



**In re EKO (Minor) (Children's Case E005 of 2024)
[2024] KEMC 47 (KLR) (15 November 2024) (Ruling)**

Neutral citation: [2024] KEMC 47 (KLR)

**REPUBLIC OF KENYA
IN THE MARALAL LAW COURTS
CHILDREN'S CASE E005 OF 2024
AT SITATI, SPM
NOVEMBER 15, 2024**

BETWEEN

OKM (NEXT FRIEND OF EKO) PLAINTIFF

AND

JA DEFENDANT

RULING

1. This ruling relates to the Notice of Motion application dated 25th September, 2024 by the Plaintiff/Applicant praying for:-
 1. (Spent).
 2. This Honourable Court be pleased to grant orders that the Plaintiff/Applicant be granted actual physical custody in respect of the Minor for purposes of taking him to receive urgently required specialized medical treatment pending the hearing and determination of this application.
 3. This Honourable Court be pleased to grant orders that the Plaintiff/Applicant be granted actual physical custody in respect of the Minor for purposes of taking him to receive urgently required specialized medical treatment pending the hearing and determination of the Main suit.
 4. The costs of this application be provided for.
2. The application is grounded on 14 averments on the face of the motion on notice. In summary, the applicant stated that the Minor was critically ill and needed urgent specialized medical attention but was being kept and confined at home by the defendant mother who lacked funds to pay for the urgent medical attention. He stated that he and the defendant were living apart following marital separation but she retained physical custody of the sickly child whom she had neglected on account of her limited



financial ability to meet the medical needs of the child. Further that on 17th October, 2024 he recorded a parental responsibility agreement with the defendant mother but she was not honouring the said agreement. He said that as per this parental responsibility agreement, he added the child to his medical cover but the defendant failed to take the child for medical attention under the said cover and this resulted in the child missing term 2 in August, 2024.

3. Annexed as exhibits to the supporting affidavit of the motion on notice were:
 - i. Minor's birth certificate;
 - ii. Summons issued by the Children's Officer
 - iii. Parental responsibility agreement dated 17/10/2024
 - iv. Screenshot messages showing the defendant asking the plaintiff for financial help to take the child to hospital;
 - v. Video recordings of the sickly child sent to the applicant by the defendant;
 - vi. Medical insurance cover for the minor taken out by the applicant as per the parental responsibility agreement;
 - vii. Treatment notes showing the specialized medical needs of the minor;

The Respondent's Case

4. In opposing the application, the defendant lodged a replying affidavit dated 30th September, 2024 containing 38 paragraphs. In summary, she deposed that it was true that the child was sickly and was suffering from recurrent convulsions which required prescriptive medicine and drugs. She highlighted convulsion incidents occurred on the following dates
 - i. 20/04/2024 for which the Minor was admitted at Maralal County Referral Hospital and subsequently discharged after treatment.
 - ii. 26/05/2024 for which the minor was admitted at Siaya County Referral Hospital and later discharged after treatment.
 - iii. 17/06/2024 for which she took it to Kisumu where a paediatrician prescribed drugs for a month.
 - iv. 23/07/2024 where when she took the child to Jaramogi Oginga Odinga Teaching and Referral Hospital where an EEG was done. It was recommended that the child undergoes an MRI scan which required Kshs 12,000 which money the Respondent did not have causing her to request the applicant but he did not send her. She added that he declined to issue his ID card copy for authorization to utilize the medical insurance cover.
 - v. 26/08/2024 on which date she had no money causing her to send the applicant an sms requesting for cash to take the child to hospital but he declined to send her the cash.
 - vi. 27/08/2024 for which she took the child to Olympic Medical Centre where he was admitted and later discharged on 30/08/2024.
 - vii. 10/09/2024, 11/09/2024 and 18/09/2024 she visited the hospital for MRI with cash which she had managed to raise from various sources. After the MRI results, the doctor at the Jaramogi Oginga Odinga Teaching and Referral Hospital made a prescription which was



to run up to 01/10/2024 and she bought the same thereby arresting the recurrence of the convulsions. The doctor advised that the child should only travel to Maralal after stabilization.

5. Annexed as exhibits to the replying affidavit were the following exhibits: Discharge summary from Siaya County Referral Hospital Prescription note on 17/06/24 by Dr. Walter Otieno. EEG from Dr. Walter Otieno EEG from the Jaramogi Oginga Odinga Teaching and Referral Hospital Request note from the doctor for an MRI Discharge from Olympic Medical Centre Payment receipt from the Jaramogi Oginga Odinga Teaching and Referral Hospital for Kshs 12,000 MRI report from the Jaramogi Oginga Odinga Teaching and Referral Hospital WhatsApp message from the respondent to the applicant requesting for cash and financial support to pay medical costs Complaints of threats reported to the OCS Maralal Police and ODPP
6. In opposing the application, she told the court that the applicant was using the backdoor to obtain actual custody of the male minor who was born in 2020 – now aged 4 years old. It was her testimony in court that if the father was genuine he should secure an appointment at Gertrude Hospital using his medical card and let the child be attended to but not deprive her of custody.
7. The applicant was represented by Mr. Lenkidi Mpapa Advocate. while the respondent was represented by Ms. Ntabo Advocate.

Issue for Determination

8. There is no dispute that the applicant and the respondent are the biological father and mother of the male minor the subject of these proceedings. The minor is aged 4 years old now. It is undisputed that the child has recurrent convulsions which require constant medical attention and care. The doctor has recommended minimum movement of the child to give it time to stabilize – this is shown by the various medical notes issued to the mother during the hospital visits.
9. The only issue to be determined in this ruling is whether the applicant who is the father of the minor has made a case on a balance of probabilities for the grant of temporary actual custody to him so that the minor can receive specialized medical attention.

Determination

10. The general principles regarding temporary custody of minors pending litigation were well discussed by the Court of Appeal in *D.O.O. -VS- J.A.O.* (Civil Appeal 25 of 2015 (2015) KECA KLR (23 July, 2015) (DK Musinga & AK Murgor JJ.A.) where the learned Judges in the relevant parts held as follows:
Section 4 (2) of the *Children Act* No. 8 of 2001 reads:-

In all actions concerning children, whether undertaken by public, or private, social welfare institutions, courts of law, administrative authorities, or legislative authorities, the best interests of the child shall be a primary consideration”.

11. In *Karanu-vs Karanu* (1975) E.A. 18 this Court had this to say,

The substantial question in this case was whether or not the Judge was right in giving custody of the children to the father. At the time the application was made the daughter of the parties was just over seven years of age, and the son was six years old. The judge correctly directed himself, that in cases of this nature, the paramount consideration was the welfare of the children, but he did not specifically refer to the generally accepted rule that, in the



absence of exceptional circumstances, the custody of young children should be with the mother”

12. In *Mebrunissa vs Pravez* [1982- 88] 1 KAR 18 this Court stated thus,

The general principle of law is that custody of such children shall be awarded to the mother unless special or peculiar circumstances exist to disqualify her from being awarded custody.”

13. The current *Children’s Act* 2022 replicates the best interest rule in section 8 consistent with Article 53 of the *Constitution*. Section 8 states:

8. Best interests of a child

(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.

(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.

(3) In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child’s age and degree of maturity.

14. As to what amounts to the best interests of the child is to be found in section 2 of the *Children’s Act* 2022:

best interest of the child” means the principles that prime the child’s right to survival, protection, participation and development above other considerations and includes the rights contemplated under Article 53(1) of the *Constitution* and section 8 of this Act;

In the present case, the minor is sickly with recurrent convulsions which require constant close medical attention and a caregiver close by. The court noted and observed that the child is a boy aged 4 years old. He is barely capable of coherent speech and self-expression and this shows that the minor is delicate in his current condition. He is currently with the mother in Siaya County while the father is in Samburu County which is more than 900kilometres away on a return trip. His survivability requires him to be disrupted the least and be given attention on short notice.



The Court Appeal in the foregoing authority went on to expound the principles that trial court ought to consider whether there are exceptional factors to rule that a father should have actual custody of a minor of tender years such as the one before this court:

On its part, instead of considering whether the circumstances enumerated by the trial court were exceptional so as to warrant an award of custody to the appellant, the High Court awarded custody to the respondent for the sole reason that the chiefs' letters lacked authenticity, because the authors were not called to testify. The High Court ought to have recognized, that the trial court did not in effect rely on the impugned letters, but on other considerations to grant custody of the child, to the appellant. It was these other considerations that ought to have been taken into account by the High Court, to determine whether or not the exercise of discretion was warranted, which was not the case here.

As a further consideration, counsel for both parties informed us from the bar that the child is still in the appellant's custody and we also observe that the divorce petition is still pending before the trial court. Having regard to the circumstances of this case, it is our considered view that upholding the order of the High Court will only result in the needless shuttling of the child between parents which is not only disruptive, but extremely unsettling for the child."

15. In the case at hand, the mother has pinpointed that she only needed the father to give his ID card number as authorization for the child to get access to the medical insurance but the father declined leading to financial hardship and deprivation of medical attention to the minor. By that fact alone, the court is satisfied that the father did not act in the best of this child as he tussled with his now estranged wife over physical custody. He ought to have consented to the use of his ID number to give authority to the medical insurance provider to enable the child benefit from the medical card. In the result, the exceptional hardship that the respondent and the minor found themselves was directly attributable to the applicant's open intransigence and this militates against the grant of temporary custody to the father at the interlocutory stage. As is well settled in the Law of Equity, no man is permitted by law to take advantage of his own wrong to the detriment of others: At page 193 of *The Broom's Maxims of Law - A Selection of legal Maxims : Classified and Illustrated* (1864) by Herbert Broom there is a chapter on "*Fundamental Legal Principles*" discussing this legal maxim : Nullus commodum capere potest de injuria sua propria : No man shall take advantage of his own wrong.
16. It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong, and this maxim which is based on elementary principles, is full recognised in Courts of law and equity, and indeed, admits of illustration from every branch of legal procedure. The reasonableness and necessity of the rule being manifest, we shall proceed at once to show its practical application by reference to decided cases; and in the first place, we may observe, that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law – frustra legis auxilium quaerit qui in legem committit
17. At page 195 the Maxim further provides that :-

It is moreover a sound principle, that he who prevents a thing being done, shall not avail himself of the non-performance he has occasioned."
18. Furthermore, as the Court of Appeal has ruled that shuttling of minors between hostile parents is not to be promoted in their best interests because such shuttling between litigating parents is physically and psychologically disruptive especially to a sickly child. Consequently, the court dismisses the application by the father for temporary custody pending hearing of the main suit because it is not in the best



interest of the child at this stage. Instead the court orders as follows: The father shall immediately but in any event not later than 72 hours of this order secure an appointment with a suitable Gertrude's Medical facility accredited under his medical insurance card located nearest to the Minor so that the Minor can receive the best quality specialized attention. Once he has done this, he shall communicate the appointment date to the respondent's counsel through her advocate. Upon receipt of the said communication of the appointment date, the mother shall expeditiously present the Minor to undergo the specialized treatment under the father's medical insurance card. The Minor shall remain in the physical custody of the mother at all times but the father shall retain the right to see and child during the said medical appointment provided that such access shall be under the supervision of the nearest Children's Officer or medical officer at the facility. Costs of the suit shall abide the outcome of the suit. Hearing to proceed expeditiously on 21st November, 2024 as diarized.

19. It is so ordered. Right of appeal is 30 days. The main suit shall proceed as scheduled.

DATED, READ AND SIGNED AT MARALAL LAW COURTS THIS 15TH DAY OF NOVEMBER, 2024.

HON.T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

MARALAL LAW COURTS

PRESENT

Mr. Lenkidi Adv for the Applicant

Ms Ntabo Adv for the Respondent

