



**In re JM & OM (Minors) (Children’s Case E009 of 2024)
[2024] KEMC 185 (KLR) (21 August 2024) (Judgment)**

Neutral citation: [2024] KEMC 185 (KLR)

**REPUBLIC OF KENYA
IN THE LAMU LAW COURTS
CHILDREN'S CASE E009 OF 2024
FM MULAMA, RM
AUGUST 21, 2024
IN THE MATTER OF JM & OM-MINORS**

BETWEEN

NM PLAINTIFF

AND

MOB DEFENDANT

JUDGMENT

A. Introduction.

1. By a plaint dated 27th May 2024, the Plaintiff seeks the following orders against the defendant.
 - a. Joint legal custody to vest in both parties.
 - b. Actual and physical custody, care and control of the minors be and is hereby granted to the plaintiff.
 - c. The defendant be granted reasonable access to the minors.
 - d. A declaration that the defendant is duty bound to take, exercise and/or discharge his parental responsibility over the minors herein.
 - e. An order for child maintenance by the defendant to cater for the
 - i. School fees and education related expenses when the minors attain school going age.
 - ii. Half of the minors medical expenses and clothing
 - iii. Food assessed at Kshs.21,000/= monthly.
 - f. Any such other order or relief this honourable court may deem fit to grant.



2. The suit proceeded by way of formal proof as the defendant despite service neither entered appearance nor filed any defence to the case.
3. In addition to the pleadings, the plaintiff has also filed herewith her affidavit of means which has been considered together with the pleadings.

The evidence

Plaintiff's case

4. The plaintiff adopted the averments contained in her pleadings and produced her documents in support of the claim contained in the list of documents dated 27th May 2024.
5. In her brief testimony in court she stated that she divorced with the defendant and while in marriage they were blessed with 2 issues aged four and a half years and 2 years and that the defendant does not provide for them.
6. She further stated that before instituting this suit, she has tried to sort the issue out of court through the chief's office, the Children's office and NLAS but all of those avenues and efforts bore no fruit hence this suit. She urged the court to grant the prayers as sought in the pleadings.

B. Issue For Determination.

- a. Who is to be granted custody of the 2 issues.
- b. What are the parties contributions towards the maintenance of the issues herein.

C. Analysis And Determination.

7. For the plaintiff to prove his case against the defendant, he ought to prove his case to a standard that is on a balance of probabilities. This case is however not defended
8. Furthermore, this being a children's matter, the best interest of the children is a primary consideration as decreed by Section 8 of the Children's Act 2022 and hence the reason I have to delve and consider the issues even if the same is not opposed.
9. Section 103 of the Children's Act 2022 sets out the following principles guiding the court in making a custody order. The court must consider the following:
 - 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 persuasions of the child;
 - g. Whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether or not those orders remain in force.
 - h. The circumstances of any sibling of the child concerned; and of any other children of the home, if any.



- i. Any of the matters specified in Section 95(2) where the court considers such matter to be relevant in the making of an order under this section; and
 - j. The best interest of the child
10. The suit as presented seeks for provision of custody and maintenance for the 2 issues herein.

Custody.

11. The plaintiff seeks to be granted custody, care and control of the minors while on the other hand the defendant father be granted reasonable access to the said minors.
12. I take note that both the plaintiff and the defendant herein are and/or subscribe to the Muslim faith. It is on that basis that some Muslim teachings on this subject are key and of great consideration in this matter.
13. In Islamic law and with due regard to the ability and capability of the parties, the mother has more right to custody of her children regardless of sex until the age of understanding recognized at seven years or so provided she has not remarried or otherwise. This was because of the report narrated by Ahmed (6707) and Abu Daud (2276) from Abdullah Ibn Amr (RA) according to which a woman said;

“O messenger of Allah, my womb was a vessel for this son of mine, and my breasts gave him to drink, and my lap was a refuge for him, but now his father has divorced me and wants to take him away from me”. The messenger of Allah (PBUH) said to her; “You have more right to him so long as you do not remarry.”
14. The reason for this was that, in early years, the mother is more suitable for raising the young child (regardless of sex) with love, mercy, attention and motherly care than the father and since the defendant has no issues with the plaintiff having the custody of the minors, the plaintiff is granted custody of the issues herein.
15. In granting the plaintiff custody of the issues herein, I have been guided by and taken into consideration of the dictates of section 103(1)(a-j) of the Children’s Act 2022.
16. The plaintiff does not run foul of any of the considerations listed in the said section and nothing has been stated to demonstrate her unsuitability in addition to the same not being opposed.
17. Furthermore, it should be noted that Section 103(2) of the Children’s Act, 2022 provides that despite one party being given custody of the children, the other who has no custody has all or any rights and duties in relation to a child.
18. Subsection 3 of the said section includes the right of access to the child on such terms as the court may direct and there is where the court comes in in the event parties have not agreed as to the access rights.
19. Since the issues will now be in the custody of the plaintiff, the defendant shall have supervised access to the issues herein either on weekends and/or holidays when the schools have closed when they attain school going age. This is to be with prior and adequate notice to the plaintiff as to time, duration and place the defendant would like to visit and have time with the issues.

Maintenance

20. The law relating to maintenance of a child is contained in [*the Constitution*](#) of Kenya, 2010 and the [*Children Act*](#). Article 53 of [*the Constitution*](#) provides:



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;

21. Maintenance is an aspect of parental care and is the responsibility of both parents of a child or children as it is in this case.

22. In Muslim religion and teachings which all the parties hitherto subscribe to, there is a different view to it where the teachings seem to place a bigger responsibility on the father.

23. As observed above in Islam maintenance of children is a joint responsibility but more so a duty of the father, according to scholarly consensus unless otherwise restricted by means. In the event custody is with the mother, then the children's maintenance MUST be paid by their father on reasonable basis and depending on his circumstances and means.

Quran 2:233; "... but the father of the child shall bear the cost of food and clothing on a reasonable basis."

Quran 65:7; "... let the rich man spend according to his means, and the man whose resources are restricted, let him spend according to what Allah has given him, Allah will grand after hardship ease."

24. With due attention and regard to the teachings of the Quran aforementioned and elsewhere in the Quran, *the Constitution* and the *Children Act* take precedence which decree that parental responsibility is a shared responsibility and it is clear that even the plaintiff acknowledges this position of the law and hence her proposal to take care of some of the needs of the issues.

25. In making maintenance orders the Children's Act 2022 ask of courts to consider the various capabilities of each of the parent so that in the end of importance is the best interests of the children are first catered for before any other consideration(s).

26. Courts of law when determining this question of maintenance and indeed the Children's Act 2022 Section 114(2) have stipulated the considerations by which the Court shall be guided when making an order for financial provision for the maintenance of a child. These considerations include inter alia:

a. The income or earning capacity, property and other financial resources which the parties or any other person in whose favour the court proposes to make an order, have or are likely to have in the foreseeable future;

b. the financial needs, obligations, or responsibilities which each party has or is likely to have in the foreseeable future;

c. the financial needs of the child and the child's current circumstances;

d. ...

27. While considering the order for financial provision for the maintenance of children, any trial Court is obligated to take into account the income or earning capacity, property and financial resources of the parties both then and in the foreseeable future.



28. The trial Court is also to consider the parties' financial needs, obligations, or responsibilities. As regard, the children, the Court is required to bear in mind their financial needs and circumstances.
29. It is against this requirement that this court often ask parties to file their respective affidavits of means so that it is in a position to assess what each parent can provide for the minors. The plaintiff did file hers and which I have duly considered.
30. The plaintiff in her affidavit of means proposes to cater for shelter, half of the medical expenses and clothing of the minors. On the other hand she proposes the defendant to take care of the minors educational needs when they attain the age of going to school, half of their medical expenses and finally monthly subsistence of Kshs.21,000/=
31. I note that the minors are still of tender years to wit four and half years and 2 years and I bet their consumption of food cannot reach the levels proposed by the plaintiff.
32. Since the plaintiff has offered to take care and provide for the minors shelter, clothing and half of the medical expenses, let her then provide for their shelter and clothing as well as half of their medical expenses.
33. As quoted elsewhere in this judgment even the Quran decrees that it is the father that shall bear the cost of food. However, this is not to suggest in any way that the order to provide food is on the basis of the said teaching but as a guiding tool in addition to what the law provides.
34. I find the proposal by the plaintiff to take care of the aforestated needs to be reasonable and parental responsibility being a shared responsibility, the defendant too must also provide towards the upkeep and well-being of the minors.
35. To this end therefore the father/Defendant shall provide for the other half of the minors medical expenses, clothing, monthly subsistence and in future he shall provide for the minors education and all related expenses. As for the monthly subsistence and as already stated despite the fact that the defendant did not defend the suit, given the age and the needs of the minors, I find the amount proposed by the plaintiff to be on the higher side and I will exercise my discretion and interfere with the proposal.
36. From the foregoing the plaintiff has proved his case against the defendant and in the best interest of justice and the best interest of the child, the orders sought shall issue with slight variations keeping in mind that both the defendant and the plaintiff have equal parental rights and responsibilities towards the children in question.

Conclusion And Disposition.

37. The upshot of the foregoing I make the following final orders;
 - a. The plaintiff is granted full custody, care and control of the minors JM & OM.
 - b. That while in the custody, care and control of the Plaintiff, the defendant shall have reasonably liberal visitation to the minors JM & OM with adequate notice as to date, time, place and duration of the visit.
 - c. That further to order (b) above the defendant shall visit the minors JM & OM on weekends and/or holidays when the schools have closed when they attain the age of going to school.
 - d. The plaintiff shall provide shelter, half of the medical expenses and clothes for the minors JM & OM.



- e. The defendant shall also half of the medical expenses of the Minors JM and OM as well as provide clothes for the minors JM and OM.
 - f. The defendant shall provide for and cater for the minors' education and all related expenses as soon as they attain their respective school going age.
 - g. The defendant shall provide to all the minors JM & OM Kshs.10,000/= towards their maintenance and upkeep and the same to be availed to the plaintiff on or before the 5th day of each month starting the month after the delivery of this judgement.
 - h. This being a children's matter, each party to bear its own costs of the suit.
38. Parties are at liberty to apply should circumstances obtaining right now change as it relates to custody and maintenance of the minors herein.
39. Orders accordingly.

DATED, SIGNED AND DELIVERED AT LAMU LAW COURT THIS 21ST DAY OF AUGUST 2024.

HON. FLAVIAN M. MULAMA

RESIDENT MAGISTRATE

In the presence of:

Court Assistant:- Therbit Ali Shee.

Najma Mohammed.

