the children’s safe return, including involvement of INTERPOL on “just in case” basis.

The defendant is able to visit the children at will and the children visit him in turn during school recess.

iv. Inter-country reciprocity.

15. Section 168 of the *Children Act* states as follows:

- “(1) The Cabinet Secretary may enter into an agreement with the government of any other country or territory on such terms and conditions as the Cabinet Secretary may think fit, under which a child who has been ordered by a court under the provisions of this Act to be sent to a rehabilitation school or other institution, or committed to the care of a fit person, may be received into that



country or territory and placed in a rehabilitation school or other institution approved under the relevant legislation of that country or territory, or received into the care of a fit person or returned to his parent or guardian.

- (2) Any child who has been ordered under the provisions of this Act to be placed in a rehabilitation school or any other institution, or committed to the care of any person, may, while still subject to such order, by warrant signed by the Cabinet Secretary, be removed from the custody of such an institution or person into any other country or territory with which an agreement has been concluded under subsection (1), and placed in a rehabilitation school or other institution or placed in the care of a fit person, or of his parent or guardian, in accordance with the law for the time being in force in the country or territory authorising such placement, until the expiration of the order, or until such child is sooner released according to law.
- (3) An order of a court of a country or territory with which an agreement has been entered into in accordance with the provisions of subsection (2) which could lawfully have been made by a Court in Kenya if the person had been within its jurisdiction, shall upon the person being received in Kenya have the same effect and be enforceable as if the order had been made by a Court in Kenya.”

I do take judicial notice that the Cabinet Secretary (as defined by the *Children Act*) has not signed any reciprocity agreement with the United States.

It is my humble view that the paramountcy principle in article 53 is the guiding principle the court should recline to when there is a lacunae in child law practice. What happens when a mother wishes to advance her career out of jurisdiction? Especially when she is the sole bread winner? In this case relocating for greener pastures? Where does that leave the children? it was for this reason that the court resorted to the paramountcy principle in article 53, COK.

Further, the minors herein are of tender years and it was in their best interest to have their mother remain as primary care giver (Hon. Gitonga’s decision).

v. Tender Year Doctrine vis a vis best interest principle

16. In the case of *HGG v YP* [2017] eKLR, the court pronounced itself as follows on the intersection between best interest and tender-year principle:

“Borrowing from the judicial authorities, the focus is to attain the best interest of the child in accordance with the principle of the *Constitution* in article 53(2) that:

“ A child’s best interests are of paramount importance in every matter concerning the child”.

The above phrase is therefore not a mere cliché or worn-out notion that does not call up any legal delight; it is a real facet in the administration of justice in matters involving children. Therefore, for a court of law to depart from the general rule on custody of children of tender years, there must be exceptional circumstances which warrant the mother to be denied custody of children of tender age. Such factors should be ones which affect the welfare and best interests of the child and may include but not limited to; the mother’s mental instability or insanity; disgraceful conduct, say her immoral behavior, drunken habit, abandoning the children; cruelty to children; and the company she keeps etc.”



(45) Further, in *Sospeter Ojaamong v Lynette Amondi Otieno* Civil Appeal 176 of 2006, The Court of Appeal held;

“The general principle of law is that custody of such children should be awarded to the mother unless special and peculiar circumstances exist to disqualify her from being awarded custody. The case of *Martha Olela & another v Jackson Obiera* Civil Application No Nairobi 16 of 1979 was cited as one authority for such principle. The mother’s disgraceful conduct, say her immoral behavior, drunken habit, bad company are some of the factors which would disqualify her from being awarded custody of a child of tender age.”

The minors before me are both below 10 years. The *Children Act* 2022 does not expressly define tender years, but there are a plethora of authorities that define children of tender years as children below 10 years of age. I wish to state that although there are no exceptional circumstances to warrant a departure from the general rule, the tender year principle was subjected to the paramountcy test in *SMM v ANK* [2022] eKLR the Court of Appeal stated follows:

“However, it is apparent that while the Tender Years Doctrine is persuasive in considering custody of children, it can no longer be considered as an inflexible rule of law. This is not to say that the substance of the rule has dissipated completely; it is to say that its inflexibility has been eroded by the evolving standards of decency reflected in article 53 of the *Constitution*. Differently put, the Tender Years Doctrine must now be explicitly subjected to the Best Interests of the Child Principle in determining custody cases. Differently put, the welfare of the children is the primary factor of consideration when deciding custody cases.”

In this case there was a convergence between the tender year doctrine and best interest principle. Especially in the absent of a reciprocal agreement.

vi. Ascertainable wishes doctrine as a consideration by the Court

17. The First Schedule of the *Children Act, 2022* in interpreting article 53 spells out best interest considerations thus:
1. The age, maturity, stage of development, gender, background and any other relevant characteristic of the child.
 2. Distinct special needs (if any) arising from chronic ailment or disability.
 3. The relationship of the child with the child's parent(s) and/or guardian(s) and any other persons who may significantly affect the child's welfare.
 4. The preference of the child, if old enough to express a meaningful preference.
 5. The duration and adequacy of the child's current living arrangements and the desirability of maintaining continuity.
 6. The stability of any proposed living arrangements for the child;



7. The motivation of the parties involved and their capacities to give the child love, affection and guidance.
 8. The child's adjustment to the child's present home, school and community.
 9. The capacity of each parent or guardian to allow and encourage frequent and continuing contact between the child and the other parent and/or guardian(s), including physical access.
 10. The capacity of each parent and/or guardian(s) to cooperate or to learn to cooperate in child care.
 11. Methods for assisting parental and/or guardian cooperation and resolving disputes and each parent's/guardian's willingness to use those methods
 12. The effect on the child if one parent/guardian has sole authority over the child's upbringing.
 13. The existence of domestic abuse between the parents/guardian(s), in the past or currently, and how that abuse affects the emotional stability and physical safety of the child.
 14. The existence of any history of child abuse by a parent and/or guardian(s); or anyone else residing in the same dwelling as the child.
 15. Where the child is under one year of age, whether the child is being breast-fed.
 16. The existence of a parent's or guardian(s) conviction for a sex offense or a sexually violent offense under the [Sexual Offences Act](#).
 17. Where there is a person residing with a parent or guardian, whether that person —
 - (a) been convicted of a crime under this Act, the [Sexual Offences Act](#)(cap 63A), the [Penal Code](#) (cap. 63), or any other legislation.
 - (b) has been adjudicated of a juvenile offence which, if the person had been an adult at the time of the offence, the person would have been convicted of a felony.
 18. Any other factor which may have a direct or indirect effect on the physical and psychological well-being of the child.
18. Further, the ascertainable wish doctrine was restated in the case of [MAK v RMAA & 4 others](#) (Petition 2 (E003) of 2022) [2023] KESC 21 (KLR) (Civ) (2 March 2023) (Judgement). The Supreme Court set out the guidelines which the courts are mandated to consider when making a decision that will impact a child, as follows:

... we are of the view that the following guidelines are necessary and ought to be considered when balancing a child's best interests and parental rights and responsibility:

1. The existence of a PRA between the parties.
2. The past performance of each parent.
3. Each parent's presence includes his or her ability to guide the child and provide for the child's overall well-being.
4. The ascertainable wishes of a child who is capable of giving / expressing his / her opinion.
5. The financial status of each parent.



6. The individual needs of each child.
7. The quality of the available home environment.
8. Need to preserve personal relations and direct contact with the child by both parents unless it is not in the best interests of the child in which case supervised access to the child must be granted.
9. Need to ensure that children are not placed in alternative care unnecessarily.
10. The mental health of the parents and
11. The totality of the circumstances

The court had a chance to interview the minors and they expressed their wish to travel with their mother.

19. I wish to state that there is no prescribed manner in law that guides the assessment of the ascertainable wishes of a child. The court adopted the Lowenfeld theory¹ of artistic expression. The children were allowed to express their wishes through art (the drawings are attached to the proceedings)

vii. Past performance of each parent

20. The plaintiff in her replying affidavit stated that the children came to Kenya (to visit the defendant) in December 2022 and March 2023, in line with the court order. The defendant was granted contact hours. That the defendant was able to access them in the United States when he last visited and was at liberty to see them any time he wished, together with his other biological children. The plaintiff raised the issue of untoward behaviour when the defendant was in the US. There was also an incident where the defendant allegedly contacted the plaintiff's employer in an attempt to discredit her legitimacy at work. This would have interfered with the children's only source of livelihood had the court not intervened.

It is my considered view that the two parties have not managed co-parenting successfully. Their personal issues are standing in the way of providing a stable home environment for the children, whether here or abroad. Will having the children come back to Kenya resolve the co-parenting problem? I do not think so. Upon perusing the file, I do find that the children have not undergone transition counselling as earlier ordered by the court. This has compounded the acrimony between the parties. Court mandated therapy is a necessity in the prevailing circumstances.

viii. Financial Status of each party

21. The defendant was to remit 50,000/- pm for the children's food. The plaintiff informed the court that she was not interested in this maintenance. The defendant informed court on the other hand that he resorted to saving up the 50,000/- pm for the children.

This court requires proof of such deposits before making any return orders.

Notably, the defendant has not demonstrated his ability to fend for the children and take them to an education system that matches the one they are currently in. He ought to file a current affidavit of means and provide the court with a list of schools offering the American curriculum here in Kenya. It will go against the best interest of these children to disturb their current home environment, education and social milieu for now.

¹ <https://www.d.umn.edu/artedu/Lowenf.html>



In her replying affidavit, the plaintiff indicated that she was planning to change the children's current curriculum to the British one. Was the defendant consulted on this? what necessitated the change?

I will give directions on how the two parties will co-parent going forward

ix. Quality of the available home environment

22. On the issue of the defendant's place of residence, the Children Officer's Report filed indicates that he has a stable home with a live in partner. Although the Judgement did not envision a live in partner, this Court requires the children to be formally introduced to the partner through transition counselling. This has not been conducted. Both parties ought to put their act together. The children require guidance from the two of them. The third party can then be introduced once a proper co-parenting plan is in place. It will be premature to have the children live with the partner as a primary caregiver in the absence of their mother

x. Interpol Intervention

23. The court directed that in the event the defendant was not able to access the children he was to seek the court's intervention through Interpol. This has since been overtaken by events. The defendant confirmed that he saw the children. The only issue was that of their schooling. The plaintiff on the other hand has allowed unlimited access in the United States. She has further availed them in Kenya for access

xi. Section 95 orders

24. Section 95 (5) states as follows:

“In relation to any proceedings concerning a child, whether instituted under this Act or under any other written law, a person shall not publish or reveal in any publication or report, including any law report, any of the following matters—

- (a) a child's name, identity, home or last place of residence or school; (b) the particulars of the child's parents or relatives; or
- (c) any photograph, depiction or caricature of the child.”

Content concerning the minors in this matter are still circulating in social media. I will give directions on how the matter proceeds from here

xii. Disposition

25. Children who experience significant conflict within their family will often have trouble with their social and emotional development and well-being. This is true for children who regularly hear their parents fighting—a phenomenon that has been referred to as 'background noise' in a child's upbringing (Moges and Weber, 2014). Even though the anger and conflict is not being directed right at the child, children can easily develop problems with their emotional security and regulation as a result. This often occurs because from the earliest ages, children emulate what they see, often copying the behavior of their parents with other social relations. If children are used to witnessing conflict and poor emotional regulation on a regular basis, this will be their understanding of social relationships as their social network expands later in life²

² <https://medcraveonline.com/JPCPY/psychology-ndash-child-emotions-the-link-between-inter-parental-conflict-and-health-emotional-development-of-children.html>



26. It is therefore imperative that the courts safeguard the holistic wellbeing of the child, as envisioned in article 53 of the Constitution. Best interest of the child goes beyond provision of basic needs.
- Family matters therefore, are best resolved ad minimum conflictus (with little conflict).

Orders:

- i. That the objection based on *res judicata* fails
- ii. That the children shall remain domiciled in the United States with the plaintiff/ mother for now
- iii. That the defendant/father is granted unlimited but reasonable access in the United States
- iv. That the defendant/father is granted unlimited but reasonable audio visual contact (at US time)
- v. That the parties to enroll in co-parenting coaching (virtually) within 30 days from today's date. This is to enable a proper co-parenting plan. Parties to agree on choice of therapist and in the event they fail to agree, to contact the court for appointment
- vi. That the children to undergo transition counselling as earlier ordered by the court within 30 days from today's date
- vii. That the defendant/father to file a current affidavit of means and file proof of 50,000/- monthly deposits (from the day judgment was rendered to date)
- viii. That summons to issue to the in charge DCI child protection unit to update the court on the status of the expunging order. Content on the minors herein is still circulating on social media despite expunge and gag orders
- ix. That mention on August 6, 2024 (for DCI follow up)
- x. That this being a family matter, I make no order as to costs

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 9TH DAY OF JULY, 2024.

JACKIE KIBOSIA, PM

In the presence of:

Mr. Malenya for the Plaintiff

Mr. Omuyoma HB. Mr. Wachira for the Defendant

Ms. Redempta, CA

