



**AA (suing as father and next friend of FA and RA) v WH (Matrimonial Case E009 of 2022) [2022] KEKC 5 (KLR) (16 June 2022) (Ruling)**

Neutral citation: [2022] KEKC 5 (KLR)

**REPUBLIC OF KENYA**  
**IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)**  
**MATRIMONIAL CASE E009 OF 2022**  
**AH ATHMAN, SPK**  
**JUNE 16, 2022**

**BETWEEN**

**AA (SUING AS FATHER AND NEXT FRIEND OF FA AND RA) .... APPLICANT**

**AND**

**WH ..... RESPONDENT**

**RULING**

1. The petitioner / applicant's notice of motion dated May 30, 2022 seek orders that:
  - i. The Application be certified urgent
  - ii. The honourable court be pleased to issue an injunction compelling the respondent to allow the applicant unlimited access to the minors as per the chief Magistrate's court order at Malindi in Children's suit No 41 of 2014
  - iii. The Honourable court be pleased for the applicant to be given security by Kenya Police every time he accesses the minors.
  - iv. The Honourable court be pleased to issue orders compelling the respondent to allow children return to school.
  - v. The Honourable court be pleased to issue permanent injunction barring the respondent from psychologically manipulating the minors and causing friction between the minors and their paternal relatives
  - vi. The honourable court issue orders for the police to assist the applicant have unlimited access to the minors.
  - vii. Costs



2. The applicant deposed that since the divorce, the respondent has been frustrating and / or denied him access to the minors despite a court order. He further averred that the respondent took the children out of school; denying the children their right to education in a bid to frustrate him.
3. The respondent opposed the application through replying affidavit dated June 7, 2022. She deposed that she never denied the applicant access of the minor children. She averred that since their divorce in 2013, the applicant has shown no interest in maintaining and providing for the minors and that she single-handedly brought up and provided for the minors. She stated further that the minor RAA goes to [Particulars Withheld] primary school while FAA goes to [Particulars Withheld] in Mombasa. She further averred that the applicant continuously insults her in front of the children. She prayed for custody of the minor children that the applicant be compelled to provide KES 62,000.00 per month as children maintenance and he be compelled to furnish her with copies of his ID and the minor's birth certificates.
4. The parties herein, were married under Islamic law. They are kindred, have relatives in Malindi and Lamu. They are blessed with three children HAA, RAA and FAA aged 18, 14 and 9 years. They divorced on January 11, 2013. Both have since remarried to different spouses. The respondent used to live in Malindi and the respondent in Nairobi. The parties had a dispute in the Children's suit No 41 of 2014 at the Chief Magistrate's Court at Malindi. She also moved to Nairobi with the children and enrolled them at [Particulars Withheld] at South B – Nairobi. One day the respondent travelled to Mombasa and enrolled FAA to a boarding Madrasa without informing or consulting with the applicant. On the same day the applicant went to the school and didn't find the children. He was apprehensive of their right to education and came to court.
5. Both parties admit a dispute between them had been heard and determined by the Children's court in Malindi. The applicant in his pleadings and annexures thereto confirm the same, yet he had averred that 'there is no suit pending in any court nor has there been any previous suit between myself and the defendant herein on the same subject matter.' This averment is patently incorrect and misleading.
6. Parties are not allowed to file same issues between same between same parties in different courts. This is aimed at ensuring there is no multiplicity and duplication of cases, there is end to litigation, stability and predictability of court decisions and maximum use of judicial time. Section 7 of the *Civil Procedure Act*, cap 21 laws of Kenya provides:

'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.'
7. The doctrine of *res-judicata* is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that an individual should not be harassed twice with the same account of litigation. See the Supreme Court's decision in the case of *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* [2016] eKLR.
8. Expounding further on the essence of the doctrine the Court in *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR pronounced itself as follows:

“The rationale behind *res-judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation



over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."

9. The parties herein had a dispute in the Children's Court at Malindi, Children's suit No 41 of 2014 heard and determined. It made findings on parental responsibility and access of the children. Although and because it is in the best interests of the children and convenient for both parties to have their dispute resolved in Nairobi where they now both reside, having no appellate jurisdiction and to avoid contradicting a court of concurrent jurisdiction, I shall not give any orders on the issues determined by the Malindi Children's court. For avoidance of doubt, the said orders issued by the children's court at Malindi are valid and still stand. They cannot be reviewed, stayed or set-aside by this court. The job of this court is limited to interpret the decision of the children's court to advance the best interests of the children and may only make decision on issues not determined in the Malindi case.
10. The Magistrate on August 25, 2015 gave the following orders:
  - i. That the parental responsibility gives the defendant unlimited access to his children
  - ii. That the defendant be given access to his children as was agreed.
11. The above order was a result of an interlocutory application. The children's court delivered a judgment on September 10, 2015. It observed parties had entered an agreement. However, he found and held

'I do not find any evidence to show that the defendant was coerced into entering the agreement. The agreement was valid. However, I find that the same does not conform with the form No. 4 of the first schedule to the children's Act. That being the case, it cannot be enforced by the court pursuant to section 26 of the children's Act. In addition, the agreement does not adequately address the needs of the children. ... in view of the foregoing, I hereby set aside the agreement.'
12. The court proceeded to give the following final orders on the matter:
  - a. The father shall continue providing all the needs for the 1<sup>st</sup> child, H.A.
  - b. The mother shall provide food, shelter and clothing for the two children under custody
  - c. The father shall cater for the school fees and other school requirements in respect of the other two children under the custody of the mother. The school fees be paid directly to the respective schools.
  - d. Both parents shall have equal responsibility towards medical care of the two children under the custody of the mother.
  - e. Both parents shall have unlimited but reasonable access to their children not under their custody.
13. The court vacated the interlocutory orders earlier made in the matter.



14. In this application, one of the children is now aged 18 years. He is able to make his own choices on access and with whom between his parents he wishes to live. The other two children are daughters and minors. They dispute relates to their access and education.
15. The final order In the Malindi case granted both parents unlimited but reasonable access to their children not under their custody. The respondent rejected the claim of denying the applicant access of the children but laments the way the access is done, at school in the presence of police officers. We agree with the respondent that this interferes with the psychological and mental health of the children. She however had in her submissions in these proceedings, had declined to have the applicant have the children on weekends ostensibly because they are female and the applicant does not take them to his home but takes them in rides in town. The children belong to path parents. The right to access is not only for the parents but for the benefit of the children. Parents must co-operate to reduce negative effects of divorce on their children. In the circumstances of this case, the best practice is to give access to the parent without physical custody on weekends and holidays so as not interrupt and or affect the children's education program. We thus clarify the meaning of 'unlimited but reasonable access' to mean that the applicant be given unconditional access of the minor children every weekend and half of the holidays (as their Madrasa program would permit).
16. The children's court order gave actual custody of the minor children to their mother, the respondent herein. The issue is heard and determined by a court of competent jurisdiction. We have no jurisdiction to review it. The Court was silent on legal custody. The general rule, which we hereby order, is that it is shared.
17. On the issue of education, RAA has since reported back at her school. A letter dated June 2, 2022 from the Headteacher indicates she attends school regularly. The respondent took FAA from [Particulars Withheld] primary school and enrolled her at [Particulars Withheld], a boarding Muslim school in Mombasa exclusively offering Islamic religious education. She did not consult the applicant, the child's father in this critical decision. No report or proof to show that the child had learning problems at the school was filed. There is no empirical study to establish that children who are slow learners at school may do well in madrasa. They are both schools and need same aptitudes. Both secular and religious education are important and parents must plan together the type of school (purely secular or integrated) or the stage and / or period a child should go to madrasa. Interruption of one type of education inevitably endangers child's academic development which offend the best interests of the child contrary to article 53 of the *Constitution* of Kenya (2010), section 4 of the *Children's Act*, cap 141 Laws of Kenya, article 3 (1) of the *United Nations Charter on the Rights of the Child (UNCRC)* and article 120 of the *Islamic Charter on Family (ICF)*. Accordingly, the respondent is hereby ordered to have FAA readmitted at the [Particulars withheld] primary school in any event but not later than (14) days from date of delivery of this ruling.
18. The issues in this application are the same as in the petition. The same are deemed determined. The matter is marked settled and resolved.
19. Each party to bear its own costs.  
Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON 16<sup>TH</sup> JUNE, 2022.**

**HON. ABDULHALIM H. ATHMAN**

**SENIOR PRINCIPAL KADHI**

In the presence of



Ms. Judith Afwande, court assistant

Applicant

Respondent

