



EWM (Suing as mother and next friend) v VS (Children's Case 746 of 2019) [2024] KEMC 82 (KLR) (1 October 2024) (Judgment)

Neutral citation: [2024] KEMC 82 (KLR)

**REPUBLIC OF KENYA
IN THE NAIROBI CHILDREN'S COURT
CHILDREN'S CASE 746 OF 2019
JC KIBOSIA, PM
OCTOBER 1, 2024**

BETWEEN

EWM (SUING AS MOTHER AND NEXT FRIEND) PLAINTIFF

AND

VS DEFENDANT

JUDGMENT

1. The Plaintiff's claim against the Defendant is for the following orders:
 - a. Spent
 - b. A permanent order restraining the Defendant from leaving the Court's jurisdiction with the minor
 - c. Actual custody, care and control
 - d. Wardship order
 - e. Costs

Plaintiff's Case

2. The Plaintiff's case is that the defendant is the biological father of the minor herein. That the Defendant resides in the United States and early 2019 the minor required urgent medical attention. That both parties agreed that the procedure is conducted in the United States. That she consented to the travels and the defendant and the minor travelled. She informed the Court that the minor did not come back as agreed. That the defendant switched off his phone. The reason she came to Court for intervention/return orders



Defendant's Case

3. It is the defence case that the parties agreed that he takes the child to the United States for treatment. He informed Court that when the child was examined he was found to have other complications that required urgent medical intervention. That he informed the Plaintiff about it. In his evidence, he reiterated that he did abduct the child

4. 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* states as follows:

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.

5. Having considered the matter – 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. Actual Custody

6. Section 102 (3) of the New Act:

Any of the following persons may be granted custody of a child—

(a) a parent;

(b)

In this case the applicant is the children's mother

Section 103 on the other hand provides the principles to be applied when making such an order:

(1) In determining whether or not a custody order should be made in favour of an applicant, the Court shall have regard to—



- (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;
- (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 matters to be relevant in the making of an order under this section; and
- (j) the best interest of the child.

Section 103

(2):

Where a custody order is made giving custody of a child to one parent, or in the case of joint guardians, to one guardian, the Court may order that the person not awarded custody shall nevertheless have all or any rights and duties in relation to a child, other than the right to actual possession, jointly with the person who is given custody of the child.

- (3) The rights specified in subsection (2) include the right of access to the child on such terms as the Court may direct.

7. 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 (emphasis added)

8. In the case of *HGG v YP* [2017] eKLR, the Court pronounced itself as follows on matters custody:

“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 do 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.”

9. Further, in *Sospeter Ojaamong vs. 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 vs. 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 minor is 10years old. I wish to state that from the proceedings, the Plaintiff has been the primary parent. I do not wish to disturb the status quo. The child has already been subjected to untold psychological suffering, occasioned by the alleged “abduction”

Both parties have had a disjointed parenting style. The child has not had stability the past few years. The Plaintiff’s prayer is that he is denied access. This is not tenable since it amounts to parental alienation. Further Article 53 speaks to equal parental rights. I will give directions on how the Defendant will participate noting the time difference

ii. Maintenance

10. Article 53 (1)

Every child has the right to-

a.



- b.
- c. 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

The Plaintiff stated that she does not require any support from the Defendant. I will guide on how the Defendant will participate. Financial support cannot be one sided, especially when the other party is actively involved in the child's life.

- 11. The issue of contempt of Court by the Plaintiff came up in the proceedings. This is a family matter. Subjecting the parties to contempt proceedings will aggravate the rift that already exists between them. I will let this matter rest as is. And in the best interest of the child
- 12. Going forward, I urge parties to be cordial with each other.

Disposition

- 13. 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 life¹

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).

Final Orders:

- i. That both parties shall have joint legal custody of the minor herein
- ii. That the Plaintiff/mother retains actual custody, care and control (no need for wardship orders)
- iii. That the Defendant/father is granted access in the following terms:
 - While in the United States:Unlimited but reasonable audio visual contact EAT
 - While in Kenya:Alternate weekends: Saturday 9am to Sunday 5pm
 - Pick up/ drop off: nearest recreational facility to the child
 - Half school holidays alternating Easter and Christmas
- iv. That the Defendant to invest in an education policy of choice at 10,000/- per month 30 days from today’s date
- v. That such monies shall be contribution towards the minor’s educational needs

¹ <https://medcraveonline.com/JPCPY/psychology-ndash-child-emotions-the-link-between-inter-parental-conflict-and-health-emotional-development-of-children.html>



- vi. That none of the Parties shall leave the court's jurisdiction with the minor without a court order
- vii. That the minor's passport (s) to be deposited in Court and immigration department notified at the earliest instance
- viii. That this being a family matter, no order as to costs
- ix. Parties at liberty to apply

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 1ST DAY OF OCTOBER, 2024

JACKIE KIBOSIA

PRINCIPAL MAGISTRATE

In the presence of:

Ms. Nganga for the Plaintiff

Mr. Wahome for the Defendant/ HB. Ms. Njuguna

Mr. Mohammed CA

