



**RKP (Suing on behalf of AWS - Minor) v SW (Children's Case E005 of 2024) [2024] KEMC 76 (KLR) (27 November 2024) (Ruling)**

Neutral citation: [2024] KEMC 76 (KLR)

**REPUBLIC OF KENYA  
IN THE MUTOMO LAW COURTS  
CHILDREN'S CASE E005 OF 2024  
LK MWENDWA, PM  
NOVEMBER 27, 2024**

**BETWEEN**

**RKP (SUING ON BEHALF OF AWS - MINOR) ..... PLAINTIFF**

**AND**

**SW ..... DEFENDANT**

**RULING**

1. Before me is a Notice of Motion dated 14/10/2024 and filed Under Certificate of Urgency on an even date seeking the following orders;
  - (a) Spent.
  - (b) That the Honorable court be pleased to issue temporally order to the respondent to release the minor namely AWS aged- 2 years to the custody of the Plaintiff/applicant.
  - (c) That the order be supervised by the head of Children Department Mutomo
  - (d) That the cost of this application be provided for.
  
2. The application is premised on the grounds set out on its face and supported by the affidavit of RKP sworn on 14/10/2024. The grounds are set out as follows;
  - (a) That the issues about the minor were handled at the children department office Mutomo on several times but failed to bear any meaningful fruits.
  - (b) That the applicant and the respondent had not legally married they were just staying together.
  - (c) That the both parties separated when the child was around 3 months and all that time the Plaintiff/Applicant was the one who was taking care of the minor up to 2 years' time the Defendant/Respondent disappeared with the minor.



- (d) That the minor is left with mother to the Defendant/Respondent who takes care of and the Plaintiff/Applicant is denied rights to access to her child.
  - (e) That the Plaintiff is in convinced enough that the child is not living in good care and also is lacking mother love at his age of minority.
  - (f) That the Defendant/Respondent summoned several times at children department office Mutomo but he appeared without the minor.
  - (g) That the Defendant/Respondent had no time with his child and plaintiff/Applicant is contended whether the grandmother will take care of the minor the way her mother can do.
3. The application is opposed vide a Replying Affidavit of SW sworn on 17/10/2024 and filed on an even date.
4. Thereafter, on 23/10/2024, I directed parties to file written submissions to this Application. Each party complied.

### **Applicant's case**

5. The Applicant deposes that she was in a relationship with the Respondent herein, whereupon they were blessed with AWS (Name with held). The issue is stated to be 2 years of age who at the moment is in the physical custody of the Respondent.
6. It was further averred by the Applicant that they got separated when the minor was three months; and that she has been taking care of minors' needs and welfare; But the Respondent, without her consent, has disappeared with the minor.
7. The Applicant also contends that the Respondent is not fit to take care of the minor herein. She avers that she is convinced that the child is not living in good care as the Defendant has failed to produce the minor to Mutomo children's office despite being ordered to do so.

### **Respondents 'case**

8. By his Replying Affidavit filed on 17/10/2024, the Respondent admits that he has been in custody of the minor herein since April, 2024. He further admits that he is the biological father of the minor.
9. The Respondent avers that, the Applicant has presented falsehoods as regards to the maintenance of the minor herein. He deposes that the Applicant has always visited the minor without any barriers and has always been sending support for the minor until 13<sup>th</sup> April, 2024 when, with consent of the Applicant, he took custody of the minor. Finally, he avers that he has provided a conducive and health environment for the minor contrary to the Applicant's allegations.
10. The Respondent argues that he is bound to suffer prejudice should the court grant custody of the minor to the Applicant. He has expressed concerns that this visitation rights will be prejudiced as he fears that she may transfer the minor to unknown places. He thus urged the court to disallow the Application and order that he remains with the custody of the minor pending the hearing and determination of the Application.

### **Analysis and Determination**

11. I have considered the Application, the Response thereto as well as submissions of the parties. The core issue in this Application is the question of who between the Applicant and the Respondent is entitled



to the custody of the minor herein. It is not in dispute that the Applicant and the Respondent are the respective biological mother and father of the minor herein.

12. Article 53(1) (e) of *the Constitution* of Kenya, 2010 provided for the rights of a child to parental care and protection. It is couched in the following terms.

“ Article 53(1) every child has a right:-

- a. ...
- b. ...
- c. ...
- d. ....
- e. To parental care and protection which includes equal responsibility of the minor and father to provide for child, whether they are married to each other or not; and
- f. ...”

13. Sub-Article (2) thereof decrees that;

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

14. In terms of Section 29(1) of the Children’s Act, 2023, any person may institute court proceedings claiming that any right or fundamental freedom of the child has been denied, violated or infringed or is threatened. Pursuant to Sub-Section (2) (a) a parent or a guardian can institute proceedings to enforce rights and fundamental freedoms of a child. The Applicant herein thus has Locus Standi to institute these proceedings in her capacity as a parent (mother).

15. Section 30 of the Children’s Act, 2022, lists the factors that the court should consider in enforcing the rights and fundamental freedoms of a child. It provides;

“ In the Application of the provisions of this Act and in any other matter before a court of Law concerning a child, due regard shall be had to the duties and responsibilities of a child to:-

- a. Work for the cohesion of the family.
- b. Respect his parents, superiors and elders at all times and assist them in cases of need provided that the child’s best interests shall remain paramount.
- c. Serve his national community by placing his physical and intellectual abilities at its service.
- d. Preserve and strengthen social and national solidarity.
- e. Preserve and strengthen the positive cultural value of his community in his relations with other members of that community.
- f. Attend school unless prevented by factors beyond their ability.
- g. Not discriminate against other children on account of ethnicity, race, disability, gene, social status or other grounds.
- h. Protect the environment.



- i. Not abuse or harm other children; and
- j. Not destroy any property”

16. As earlier indicted, in this Ruling the Applicant has sought custody of the minor as a parent. The Respondent has contended the grant of custody to the Applicant in his capacity as a parent (father), as well. Pursuant to Article 53(2) (e) of *the Constitution* of Kenya, 2020, both the Applicant and the Respondent have equal rights of custody of the minor herein. In considering whom to grant custody the court, by dint of Section 103(1) of the Children’s Act, 2022 is enjoined to consider the following;

- (a) The conduct 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, personal protection order or an exclusions 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 to be relevant in the making of an order under this Section; and
- (j) The best interests of the child.

17. The Supreme court of Kenya in MAK-VS- RMAA (2023) KESC 21(KLR) listed the following guidelines for determination of custody matters. It held;

“Courts therefore, while making a decision that will impact the child are mandated to consider all the circumstances affecting the child. As such 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 responsibilities”

1. The existence of a PRA between the parties.
2. The past performance of each parent.
3. Each parent’s presence including his or her ability to guide the child and provide for the Childs 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 to the child.
7. The quality of the available home environment.



8. Need to preserve personal relations and direct contact 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 parent and
  11. The totality of the circumstances.
18. I will now proceed to determine the present Application guided by the above principles. The minor herein is aged 2 years and as such falls under the category of a child of tender years. Thus by operation of the doctrine of tender years, the custody should be granted to the mother (the Applicant herein) unless exceptional circumstances are demonstrated to exist. See RA-VS JNO suing as the Next Friend and mother minors IO and MM 92024) KECH 2557(KLR).
  19. Are they exceptional circumstances that have been established herein to deny custody to the minor herein to the Applicant (mother)? In JO Vs. SAO (2016) eKLR exceptional circumstances were stated to include; “Mother being unsettled; where a mother has taken a new husband; where she is living in quarters that are deplorable stated or where her conduct is disgraceful or immoral”
  20. The Respondent (father) has not established any of the aforesaid exceptional circumstances. He only expressed fears that he may not be able to visit the minor herein as the Applicant (mother) is bound to relocate to unknown places. This allegation was not substantiated and does not qualify as an exception to the general face as regards to grant of custody to mother for children of tender years. In the absence therefore, I hold and find that the best interests of the minor herein will be realised by granting the applicant actual physical custody.

### **Disposition**

21. The upshot is that I find the Notice of Motion dated 14/10/2024 merited. I hereby allow it in the following terms.
  - (a) That the Applicant (mother) be and is hereby granted actual and physical custody of the minor herein pending hearing and determination of the maintenance cause.\*
  - (b) That the Respondent (father of minor) shall forthwith surrender the actual and physical custody of the minor herein to the Applicant.
  - (c) That Respondent is granted unlimited visitation rights of the minor herein at reasonable times and places.
  - (d) That the order of this court of 23/10/2024, in regard to 50:50 sharing of medical needs, shelter, clothing and food shall continue to be in effect pending the hearing and determination of the maintenance cause herein.
  - (e) The Officer in charge of Mutomo Sub-County Children’s Department to supervise enforcement of above orders.
  - (f) Each party is at Liberty to move the court.
  - (g) Each party shall bear the costs of his/her application.

**DATED, SIGNED AND DELIVERED THIS.....27<sup>TH</sup> .....DAY OF ..... NOVEMBER.....2024.**



**HON. L .K. MWENDWA**  
**PRINCIPAL MAGISTRATE**

