



REPUBLIC OF KENYA



KENYA LAW
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**MKM v GGM (Family Appeal E119 of 2022)
[2026] KEHC 4848 (KLR) (Family) (17 April 2026) (Judgment)**

Neutral citation: [2026] KEHC 4848 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

FAMILY APPEAL E119 OF 2022

H NAMISI, J

APRIL 17, 2026

BETWEEN

MKM APPELLANT

AND

GGM RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. Terer, Resident Magistrate at the Chief Magistrate's Court at Milimani delivered on 18 November 2022 in MCCHCC No, E373 of 2022)

JUDGMENT

1. The present appeal arises from a deeply protracted and heavily contested child custody and international relocation dispute. The matter pits the Appellant, against the Respondent concerning the legal and actual custody of their minor child, who was born on 5 January 2016.
2. The litigation commenced in the Children's Court when the Respondent filed an Amended Plaint dated 26 August 2022. The Respondent sought an array of orders, primarily requesting that she be granted sole legal and actual custody, care, and control of the minor, alongside the leave of the court to permanently relocate with the child to the Commonwealth of Australia. The Respondent averred that the relocation was necessitated by her acquisition of gainful employment in Victoria, Australia, and further alleged that the Appellant had historically exhibited alcohol dependency, cruelty, and emotional neglect, rendering joint custody unfeasible.
3. In fierce opposition, the Appellant filed a Statement of Defence and Counterclaim dated 7 September 2022. The Appellant vehemently denied the allegations of unfitness and instead accused the Respondent of systematic parental alienation. He averred that the Respondent had repeatedly frustrated his access to the minor, relocated the child within Kenya without his knowledge, and had ultimately abandoned the child in Kenya with third parties while she travelled to Australia to secure her



employment. Consequently, the Appellant's Counterclaim sought actual custody, care, and control of the minor, alongside a permanent injunction restraining the Respondent from removing the child from the jurisdiction of the Kenyan courts.

4. The trial court heard the matter and delivered a final Judgment on 18 November 2022 in favor of the Respondent, granting her sole legal and actual custody of the minor, and unconditionally permitting her to travel with the minor to Australia. The Appellant was granted limited, structured access during the minor's summer holidays and virtual access via electronic gadgets.
5. Aggrieved by this determination, the Appellant lodged the instant appeal before this Court, seeking to have the trial court's judgment set aside and his Counterclaim allowed in its entirety. As a first appellate court, the mandate bestowed upon this Court is well settled. This Court is obligated to re-evaluate, re-assess, and re-analyze the evidence tendered before the subordinate court, both on points of law and fact, and to arrive at independent findings and conclusions, while bearing in mind that it did not have the advantage of observing the demeanour of the witnesses.

Brief Background

6. The parties met in the year 2007 in a professional setting and subsequently commenced a romantic relationship in 2012. The nature of the union that followed was heavily contested during the trial. The Appellant contended that the parties solemnized their union through a traditional customary marriage celebrated on 15 April 2015, averring that he fulfilled all traditional rites, including the payment of dowry amounting to Kshs. 300,000/= to the Respondent's family. This assertion was corroborated by the testimony of the Appellant's mother, Lucy Gachigo Mutwiri, who testified to her presence at the dowry negotiations. Conversely, the Respondent explicitly denied the crystallization of a legal marriage, asserting that while preliminary dowry negotiations occurred, the planned formal wedding scheduled for 29 August 2015 was aborted due to the deterioration of their relationship. The Respondent presented email communication and budget plans from May 2015 to support her assertion that the marriage plans were ultimately abandoned. Regardless of the exact legal classification of their union, it is an undisputed fact that the parties cohabited and that the Appellant is the biological father of the minor, thereby invoking the full spectrum of parental rights and responsibilities enshrined in *The Constitution*.
7. The relationship between the parties was characterized by significant turbulence. The Respondent testified that between 2013 and 2019, the Appellant was frequently absent due to employment obligations in South Africa and Ghana. She alleged that the Appellant suffered from severe alcohol dependency, which resulted in erratic behaviour, emotional abuse, and failure to consistently provide for the minor's holistic needs. The Appellant, however, presented evidence of substantial financial contributions to the family unit. He adduced records demonstrating that he consistently paid the minor's school fees at Nova Pioneer Academy, maintained a comprehensive medical insurance cover for the family, and routinely remitted monthly upkeep stipends of Kshs. 50,000/=. Furthermore, the Appellant provided documentation showing massive capital injections into joint business ventures, including contributions of Kshs. 632,217/= towards a salon business in Meru, as evidenced by bank transfer records and partnership communications from 2015.
8. The disintegration of the relationship culminated in several legal and physical confrontations. In 2018, the Respondent filed Children Cause No. 1021 of 2018 seeking to relocate with the minor to Canada for further studies, a move the Appellant opposed. That suit was eventually withdrawn by mutual consent following a brief reconciliation. However, the reconciliation failed, and the parties established separate residences. The conflict reached a critical juncture in mid-2022 when the Respondent secured employment in Victoria, Australia, as evidenced by an employment contract dated 19 July 2022. In



preparation for this relocation, the Respondent forwarded a blank Australian visa consent form to the Appellant for his signature in December 2021. The Appellant refused to execute the document, citing a lack of consultation, fear of permanent parental alienation, and the absence of a structured plan for the child's education and welfare in Australia.

9. The access dispute escalated severely in August and October 2022. Following an interlocutory access order issued by the trial court on 4 August 2022, the parties engaged in highly acrimonious exchanges. The Respondent alleged that the Appellant utilized his access weekends to expose the child to strangers and inappropriate environments, specifically citing an incident on 9 October 2022 where an unknown male individual picked up the minor from her residence on the Appellant's behalf. Conversely, the Appellant testified that upon attending a school function in July 2022, he discovered the minor looking dejected and malnourished. Upon inquiry, he learned that the Respondent had already travelled out of the country to Australia, leaving the minor in the care of third parties without his knowledge or consent, a situation he characterized as abandonment.
10. Upon the conclusion of the trial, the trial court delivered a judgment that effectively granted the Respondent's prayers in their entirety, while entirely dismissing the Appellant's Counterclaim without substantive analysis. The precise orders were:
 - a. The Plaintiff is granted the legal, actual custody, care and control of the minor.
 - b. The Plaintiff is granted leave to travel with the minor to Australia or any other jurisdiction as circumstances may require;
 - c. The Defendant to be granted access to the minor during the summer holidays. Parties to mutually agree on the place and modalities of this mode of access;
 - d. The Plaintiff to facilitate the Defendant's access to the minor in Australia whenever he desires by supplying requisite visa application documents;
 - e. That the Defendant to avail the requisite gadgets and/or equipment to facilitate his virtual access to the minor;
 - f. Parties to agree on the Defendant's telephone and virtual access to the minor taking into account the different time zones differences;
 - g. The Plaintiff to fully assume parental responsibility of the minor whilst in Australia and the Defendant is at liberty to assist depending on his financial abilities;
 - h. Each party to bear own costs.

The Appeal

11. The Appellant's Memorandum of Appeal raises several critical questions of law and fact, challenging the jurisprudential basis of the trial court's decision.
12. The Appellant argues that the trial court erred in law by granting sole legal custody to the Respondent without any evidentiary finding that the Appellant was an unfit father. The Appellant contends this violates the principle of equal parental responsibility enshrined in section 32 of the *Children Act*.
13. The Appellant asserts that the trial court erroneously applied the exceptional circumstances rule and prioritized the Tender Years Doctrine over the paramount consideration of the child's best interests, specifically ignoring evidence of the Respondent's alleged abandonment of the minor.



14. The Appellant argues that the trial court failed to consider the practical difficulties, immense expenses, and the likelihood of total parental alienation that would result from permitting the minor to be permanently removed to Australia. The Appellant further contends that the trial court's order permitting travel to any other jurisdiction was fatally broad.
15. The Appellant submits that the trial court erred in failing to institute legal safeguards—such as security bonds or mirror orders—to ensure the enforceability of the Appellant's access rights once the minor was removed from the jurisdiction of the Kenyan courts.
16. The Respondent, in her written submissions, robustly defended the trial court's judgment. She submitted that the trial court correctly applied the law, noting that under Kenyan jurisprudence, there is a legal presumption that a child of tender years belongs with the mother unless exceptional circumstances dictating unfitness are proven. Citing the cases of *KMM v JIL eKLR* and *HGG v YP eKLR*, the Respondent argued that the Appellant completely failed to adduce evidence of disgraceful conduct, immorality, or mental incapacity on her part that would justify denying her actual custody.
17. Regarding the relocation, the Respondent submitted that the trial court correctly evaluated the best interests of the child under section 83 of the *Children Act*. She argued that the relocation was bona fide, driven by her employment in Australia, and would afford the minor superior educational and cultural exposure. She further submitted that the Appellant's parental rights were not extinguished, as the trial court had provided for structured virtual access and physical access during school holidays.

Analysis & Determination

Equal Parental Responsibility vs. Sole Legal Custody

18. The first issue for determination is whether the trial court erred in law by stripping the Appellant of legal custody and awarding sole legal custody to the Respondent. It is a fundamental tenet of family law that legal custody and actual custody are distinct legal concepts. Legal custody pertains to the parental rights, duties, and authority to make significant, long-term decisions concerning a child's upbringing, including matters of education, religion, medical care, and general welfare. Actual or physical custody refers merely to the day-to-day physical possession, care, and control of the child.
19. The legal architecture governing parental responsibility in Kenya underwent a revolutionary paradigm shift with the promulgation of *The Constitution*. Article 53(1)(e) explicitly and unequivocally guarantees every child the right to parental care and protection, which includes the equal responsibility of both the mother and the father to provide for the child, whether they are married to each other or not.
20. This constitutional imperative was subsequently codified to cure historical gender biases through the enactment of the *Children Act*. Section 32(1) dictates that, subject to the provisions of the Act, parents shall have parental responsibility over a child on an equal basis, and neither the father nor the mother shall have a superior right or claim against the other in the exercise of such responsibility, regardless of whether the child is born within or outside wedlock.
21. The Supreme Court recently provided definitive guidance on the inviolability of these rights in the landmark decision of *MAK v RMAA & 4 others KESC 21 [2023] (KLR)*. In that matter, the Court held that parental rights cannot be arbitrarily extinguished without conclusive, empirical evidence of gross unsuitability. The Court emphasized that foreign and domestic courts alike must adhere to the constitutional framework of equal parental responsibility, and that stripping a parent of legal custody



requires an extremely high evidentiary threshold demonstrating that the parent poses a direct threat to the child's welfare.

22. In the present case, the trial court entirely stripped the Appellant of legal custody without making any definitive, evidence-based finding that he was an unfit parent. While the Respondent levelled various allegations of alcohol dependency and emotional turbulence against the Appellant, the evidentiary record demonstrates that the Appellant has consistently fulfilled a significant portion of his parental obligations. He maintained comprehensive medical insurance for the minor, paid premium school fees at Nova Pioneer Academy, and continually sought access and involvement in the child's life. As established in *JKN v HWN* [2019] eKLR, spousal conflicts or allegations of past interpersonal misconduct do not inherently render a parent unfit to exercise legal custody over a child, unless such conduct is proven to cause direct harm to the minor.
23. The jurisprudence dictates that sole legal custody should only be vested in one parent in exceptional circumstances—such as documented physical abuse, severe persistent neglect, or profound mental incapacity. None of these thresholds were conclusively established against the Appellant to a degree that warrants the termination of his constitutional right to participate in the major decisions of his daughter's life. The trial court blatantly misdirected itself in law by conflating actual physical custody with legal custody, thereby issuing an order that directly contravenes section 32 of the *Children Act*. The award of sole legal custody to the Respondent was an erroneous deviation from the law. Consequently, joint legal custody must be restored, affirming that both parents retain equal, shared authority over the minor's long-term welfare and developmental trajectory.

Actual Custody, the Tender Years Doctrine, and the Best Interests of the Child

24. The second issue pertains to the award of actual custody to the Respondent. The trial court awarded actual custody to the mother, relying heavily on the jurisprudential presumption that a minor of tender years—particularly a female child—ought to reside with the mother. The Appellant heavily contests this, arguing that the trial court blindly applied the Tender Years Doctrine while ignoring the Respondent's alleged abandonment of the minor when she travelled to Australia.
25. The legal landscape in Kenya has significantly evolved, moving away from rigid, gender-based presumptions toward a holistic, child-centric evaluation. Article 53(2) of *The Constitution* mandates that a child's best interests are of paramount importance in every matter concerning the child. In the highly persuasive and jurisprudentially rich decision of *SMM v ANK* [2022] eKLR, the Court provided a seminal exposition on this evolution. The Court noted that while the Tender Years Doctrine remains a persuasive consideration, it is no longer an inflexible rule of law. The doctrine has been explicitly subjugated to the Best Interests of the Child principle. The modern approach rejects automatic maternal preference, requiring instead a gender-neutral, comprehensive evaluation of the child's physical, emotional, and educational needs.
26. The evidentiary record confirms that the Respondent has been the primary caregiver for the minor since the parties separated and established separate residences in 2017. The minor, now 8 years old, has grown accustomed to the daily routine, emotional support, and primary care provided by the mother. Uprooting the minor from the primary caregiver she has known for her entire conscious life would likely cause severe psychological disruption.
27. The Appellant vehemently argues that the Respondent abandoned the child by travelling to Australia and leaving the minor with third parties. However, an objective review of the evidence indicates that the Respondent travelled temporarily to attend interviews, sign employment contracts, and secure housing and educational placements to facilitate the child's subsequent relocation. Under section 159(1)(a) and section 224 of the *Children Act*, abandonment is legally defined as a persistent failure to maintain



contact or provide for a child for a period exceeding six months to one year, or leaving a child without any provision for their care. Leaving a child temporarily in the care of trusted relatives or nannies while preparing for international family migration does not meet the strict legal threshold of abandonment.

28. The minor is deeply bonded with the Respondent. While the Appellant is clearly a willing and financially capable father, transferring primary physical custody to him merely to prevent the child's relocation would prioritize the father's access rights over the child's established emotional stability.
29. Therefore, while the trial court may have relied on an antiquated, rigid articulation of the Tender Years Doctrine, the ultimate conclusion—that the minor's actual physical custody should remain with the Respondent—aligns perfectly with the child's best interests. Preserving the continuity of care by granting actual custody to the mother is fundamentally sound in law and fact, and that specific order is hereby upheld.

International Relocation and the Jurisdictional Vacuum

30. The most contentious and legally complex issue in this appeal is the trial court's order granting the Respondent leave to relocate with the minor out of Kenya. The trial court issued a remarkably broad decree, stating that the Respondent is granted leave to travel to "Australia or any other jurisdiction as circumstances may require".
31. The rapid globalization of the modern workforce frequently results in transnational family disputes. When a custodial parent seeks to relocate internationally, the Court is faced with an excruciatingly delicate balancing act. The Court must weigh the custodial parent's constitutional right to freedom of movement, career advancement, and self-determination against the non-custodial parent's right to maintain a meaningful, continuous relationship with the child. Overarching both of these competing adult interests is the supreme metric: the best interests of the child.
32. Relocation applications in Kenya are rigorously evaluated using the welfare checklist enumerated under section 83 of the *Children Act*. This Court must evaluate the trial court's assessment of several factors, including the likely effect of the change in circumstances on the child, the practical difficulty and expenses of contact, and whether the relocation is motivated by a genuine desire to improve the child's standard of living rather than a mala fide attempt to alienate the left-behind parent.
33. The Appellant correctly relies upon the highly influential Australian High Court decision in *U v U* (2002-2003) CLR 238 and the seminal English decision in *Hadkinson v Hadkinson* 2 All ER 567, both of which have been heavily integrated into Kenyan jurisprudence. In *U v U*, the court emphasized that the practical difficulty and entailed expense of the child having contact with a parent must be meticulously weighed to determine if it will substantially and detrimentally affect the child's right to maintain a personal relationship with the left-behind parent.
34. The evidentiary record demonstrates that the Respondent's relocation to Victoria, Australia, is bona fide. She secured a legitimate employment contract, which notably includes full tuition scholarships for the minor in Australia. These factors undeniably contribute to the economic, social, and educational enhancement of the minor's life. The relocation is not a frivolous endeavour aimed at frustrating the Appellant, but a substantive career progression for the primary caregiver, which inherently benefits the child.
35. However, the trial court's blanket order granting leave to relocate to Australia "or any other jurisdiction as circumstances may require" is overly broad, legally precarious, and constitutes a serious misdirection of law. Such open-ended, geographically boundless orders effectively terminate the court's wardship over the minor, grant the relocating parent unfettered unilateral power, and strip the non-custodial



parent of any predictable geographical nexus for access. Relocation orders must be geographically specific to allow the court to assess the specific socio-legal environment the child is entering.

36. The Appellant's profound apprehension regarding the permanent loss of contact with his daughter is entirely justified. International relocation inherently strains the bond between the child and the non-custodial parent due to vast distances, exorbitant travel costs, and complex time zone differences. The trial court ordered virtual access and summer holiday visits but entirely failed to recognize the immense jurisdictional hurdle involved in enforcing these orders once the child leaves Kenyan soil.
37. The analysis reveals a critical, overriding omission by the trial court: The Republic of Kenya is NOT a signatory to the 1980 Hague Convention on the Civil Aspects of International Child Abduction.
38. The Hague Abduction Convention is the primary multilateral treaty framework designed to secure the prompt return of children wrongfully removed to or retained in any Contracting State, and to ensure that rights of custody and access under the law of one Contracting State are effectively respected in the other. In the absence of Kenya's accession to this treaty, there is no automatic, reciprocal mechanism for the enforcement of Kenyan custody or access orders in Australia. If the Respondent were to breach the access agreement upon settling in Victoria, the Appellant would have no international treaty mechanism to seek the child's return or to enforce his visitation rights. He would be forced to initiate entirely fresh, prohibitively expensive litigation de novo within the Australian family court system, facing severe jurisdictional disadvantages.
39. When a Kenyan court permits a minor to be permanently removed to a non-Hague or non-reciprocating jurisdiction, it must jealously guard its orders to ensure they are not rendered in vain. In *FAM v HSS* [2008] KECA 316 (KLR), the Court of Appeal poignantly noted that once a child is removed from the jurisdiction, satisfactory means of ensuring return are exceedingly difficult to devise, and thus leave must be granted subject to every guarantee that is reasonably possible. The trial court failed utterly in this duty.
40. To cure this glaring jurisdictional vulnerability and protect the constitutional rights of the left-behind parent, courts engaging in transnational family law utilize specific, highly effective legal instruments: Mirror Orders and Security Bonds. The trial court's failure to institute either of these safeguards, despite the Respondent's admission that she would be away for a minimum of 8 years and her explicit refusal to provide security voluntarily, was an error in principle that this Court must rectify.
41. A mirror order is an order issued by a competent court in the destination country that perfectly reflects and registers the terms of the custody and access judgment passed by the originating court. Its fundamental purpose is to ensure that the originating judgment is recognized and seamlessly enforceable in the foreign jurisdiction, thereby facilitating international compliance without necessitating fresh, contested litigation abroad. By obtaining a mirror order, the foreign court accepts jurisdiction over the matter specifically to enforce the terms agreed upon or ordered by the originating court.
42. The Supreme Court of India in the landmark case of *Smriti Madan Kansagra v. Perry Kansagra*—a case that specifically involved the relocation of a child from India to Kenya—set a profound comparative precedent regarding non-Hague jurisdictions. Recognizing that Kenya is not a Hague signatory, the Indian Supreme Court mandated the establishment of a mirror order in the Kenyan High Court to ensure that the Indian access and custody judgments were upholdable, recognizable, and enforceable before allowing the child to permanently relocate to Nairobi.
43. This comparative jurisprudence applies inversely with equal force in the present matter. Before the Respondent can legally enjoy the protection of the relocation order and settle in Australia, she must



voluntarily submit to the jurisdiction of the relevant Australian court to register and mirror the Kenyan custody and access orders. This ensures that the Appellant's access rights are protected under Australian domestic law. A failure by the trial court to mandate a mirror order left the Appellant legally exposed, practically disenfranchised, and vulnerable to total parental alienation.

44. Furthermore, Kenyan law explicitly contemplates the necessity of financial guarantees in relocation disputes. Section 150(2)(b) of the Act empowers the court to cause an applicant to execute a security bond, with or without sureties. This bond guarantees compliance with access orders and the eventual return of the child if so ordered by the court.
45. The Court has routinely utilized this mechanism in relocation and holiday access disputes to secure compliance. For instance, courts frequently order the relocating parent to deposit security bonds of substantial sums with Kenyan sureties to ensure that the child is not unlawfully retained abroad and that access schedules are strictly adhered to.
46. While the relocation to Australia ultimately serves the material best interests of the minor by providing superior educational and economic stability, it must not be permitted to act as a de facto termination of the Appellant's parental rights. Therefore, the grant of leave to relocate must be made strictly conditional upon the Respondent fulfilling rigorous legal and financial safeguards.

Disposition

47. The appeal succeeds in part. The Judgment and Decree of the Chief Magistrate's Court at Milimani delivered on 18 November 2022 in MCCHCC/E373/2022 is hereby set aside and substituted with the following comprehensive orders to govern the co-parenting and relocation of the minor:
 - i. The Appellant and the Respondent are hereby awarded joint legal custody of the minor. Both parents shall have equal, shared rights to consult and make determinations regarding the minor's long-term welfare, including major educational choices, significant medical interventions, and religious instruction.
 - ii. The Respondent is granted actual custody, care, and control of the minor.
 - iii. The Respondent is granted leave to relocate with the minor strictly to Victoria, Australia. The trial court's order allowing relocation to "any other jurisdiction as circumstances may require" is expressly vacated.
 - iv. Within ninety (90) days of this Judgment, the Respondent shall initiate proceedings in the appropriate Federal Circuit and Family Court of Australia having jurisdiction over the minor's residence, to register this Judgment as a Mirror Order. The Respondent shall file formal proof of such registration with the Deputy Registrar.
 - v. The Appellant shall have unlimited, unimpeded virtual access to the minor at reasonable hours, factoring in the time zone differences between Kenya and Australia.
 - vi. The Appellant is granted physical access to the minor during the minor's extended school holidays. The parties shall equally share the minor's time during this period if the minor travels to Kenya.
 - vii. Should the Appellant travel to Australia, the Respondent shall facilitate unimpeded physical access to the minor during weekends and non-school hours. The Respondent shall promptly provide any letters of invitation, documentation, or consents required to support the Appellant's visa applications to visit Australia.



viii. The financial maintenance of the minor shall be shared proportionally. While the Respondent shall bear the primary day-to-day costs of the minor's housing and basic upkeep in Australia, the Appellant shall continue to contribute to the minor's specific educational or major medical expenses.

ix. Each party shall bear their own costs for this appeal.

DATED AND DELIVERED AT NAIROBI THIS 17 DAY OF APRIL 2026

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For Appellant: N/A

For Respondent: Mr Machira h/b Mr. Otieno

Court Assistant Lucy Mwangi

