



REPUBLIC OF KENYA



KENYA LAW
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GOO v BAB (Civil Appeal E262 of 2023) [2025] KEHC 784 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEHC 784 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E262 OF 2023
TW OUYA, J
JANUARY 30, 2025**

BETWEEN

GOO APPELLANT

AND

BAB RESPONDENT

(Being an appeal arising from the Judgement and Decree of Honourable Wanyaga delivered on 18th January 2021 in Thika CM Children’s Case No. 134 of 2019)

JUDGMENT

Background

1. This matter emanates from the Judgement and Decree of Honourable Wanyaga Senior Resident Magistrate delivered on 18th January 2021 in Thika CM Children’s case No. 134 of 2019. This was a maintenance suit initiated by BAB (Respondent herein) suing as mother and next friend of LH, LF and LL who were minors against GOO (Appellant herein).
2. The matter proceeded to full trial and the Trial Court found in favor of the Respondent awarding the following amounts to be met by the Appellant:

“...considering that the earning capacities of the parties herein is equal, the financial obligations are divided equally i.e Ksh. 18,804/=. The defendant deponed that he has been providing schooling for the minors, he shall continue paying school fees and related expenses (excluding school uniforms). As noted earlier, school fees amounts to Ksh. 7,835/= per month. This amount is to be deducted from Kshs. 18,804/= leaving a balance of Ksh. 10,968/=. The defendant will thus in addition to meeting school fees and related expenses as per the fees structure provide Ksh. 10,000/= every month with effect from February 2021.”
3. In addition to the above, the trial court made a finding that the parties had reached a consent on the issue of custody and access to the children details and particulars of which were undisclosed.



4. The Appellant being dissatisfied with the above decision appealed to the high court at Kiambu against the said decision on the following grounds:
 - a. That the learned magistrate erred in law and in fact and misdirected himself by imputing that parties had reached a consent on the issues of custody despite no such consent having been recorded.
 - b. That the learned magistrate erred in law and in fact by failing to take into account the Appellant's prayer to have unlimited access of the minors, half the school holidays and every alternate weekend.
 - c. That the learned magistrate erred in law and in fact and misdirected himself by failing to take into consideration evidence by the Appellant that he had been denied access and custody of the minors.
 - d. That the learned magistrate erred in law and in fact by disregarding the pleas by the Appellant to be granted full custody of the minors.
 - e. That the learned magistrate erred in law and in fact by failing to take into account evidence adduced by the Appellant on his income and financial capability to cater for the minors.
 - f. That the learned magistrate erred in law and in fact by totally disregarding the evidence adduced by the appellant that he had another family which he caters for and was the legal guardian to other children whom he also caters for and as such the sums computed as monthly remissions was extremely unreasonable and harsh.
 - g. That the learned magistrate erred in law and in fact by failing to consider that the Respondent also works and has a salary and therefore the financial responsibility of catering for the minors ought to be split equally hence the computation of the financial responsibility of the appellant as against the Respondent in unfair.
 - h. That the learned magistrate erred in law and in fact by failing to consider that the children had been transferred to a more expensive school against the Appellant's wish and financial capability and failed to consider the Appellant's proposal to have the minors taken to [particulars withheld] Primary School which is a public school that is within the financial reach of both the appellant and the Respondent.
 - i. That the learned magistrate erred in law and in fact by failing to consider the best interests of the minors in contravention with the Children's Act by failing to consider the Appellant's evidence that the children were being neglected and mistreated as the Respondent is an absentee parent and on numerous times leaves the sister to take care of the children.
 - j. That the learned magistrate erred in law and in fact by failing to consider that the Respondent brings different lovers to the house that could lead to moral decay of the children.
 - k. That the learned magistrate erred in law and in fact by failing to consider testimony by the Appellant pertaining to the mistreatment and abuse of the minors at the hands of the respondent and her sister.
 - l. That the learned magistrate erred in law and in fact by disregarding the grounds contained in the replying affidavit filed on 5th February 2020.



- m. That the learned magistrate erred in law and in fact by overly burdening the appellant with financial responsibility of the minors instead of balancing between the two parties as envisioned by the children's Act.
 - n. That the learned magistrate's Judgement was unjust in the circumstances, against the weight of the evidence adduced and based on misguided points of fact and wrong principles of law thus occasioning a miscarriage of justice.
 - o. That the decision of the learned trial Magistrate is against the law and weight of the evidence and material on record and the same is against the interest of justice.
5. The Appellants pray for orders that:
- i. This appeal be allowed
 - ii. The Judgement and decree of Hon. Wanyaga delivered in Thika CM Children's Case No. 134 of 2019 on 18th January 2021 and all consequential orders arising therefrom be set aside.
 - iii. The appellant be awarded the costs of this Appeal and also the costs of the suit at the Lower court.

Submissions

6. The matter was canvassed by way of submissions by the appellant. The respondent did not file any submissions. The gist of the appeal hinges on two main issues; That the Trial Court failed to address the issue of custody of the children in its judgement and secondly that, the award against the Appellant for financial contribution towards maintenance of the minors was excessive and/or unfair.
7. The Appellant submits that there was no consent on the custody and access to the children and if there was one, he was not in the picture and that the court ought to have recorded the same as part of the judgement. He submits that this was a pertinent issue in the suit and failure by the court to address it is fatal. Further to the above, the Appellant submits that he had raised concern about the wellbeing of the children to the court during the trial that the Respondent was not taking the care of them by virtue of neglect and other unbecoming conduct not in the best interest of the child.
8. The Appellant has cited the *Constitution* Article 53 on the best interest of the child and section 4(2) of the *Children Act* that the best interest of the child shall be a primary consideration in all actions undertaken by public authorities concerning children. He urges the court to find that the best interest of the Children is to be with him the father where the mother has proved to be irresponsible. The Appellant now states that based on the omission by the trial court to address the issue in question, the Respondent has denied him of custody and access to the children and cut him off any form of communication making it hard for him to access them. He relies on Article 19 of *The African Charter and Welfare of the Child* and all attendant legislation on the rights of the child to parental care.
9. The Appellant's ultimate prayer is that this court grants him visitation rights every alternate weekend, Saturdays and Sundays (all inclusive) and half of all the holidays. He states that he is ready to pick children at 9.am on Saturdays and return them to the respondent on Sunday at 3.00 pm.
10. Secondly, the Appellant has raised the issue that the award against him towards maintenance of the minors was excessive and/or unfair. The Appellant states that he availed his pay slip as evidence to the trial court that he earned Ksh. 13,000 per month and that he had guardianship of other children. He states that the trial court relied heavily on the Respondent's evidence and ignored his version that the same were based on forged receipts and lies.



11. He submits that in order to comply with the said court orders and award, he is forced to relocate his children to public schools and relocated to live in deplorable conditions. He contends that had the court considered his source of income, it could not have made the orders it did. He relies on the Authority of *J.O.O Vs. A.J.M* (2017) eKLR where it was observed that the best interests of the child principle should not be used by one parent to the detriment of the other.
12. Further, the appellant is guided by the case of *S.A.K Vs. Z.D.N.P* (1209) eKLR where the court found an order by the trial court for maintenance payment of Ksh. 50,000 per month against the appellant's monthly salary of Ksh. 93,129/= was an act based on wrong principles in reaching such an order without considering that the appellant had two other children.
13. Section 94(1) of the *Children Act* stipulates factors that guides the court when making an order for financial provision for maintenance of children as follows;
 - a. The income or earning capacity, property and other financial resources which the parties or any other person in whose favor the court proposes to make an order, have or likely to have in the foreseeable future.
 - b. The financial needs. Obligations, or responsibilities which each party has or is likely to have in the foreseeable future.
 - c. The financial need of the child's current circumstances.
14. He submits that the trial court disregarded his evidence that he has another family with children and guardianship of other children whom he caters for and that the sums awarded as monthly remissions were excessively high.
15. The lower court in its judgement pronounced that both parties have equal obligation to provide for the welfare of the children but proceeded to order that the Appellant pays school fees and all other related expenses solely. This was in total contradiction on the reasoning of the court on 50:50 responsibility by both parents. The respondent is also working and earns more than the Appellant. The court also ought to have considered that the respondent does not have other children unlike the Appellant who has availed guardianship documents of his other children that he has been living with and provides for their wellbeing to date. It's the Appellant's submissions that all financial responsibilities ought to be shared equally between the parties.
16. It is for the aforementioned reasons that the Appellant seeks for orders to have the children transferred to less expensive school where the school fees shall be at least half of what is paid now. It is also important to bring to the court's attention that the children have since been transferred to a school unknown by the Appellant without his knowledge and consent. The appellant therefore seeks orders to compel the Respondent to reveal the school that the minors were transferred to so he can have an opportunity to follow up on the minors' academic progress. He seeks to be apportioned financial responsibility that he is able to personally pays for without involving the Respondent to avoid conflict in future.

Analysis and Determination

17. This being the first court of review, has the duty to re-evaluate the entire evidence taking into account that the Trial Magistrate had the opportunity to hear the witnesses, evaluate the evidence and to come up with a determination. The court has therefore considered the entire evidence and the Appellants submissions. The issues raised by the Appellant remain constant. That the issue of custody and access to the minors was not addressed by the trial court. It is the court's observation that this issue is now



spent as it was addressed by the trial magistrate vide Ruling delivered in Thika on 7th April 2020 vide which the court granted him access to the children on alternate weekends Saturdays and Sundays. The Appellant has raised the issue that this order has never been enforced and that the respondent has cut communication from him and he does not know the whereabouts of the children nor the schools that they go to. It is unfortunate that these concerns although raised to the trial court, were not addressed.

18. Considering that minors are at the center of the dispute at hand, the “best interest principle” is fundamental in decision making herein. Section 8 of the *Children Act*, CAP 141 provides for the best interests of the child as:

- “1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies-
2. All judicial and administrative institution, and all persons acting in the name of such institutions, when exercising any power conferred under this act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that it 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 and
 - c. Secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.
3. An any matters affecting the child, the child shall be accorded an opportunity to express their opinion and that opinion shall be taken into account in appropriate cases, having regard to the child’s age and degree of maturity.
4. The cabinet secretary shall issue guidelines to give effect to this.”

19. In *F.O.O Vs. M.C.A* (matrimonial cause 49 of 2013) (2023) KEHC 24900(KLR), Nyaundi j, the best interest principle was affirmed in that;

“...the law and judicial precedents require that this be the paramount consideration. The court is thus obligated to consider the impact that its decision will have on the well-being of the child and always make a decision that fosters the well-being of the child.”

20. Further, in *Re P.M.M (Child)* (Adoption cause E009 OF 2023) (2024) KEHC 5901 (KLR) Nyakundi j, opined that, in every decision, the court’s formulation is to ensure that the interest of the children must extend beyond those that are given explicit constitutional protection in article 53(1) and (2) of the *Constitution*.

21. This court is hesitant to grant the Appellant the prayer to have access to the minors during half of all the holidays being that the appellant already lives with another family. Instead, this court reviews the order for access to the minors on alternate weekends to include school holidays. Concerning the whereabouts of the minors and the school that they have been transferred to, this court directs that Respondent and the Children Officer Thika be summoned to appear before the Deputy Registrar. The respondent to answer as to why she has disobeyed court orders and the Children Officer to file report on the whereabouts and welfare of the minors.



22. Concerning the award for maintenance of the children, the evidence indicates that both parties are Primary School Teachers earning similar income but encumbered with loans and other obligations. At the time of the trial, the Appellant's pay slip indicated that his net pay was kshs.13,539 while the Respondent's net income was kshs.14,545.
23. From this court's analysis, the award by the trial court was excessive considering the Appellant's income. The court takes cognizance that the trial court apportioned the responsibility at 50:50 between the Appellant and the Respondent. However, a contribution of kshs.18,804 per month for the respondent was still way above his income of kshs.13,539. This court holds that there is need to adjust the living standard to the level that can be afforded by the parties and to give the Appellant room to attend to his other children and dependents. It is noted further that the court made awarded kshs.10,968 having taken into account that the Appellant pays the school fees. The court ordered further that the Appellant to pay additional kshs.10,000 over and above the school fees which he pays in full and which may not be constant as the children get older. This amount ought to be reduced and compensated for by the Respondent's contribution being that their income is at the same level.
24. This court may not delve into which schools the minors attend and the cost thereto save to reaffirm that the standard should be commensurate with what the parties can afford and should not be expensive at the expense of the Appellant.
25. Based on the above findings, this court holds that the award by the trial court was reasonable save that the extra amount of kshs. 10,000 is set aside and substituted with kshs.5,000. The Appellant will therefore contribute a total amount of kshs.15,968 per month in addition to paying school fees with effect from the date hereof.

It is hereby ordered that:

- i. The extra amount of Ksh. 10,000 is set aside and substituted with kshs.5,000. The Appellant will therefore contribute a total amount of kshs.15,968 per month in addition to paying school fees with effect from the date hereof.
- ii. The orders granted by the court vide Ruling delivered in Thika Children's Case No. 134 of 2019 on 7th April 2020 are hereby reviewed to: "All Alternate weekends including school holidays"
- iii. This matter to be mentioned before the Deputy Registrar on Thursday 13th February 2025 and the Respondent summoned on account of disobeying court orders issued on 7th April 2020 regarding access to the children by the Appellant.
- iv. Upon mention of the matter before the Deputy Registrar, The Children Officer to be summoned to submit a report on the whereabouts and welfare of the minors

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30th DAY OF January 2025.

R.O A

HON. T. W. Ouya

JUDGE

FOR the Applicant: GO

FOR Respondent: N/A

Court Assistant: Martin Korir

