



**WMM v MWK (Civil Appeal E165 of 2025)
[2026] KEHC 950 (KLR) (Family) (2 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 950 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E165 OF 2025
CJ KENDAGOR, J
FEBRUARY 2, 2026**

BETWEEN

WMM APPELLANT

AND

MWK RESPONDENT

*(Appeal from the Ruling of Hon. J. Kibosia, Principal Magistrate,
in Nairobi Children Court Children Case No. E1252 of 2025)*

JUDGMENT

1. The Respondent, who is the biological mother of DRNM, minor, instituted a suit against the Appellant, who is the minor's biological father, at the Children's Court at Nairobi.
2. The parties married and lived together as husband and wife from 2016 until 2025, when they separated. They lived together in South Africa for some time, but at the time of filing the suit, the Appellant resides in Nairobi and is separated from the Respondent, who resides and works for gain in South Africa.
3. The Respondent has actual custody of the minor, who is approximately six years old.
4. The Children's Court issued an interim order of maintenance of Kshs.30,000/= to be paid by the Appellant. At the hearing of the matter, the Court enhanced the maintenance to Kshs.50,000/= and also made a finding that it had no other jurisdiction with regard to the rest of the issues raised by the parties in the pleadings before the Children's Court.



5. The Appellant was dissatisfied with the ruling and preferred the present appeal. The memorandum of appeal raises the following grounds;
 - a. That the Learned Magistrate rendered her decision through a wrong analysis of the issues for determination as relates to relevant facts, interpretation of facts and application of the law.
 - b. That the Learned Magistrate exhibited bias by unilaterally amending the interim orders of KES 30,000/- per month to KES 50,000/- without any basis or interrogating both parties financial means in as relates to their obligations.
 - c. That the decision of the Learned Magistrate is in the circumstances unjust and unfair.
 - d. Such other and or further grounds as may be canvassed, adduced, proved and or emerge at the hearing of this appeal.
6. The appeal was canvassed via submissions.
7. The Appellant submitted that the Children’s Court at Nairobi had jurisdiction over the matter and further that the increase in the maintenance order from Kshs.30,000/= to Kshs.50,000/= was awarded without considering both parties’ affidavits of means, rendering the decision prejudicial and arbitrary.
8. The Appellant prays that the appellate Court sets aside all the orders emanating from the Ruling delivered on 11th September, 2025 and that the applications dated 14th July, 2025 and 21st August, 2025 be heard before a different Magistrate on a priority basis.
9. The Respondent submitted that the Children’s Court considered the relevant facts of the case and the applicable law in issuing the determination. She submitted that the Appellant is a person of means and that their means had been presented via interviews with the Children Officer.
10. She asked the Court to uphold the maintenance orders that were issued by the Children’s Court to ensure that the Appellant do indeed provide for the Child. With regard to the issue of the application of the minor’s residency permit and visa to allow her to continue living and attending school in South Africa, she submitted that this should be left to the South African Court.
11. I have considered the memorandum of appeal, the record of appeal and the parties’ submissions. The issues for determination are whether the Children’s Court has jurisdiction to hear and determine the case involving the minor, DRNM, who is residing abroad with her mother, the Respondent and, secondly, whether the increase in maintenance from Kshs.30,000/= to Kshs.50,000/= by the Children’s Court was merited.

Jurisdiction

12. The Children’s Courts are designated courts presided over by Magistrates that the Chief Justice has appointed by notice in the Kenya Gazette. (See Section 90 of the Children’s Act). They exercise civil and criminal jurisdiction in matters involving children.
13. Under Section 91 (1) of the Children’s Act, the Children’s Court have jurisdiction to —
 - a. conduct civil proceedings on matters set out under Parts iii, v ii, v iii, ix, x, xi, xiii, xiv and xv of this Act;
 - b. hear any charge against a child other than a charge of murder;



- c. hear a charge against any person accused of an offence under this Act;
 - d. hear a charge in any case in which a person is accused of an offence against a child or in which a child is the victim or complainant, and exercise any other jurisdiction conferred by this Act or any other.
14. The jurisdiction of a Court is established by the issues and prayers outlined by the party filing the suit. Parties cannot expand a Court's jurisdiction beyond what is provided by *the Constitution* or Statute. In children matters, it is essential for Children's Courts to thoroughly examine each case independently where jurisdictional questions are raised, ensuring that they consider the specific circumstances of each case and prioritize the child's best interests.
15. The Respondent initiated the suit via a Notice of Motion Application dated 14th July, 2025. It sought the following orders;
- i. That this Application be certified urgent and be heard on priority basis.
 - ii. That pending hearing and determination of this Application, the Plaintiff/Applicant be granted leave to process the permanent Residency documents for the minor at the Immigrations Department in South Africa without the consent of the Defendant/father.
 - iii. That the Plaintiff/Applicant be granted the interim Legal and Actual Custody of the minor.
 - iv. that the Defendant/Respondent be compelled to provide Ksh.80,000/= per month as interim maintenance of the minor pending hearing and determination of the suit.
 - v. That a Children Officer Report be filed in court.
16. The Appellant, besides his response to the Respondent's application, also filed an application dated 21st August, 2025. The application sought the following orders;
- I. That this matter be certified as urgent, be heard ex-parte and service on the Respondents and the Interested Parties herein be dispensed with on the first instance on the premise of urgency. Additionally, that hearing dates for this Application be granted on priority basis.
 - ii. That prior or during issuance of directions (before the Plaintiff, Respondents and Interested parties file their responses-) as affects the Applications dated August 13, 2025 and July 14, 2025 this Honourable Court do grant leave to the Defendant to file further affidavits sworn by the Defendant and other witnesses introducing further critical evidence within 7 days of such leave being granted.
 - iii. That pending determination of this Application and/or the main suit, this Honourable Court be pleased to appoint CWM Holder of National ID. No. 214XXXX, as the Defendant's testamentary guardian, with full paternal rights as the Defendant is entitled to within the law, in place of the Defendant should the Defendant be incapacitated temporarily or permanently.
 - iv. That this Honourable Court be pleased to Order that an independent child therapist be appointed on or before August 20, 2025 or within such other period as may be prescribed by the court to assess and treat the minor in South Africa and file periodic and final reports as may be applicable.
 - v. That pending determination of the Applications dated July 14, 2025 and August 13, 2025 including determination of the main suit, this Honourable Court be pleased to order that:



- a. The Defendant be granted shared legal custody with the Plaintiff and that the Defendant be granted actual physical custody whereas the Plaintiff be granted supervised access on terms to be decided by the Court;
 - b. The Defendant (holder of Kenyan Passport No. AK087XXXX) be allowed to travel and pick the minor (holder of Kenyan Passport No. AK087XXXX) from the Republic of South Africa and travel with the minor to Kenya. Additionally, that the Plaintiff does surrender the minor's original passport to the Defendant and any other relevant document to facilitate the minor's travel;
 - c. The Plaintiff (holder of Kenyan Passport No. AK087XXXX) be restrained from traveling with the minor from the Republic of South Africa to any other country other than Kenya. Additionally, if the Plaintiff and the minor are in Kenya, the Plaintiff is restrained from traveling with the minor outside Kenya unless authorised by the Court or the Defendant in writing to travel to South Africa or any other country. That these Orders are only to be varied by this Honourable Court.
 - d. The Plaintiff do provide all information and documentation used to obtain the Plaintiff's Critical Skills Permit from Minister for Home Affairs from South Africa as submitted to the Plaintiff's employer, the South Africa Qualifications Authority and any other statutory entity or person in Kenya or South Africa.
 - e. The 2nd to 7th Respondents do expedite the resolution of the Defendant's criminal complaint at Muthangari Police Station as relates to OB No. 21/08/08/25.
 - f. The Interested Parties if so willing, do assist the 2nd to 7th Respondents in resolving the criminal complaint filed by the Defendant through expedited processing of requests for information and allowing direct contact between all agencies or statutory entities as may be necessary including all other means that may expedite resolution of the complaint referenced.
- vi. That in the alternative to prayers 5 (a)& 5(b), pending the hearing and determination of this application and/or main suit as may be so ordered, this Court does order the Plaintiff:
- a. To facilitate virtual access of the Defendant to the minor on a daily basis: and
 - b. To ensure the Defendant be granted two-thirds of every school holiday to live with the minor in Kenya and return the minor back to the Republic of South Africa. Additionally, that the Defendant do cater for costs of travel of the Defendant and the minor; and
 - c. Be restrained from removing the minor from her current school, Trinity House School in South Africa, and the Plaintiff to communicate to the Defendant any event of nonattendance of the minor within 24 hours of such occurrence happening;
- vii. That this Honourable Court be pleased to order that pending the completion of investigations of the criminal complaint (OB No. 21/08/08/25.) filed by the Defendant, the determination of the Plaintiff's prayer seeking a waiver of the Defendant's consent in the Plaintiff's Application dated July 14, 2025 is suspended until otherwise determined.
- viii. That this Honourable Court be pleased to Order the 2nd to 7th Respondents do comply with all Court Orders requiring their enforcement jointly or severally as may be applicable or directed by this Court.



- ix. That this Honourable Court be pleased to Order the 1st Respondent to supply a copy of her payslip for the period February 2025 to August 2025 and her Affidavit of Financial Means within 7 days of service of this Court Order. Additionally, the Defendant is to be ordered to supply his Affidavit of Financial Means within the same period.
- x. That each party bears its own costs.
17. As I consider this matter, I am mindful of the Constitutional and Statutory imperative that the Child's best interests are 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”.
- Section 4 (2) and (3) of the Children's Act (“the Act”) provides: -
- (2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
- (3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act 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;
- (c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.
18. The Respondent applied to the Court for leave to process the permanent residency documents for the minor at the Immigration Department in South Africa, without the consent of the minor's father, who is also the Respondent. She requested interim legal and actual custody of the minor to facilitate this processing. Since the residency documents were to be processed in South Africa, I agree with the Trial Court that this issue is outside the jurisdiction of the Children's Court in Kenya. Because the laws of the host country apply, the Children's Court in Kenya cannot issue directives to processes within the Immigration Department in South Africa.
19. The other prayer that the Respondent sought was that the Appellant be compelled to provide Kshs.80,000/= per month as interim maintenance of the minor pending hearing and determination of the suit. The suit in question was initiated through a Notice of Motion Application dated 14th July, 2025. The prayer for legal and actual custody of the minor, as well as maintenance, was presented as interim and, therefore, was based on the determination of the prayer for leave to process immigration documents, as mentioned in the previous paragraph.
20. I have also looked at the prayers sought in the Appellant's application dated 21st August, 2025. Prayer 1 is spent, and prayer 2 on affidavits is rendered moot based on the findings about the application filed by the Respondent. Prayer 3 that asks the court to appoint a testamentary guardian would not be admitted for hearing because Section 124 of the *Children Act* and the Children (Guardianship) (Practice and Procedure) Rules, 2024 outline the procedures for the appointment of testamentary guardians and



registration of the testamentary instrument. A testamentary guardian may be appointed by a parent or guardian of the child in accordance with Section 124 of the Act.

21. The other prayers in the Appellant's application related to issues concerning travel, the Respondent's qualifications, and other matters unrelated to the child, including a criminal complaint.
22. The matters presented before the Children's Court that were relevant to the child primarily involved immigration issues in the host country, South Africa. Although the Child is a Kenyan citizen as provided for in Article 14(1) of *the Constitution* of Kenya, the prayer for leave to process the child's permanent residency documents with the South African Immigration Department without the father's consent exceeded the jurisdiction of the Children's Court exercising its jurisdiction as vested by Section 91 of the *Children Act*, CAP 141 of the Laws of Kenya.
23. This decision should not be interpreted to mean that the jurisdiction will not be applied to other matters covered by Section 91 simply because the child is outside the court's jurisdiction. (See ALO vs SOO [2024] KEHC 13098)
24. The order of the Children's Court on maintenance was made in the interim. There is an indication in the record that the Children Officer's report was presented. The Appellant, in his replying affidavit, stated that he has set aside Kshs.76,859/= per month for the minor. The enhancement to a sum of Kshs.50,000/= cannot be said to have been plucked from the blue. The parties were afforded an opportunity to be heard, and there was sufficient material for the Court's consideration.
25. I must caution myself that, to my knowledge, no substantive suit has yet been filed regarding the custody and maintenance of the child. The initial applications filed at the Children's Court having been unsuccessful, what happens to the maintenance orders? What orders can be put in place to safeguard the child's best interests, as required by *the Constitution* and the *Children Act*?
26. Disposition
 - a. The Appeal is dismissed. Each party shall bear own costs of the appeal.
 - b. The child being a child of tender years, it is in the child's best interests that formal orders for actual and legal custody and access be established, particularly given that the parents, though citizens of Kenya, are separated and in different jurisdictions. Additionally, significant decisions regarding the child's education, health, and welfare must be made. In consideration of the best interests of the child, the parties (either) involved are directed to file a substantive suit within 90 days if they have not reached a consensus.
 - c. In the best interest of the child, the interim monthly maintenance order of Kshs.50,000/= shall remain in effect for a period of four months. During this time, the parties are expected to pursue the directions outlined in (b) above. Once the suit is filed, the Children's Court may review, vary, or entertain any applications presented before it on the same.
 - d. Mention date to be fixed before the Children's Court.
27. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 2ND DAY OF FEBRUARY, 2026.

C. KENDAGOR

JUDGE

In the presence of:



Court Assistant: Beryl

Mr. O'makalwala, Advocate for the Appellant

Mr. Njuguna, Advocate for the Respondent

