



**In re DM (Minor) (Miscellaneous Application E003 of 2023)  
[2023] KEMC 288 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEMC 288 (KLR)

**REPUBLIC OF KENYA  
IN THE KWALE LAW COURTS  
MISCELLANEOUS APPLICATION E003 OF 2023  
ZK KAGENYO, RM  
MAY 26, 2023**

**BETWEEN**

**TJOE ..... APPLICANT**

**AND**

**DHK ..... 1<sup>ST</sup> RESPONDENT**

**IAM ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. This court was moved by way of a Notice of Motion application dated 20<sup>th</sup> January 2023 and filed in court under Certificate of Urgency on the 24<sup>th</sup> day of January 2023 (even though wrongly date stamped as 2022), supported by the Affidavit of TJOE of 20<sup>th</sup> January 2023 seeking orders that;
  - a. That this matter be certified urgent and service thereof be dispensed with in the first instance;
  - b. That the Honourable Court be pleased to grant and vest the Applicant the full and sole custody of the minor DM;
  - c. That the Honourable Court be pleased to grant an order permitting the applicant to take with her the said minor to Germany or any other lawful destination; and
  - d. That the cost of this Application be provided for.
2. The application was said to be based on the grounds that;
  - i. The applicant is the stepmother of the minor whereas the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are the biological father and mother respectively;



- ii. Since the conception of the minor the applicant and the 1<sup>st</sup> Respondent have been cohabiting together and are for all intents and purposes man and wife and are recognized as such by all who are known to them;
  - iii. The 2<sup>nd</sup> Respondent, due to some unavoidable circumstances has been unable to meet her parental responsibilities for the minor hence for the best interest of the minor, parties made arrangements for all her parental duties and responsibilities to be met by the applicant;
  - iv. The applicant has been meeting all the parental duties and responsibilities of the minor on behalf of the 2<sup>nd</sup> Respondent and the minor recognizes her as his mother;
  - v. The applicant is currently domiciled in Germany and is willing and able to meet all parental duties and responsibilities on the minor whereas she is slated to depart from this court's jurisdiction within the month of January 2023 and desirous of taking the child with her;
  - vi. The Respondents have no objection to the applicant being granted full and sole custody of the minor; and
  - vii. That the application is made in good faith with the best interests of the minor in mind and is not prejudicial to any party hearing
3. The same grounds were reflected in the Supporting Affidavit.
  4. The 2 Respondents filed their respective consents stating thus;

For the 1<sup>st</sup> Respondent,

I DHK of ID 135XXX..... being the biological father of the minor DM aged 2 years hereby confirm that I have no objection to the applicant taking full and sole custody of the minor and consent to the minor accompanying the applicant to Germany or any other lawful destination.

And for the 2<sup>nd</sup> Respondent,

I IAM of ID 402XXX..... being the biological parents of the minor DM aged 2 years hereby confirm that I have no objection to the applicant taking full and sole custody of the minor and consent to the minor accompanying the applicant to Germany or any other lawful destination.

5. The court asked for a children officer's social inquiry report that was filed on 9<sup>th</sup> May 2023.

### **Analysis of the evidence**

6. The matter was heard today where the court established the following facts;
  - a. The document said to be annexed as TJO-1, the birth certificate for the child was improperly attached as it offended Rule 9 of the Oaths and Statutory Declarations Rules but as was corroborated by the viva voce evidence of the 2<sup>nd</sup> Respondent, the court is reliably informed that the minor was born on 27<sup>th</sup> November 2020;
  - b. There were untruths in the documents filed in court and in particular the relationships and what emerged is that;
    - i. The 2<sup>nd</sup> Respondent is the biological niece to the 1<sup>st</sup> Respondent;



- ii. That even though not married, the 1<sup>st</sup> Respondent and the Applicant are partners of over 10 years, according to them;
  - iii. That the minor MD is the biological son of the 2<sup>nd</sup> Respondent; and
  - iv. That the 1<sup>st</sup> Respondent is not the biological father of the minor MD.
- c. That now, the 2<sup>nd</sup> Respondent together with her present partner DDT have been blessed with another child, a girl, who is 3 weeks old now that she lives with together with her partner DDT;
  - d. The court was unable to get and record the feelings or sentiments of the said partner, DDT about the minor DM and his readiness to take him or live with him in the same house;
  - e. That the 1<sup>st</sup> Respondent is not the biological father of the minor and that the biological father of the minor is unknown to the 2<sup>nd</sup> Respondent and the whole world, to the best of her knowledge;
  - f. That the Applicant has one biological child, a daughter aged 12 years who lives and studies in Kenya;
  - g. That since birth, the minor herein has been living in the house of and with the Applicant and when the minor was 14 months old, the 2<sup>nd</sup> Respondent left him and went to explore life out there never to come back for her child;
  - h. That the minor, for all intent and purposes, appears to know the Applicant herein as the mother, the 1<sup>st</sup> Respondent as the father and the 2<sup>nd</sup> Respondent as any other fellow mortal;
  - i. That the Applicant lives and works for a living in Kenya as a Tour Operator and visits Germany during holidays and given that even her German passport bears an expiry date, given that she regards Kenya as where she lives and Germany as where she visits, it would take more convincing to persuade this court otherwise that her domicile is Germany;
7. The court was able to observe the minor in court. Based on the viva voce evidence by the parties and the mere observation, I have no doubt that DM is a minor.
  8. The court is however dismayed by the intentional misrepresentation of facts on the documents filed in court and do reprimand the parties, in the strongest manner for intentionally misrepresenting facts for whatever reasons and worst, well aware that this is a matter involving a child who know not what is happening in court and could not raise his voice or hand to correct such misrepresentations touching on him.

### **Analysis and determination**

9. The application before court is coached under sections 4, 6, 25, 8(a), 82 (1), (3) (c) and (d) and 83 of the [Children Act](#) and sections 1A, 1B, 3A of the [Civil Procedure Act](#) and Order 5 1 Rule 1 of the Civil Procedure Rules, 2010 and under Articles 53 and 159 of [the constitution](#) of Kenya.
10. It is my view that to the extent that the Applicant grounded her application on the [Children Act](#), the same is based on the wrong provisions of the law as, based on the apparent desires of the Applicant, that would appear to be based on the retired [Children Act](#), 2001 which was repealed under section 249 (1) of the [Children Act](#), 2022, herein the Act, whose application commenced on 26<sup>th</sup> July 2022.



11. Further under the *Children Act*, 2022, the Rules to move court on applications by parties have not been developed. However, section 24 of the *Interpretation and General Provisions Act* guides that,

Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder.

12. As such, the Applicant ought to have been guided by the Rules under the repealed *Children Act*, which does not anticipate initiation of proceedings by way of a Notice of Motion but rather by way of either Chamber Summons or Originating Summons. Be that as it may, the Court proceeded under Article 159 (2) (d) of *the Constitution* and Section 95 (3) of the Children, 2022 to make its determination on merit but cautioned itself that it is not the business of the court to draft or recraft pleadings for a party and a party should not abuse the provisions of Article 159 (2)(d) to sanctify a procedural defect as in this one, the defects goes even to the root of the application and hence cannot be termed as just procedural technicalities but too substantive a matter.

13. From the face of the application, the applicant is seeking for custody orders.

14. Section 102 of the Act guides us thus,

1. A Court may, on the application of one or more persons qualified under subsection (3), make an order vesting the legal custody of a child in the applicant or applicants.
2. An order under subsection (1) may be referred to as a custody order, and the person to whom legal custody of the child is awarded is referred to as the custodian of the child.
3. Any of the following persons may be granted custody of a child—
  - a. parent;
  - b. a guardian;
  - c. any person who applies with the consent of a parent or guardian of a child and has had actual custody of the child for a period of three years preceding the making of the application, unless the Court is satisfied on evidence that a shorter period is sufficient to justify an order made in determination of the application; or
  - d. any person who, while not falling within paragraphs (a), (b) or (c), can show cause, having regard to section 101, why an order should be made awarding the person custody of the child.

15. Section 103 of the Act codifies the imperatives that the Court should consider in granting the custody order which are,

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. (which I must say that it calls for reference to the guide at the First Schedule of the Act and section 95 of the Act.)
16. In this case, it has been established that the Applicant has been living with the minor since he was an infant. It is further discernable that some of the reasons why the 2<sup>nd</sup> Respondent abandoned the child was due to poverty at the time and ignorance of the young adult she was who had just cleared her secondary school education. It is further to be noted that she had just lost her mother 2 years to the birth of the minor herein.
17. In her own words, the 2<sup>nd</sup> Respondent hinted to this court that after the newborn baby who is 3 weeks old is of 3 months old, she will start retracing the steps and compass of her life and stand on her own two feet. It was quite clear that she fears taking in the minor due to financial disability. To this effect, the court is guided by the provisions of section 12 (4)(c) of the Act that guides that when taking a child to an alternative care, such factors as poverty should not be the driving force, thus, poverty, disability or provision of education shall not be the driving factor for removing a child from his or her family and placing him or her in alternative care.
- The court is alive to the fact that the minor is not being taken away from the place he knows as home neither is a custody order classified as an alternative care under section 12 of the Act but the net effect of the application is to cut off the influence the mother may have on her child in decision making among other parental responsibilities.
18. This court notes that this is a delicate case to balance considering the relationship between the applicant and the minor which is linked up by the 2<sup>nd</sup> Respondent who saw it very difficult to describe his relationship with the applicant describing her as a partner and showing hesitation and reluctance on the mere suggestion by the court referring to the applicant as the spouse or wife of the Applicant. It is to be noted that the applicant had said that the 1<sup>st</sup> Respondent is her husband and the amorphous nature of such a relation calls for further attention and interrogation by this court.
19. It is further to be noted that in the application and in the consent of the 1<sup>st</sup> Respondent, they had lied before this court that the 2<sup>nd</sup> Respondent is the biological father of the minor herein.
20. The substance of the application and the facts that came out during the hearing made this court interrogate further the nature of the application before it and the net effect after granting the same.
21. It is my considered view that the resultant effect of the application is granting of what is akin to an adoption order under the disguise of a custody order. While cautioning itself not to step on what is the preserve of the High Court, the Court interrogated what a custody order is and its legal implications.
22. Section 2 of the Act defines custody to mean, lawful custody, whether by operation of law, written agreement or order of a Court of competent jurisdiction.



It then defines actual custody to mean, the physical possession, care and control over a child, whether or not such custody is exercised independently or jointly with another person.

and further defines legal custody to mean, means the conferment, to a person, of parental rights and responsibilities of a person having lawful custody over a child for a defined period of time under an order of a Court of competent jurisdiction.

23. On its part, The retired *children Act*, 2001, under Part VII which is the replica of Part IX of the current *Children Act*, 2022, defined under section 81 (1) the terms custody, care and control, legal custody and actual custody to mean,
  - a. “custody” with respect to a child, means so much of the parental rights and duties as relate to the possession of the child.
  - b. “care and control” means actual possession of a child, whether or not that possession is shared with one or more persons.
  - c. “legal custody” means so much of the parental rights and duties in relation to possession of a child as are conferred upon a person by a custody order.
  - d. “actual custody” means the actual possession of a child, whether or not that possession is shared with one or more persons.
24. Section 102 (1) of the Act contemplates the court making an order vesting the legal custody of a child in the applicant or applicants. On its part, the retired Act, under section 82 (1) which is a close clone of the present provision contemplated the court making an order vesting the custody of a child in the applicant or, as the case may be, in one or more of the applicants.
25. The court notes that the old Act was desirous of granting the custody of a child, but the new Act is specific to granting the legal custody of a child. Further, the court notes the broadened definition of the term legal custody which includes the conferment of rights by the court for a specific period of time.
26. In my view it would then appear that without the parameters or confined factors to consider on the extent of the rights that the court can grant the custodian, then a court may end up granting so much absolute orders which are even so close to adoption orders, which is defined as,
  - “adoption order” means an adoption order made under section 183 vesting the parental rights and responsibilities relating to a child in the adopter.  
a route that this court shall not take.
27. Having listened to the parties herein, appreciating the sentiments of the 2<sup>nd</sup> Respondent and the situation the minor herein is at, appreciating that the minor for now knows that the Applicant is his mother while the 2<sup>nd</sup> Respondent is just but a stranger but well aware that he is still developing and some day he will come to know the truth and reality, this court shall issue orders allowing an extension of the status quo but limited to such a length of period to accommodate the views of the minor based on the different developmental stages. I note that what the Applicant is asking is all that she has been doing only that this time she is asking for court’s permission to continue doing the same and it is in the best interest of the child if the same is allowed as no vice or ill doing towards the minor against her was cited from any quarter.
28. The court notes the pre-condition under section 102 (3)(c) of the Act and is satisfied that due to the age of the minor, the same could not be attainable.



29. The Applicant prayed for costs but the prayer is untenable given the relationship with of the parties and the nature of the application and as such, she shall bear her own costs.

### **Disposition**

30. From the foregoing, I am satisfied that it would be in the best interest of the minor DM if the application as prayed succeeds in part which it does and the following orders recommend themselves thus,
- a. The Applicant herein TJOE is hereby appointed as a custodian of the child DM for a period of 3 calendar years effective today the 26<sup>th</sup> day of May 2023 unless earlier revoked or later lawfully extended by the court in accordance with the law;
  - b. The Applicant is granted the permission to remove DM, the minor herein, from the borders of the Republic of Kenya and travel with him to Germany or any such other lawful destination; and
  - c. The Applicant is required to inform this Court by filing within this file not later than 14 days before departure, the itinerary of her travel with DM, the minor herein and her contact address while outside the country whenever she plans and intends to travel outside the Republic of Kenya, and further inform the court of their return, within 14 days of their arrival back in Kenya.

**DATED, SIGNED AND DELIVERED IN CAMERA AT KWALE ON THIS 26<sup>TH</sup> DAY OF MAY 2023.**

**KIONGO KAGENYO**

**RESIDENT MAGISTRATE**

In the presence of;

Mr. Archibald Kimbada- Court Assistant

Mr. Oliech Dominic, for the Applicant

Abbreviations/ list of redacted names

In compliance with section 95 (5) of the *Children Act* 2022, the Court used abbreviations to refer to the parties but for avoidance of doubt and for purposes of extracting the Order, the following abbreviations have been used to refer to the parties as herein below;

TJOE to mean Tunu Juma Osore alias Tunu Juma Osore Eberl;

DHK to mean David Henry Kibuyu;

IAM to mean Irene Amina Masinde;

DDT to mean Dogratus Dala Taka; and

DM to mean David Mdoe.

And pursuant to section 95 (7) of the *Children Act*, access to the full names of the parties to this application and for the minor herein, and access to the file as a whole is restricted and not to be accessed by non-parties to this matter unless with leave of court or clear authorization by this Court's Executive Officer.

**26<sup>th</sup> May 2023**

