



BAJ (Suing as Father and next friend to the Minors) v ZNH (Civil Appeal E071 of 2024) [2025] KEHC 3982 (KLR) (26 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3982 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E071 OF 2024
E OMINDE, J
MARCH 26, 2025
IN THE MATTER OF AN APPLICATION UNDER
THE CHILDREN ACT, 2021 LAWS OF KENYA
IN THE MATTER OF FBA, HA AND IA (MINORS)**

BETWEEN

**BAJ APPLICANT
SUING AS FATHER AND NEXT FRIEND TO THE MINORS**

AND

ZNH RESPONDENT

RULING

1. By a Notice of Motion dated 22/10/2024, the Appellant/Applicant seeks the following orders;
 1. Spent.
 2. That pending the hearing and determination of this Application the Honourable Court do issue orders that the Plaintiff/Applicant be granted access to the subject minors by having them for half the school holiday during the current school holiday.
 3. That pending the hearing and determination of this application the Honourable Court do issue an order that the Plaintiff/Applicant be allowed to have unlimited phone access to the subject minors.
 4. That pending the hearing and determination of this application the Honourable Court do issue an order that the Defendant/Respondent be compelled to provide a phone number where the Plaintiff/Applicant can have unlimited phone access to the subject minors.



5. That this Honourable Court do issue an order compelling the OCS nearest police station to enforce any orders made against the Defendant/Respondent.
2. The application is premised on the grounds therein and it is further supported by the Affidavit sworn by the Applicant on the same date.
3. The Applicant deposed that he is the biological father of the minors herein whilst the Respondent is their biological mother. He contended that the Respondent has denied him access to his children, that he only gets to talk to his children when they sneak and call him using different phones, that he has tried reaching out to the Respondent to allow him to see and talk to his children but she has cut off all communications and that his family members have also reached out to her family but they have told him to forget that he ever had children.
4. The Applicant maintained that he does not know the well fare of his children and the situation pains him and has affected him physiologically as he loves his children very much. The Applicant fears that his children do not attend school since June 2023 as he went to their previous school and was told that no transfer request had been made as the children are still registered in the school under the nemis system. The Applicant further deposed that it is evident that no school admits children without a nemis number. The Applicant contended that his children's right to education has greatly been infringed.
5. The Applicant deposes that he is desirous of exercising his parental rights and obligations over his children and he will continue to give the best care possible and that he shall have a good care giver since he has hired a nanny and together with his mother and his older daughter who is living with him they will assist him take care of the children. The Applicant deposes that he is aware that the Respondent is the mother of the children and as such he wants the Court to divide the school holidays between them. That he also has adequate means to provide for the children while under his care.
6. The Applicant further deposed that both him and the Respondent have equal parental rights and that he will be greatly prejudiced as he has not been allowed to enjoy his parental rights.
7. In conclusion, the Applicant deposed that the Respondent has not provided any compelling reasons why he should not be granted access to his children and that it is in the best interests of the minors that the Courts grants the orders sought.

Replying Affidavit

8. The application is opposed by the Respondent vide her Replying Affidavit sworn on 25/11/2024.
9. In the said Affidavit, the Respondent deposed that the Applicant is being dishonest, that she has not cut off communication with the Applicant herein, that the Applicant herein has his phone number which he has never bothered to call and ask about the minor's welfare. In the alternative, the Applicant deposed that she willing to give him a phone number to which he call and talk to the minors. The Respondent maintained that her family members have never denied the Applicant access and neither have they said anything about forgetting that he ever had children and that the children are doing well and are in school.
10. The Respondent further deposed that the children are enrolled in [Particulars Withheld] Academy in Eldoret, an integrated school and that her brother has been supporting her and assisting her in paying their school fees since the Applicant herein disregarded the Kadhi's order to provide support and school fees. The Respondent added that if the Applicant was being truthful and willing to support and exercise his parental rights and obligations over his children, he would have complied with the orders given by the Kadhi in terms of provision of school fees, medical expenses, clothing and more.



11. The Respondent further deposed that she was initially hesitant but now open to allow Court supervised access in Eldoret, preferably at [Particulars Withheld] Hotel in Mti Moja in presence of the mother and aunt to the children FM, due to the fact the Applicant herein has exhibited violent behaviour towards her and the minors on several occasions. According to the Respondent structured access is paramount and is in the best interest of the children as they are emotionally fragile and traumatized.
12. The Respondent contended that the Applicant's mother previously stayed with the minors and did not look after them as she left for work and the welfare of the children under her watch was not good as the minors never attended school. The Respondent alleged that the Applicant herein often abuses drugs and alcohol in presence of the minors and often exhibited violent behaviours toward her while they watched. The Respondent is not sure if the hired nanny will be able to take of the children well as she is not sure of her experience with children. The Respondent added that the children are still of tender age and require full attention of their mother.
13. The Respondent acknowledged that it is true that they have equal parental rights but urged the Court to investigate the circumstances of this case, call the minors and interview them if need be and inquire whether they are comfortable spending the holidays with their father and in the alternative, the Respondent sought Court to allow supervised visits.
14. The Respondent deposed that she is willing to receive the Applicants contribution and have him exercise his parental rights of bonding with the children save that the visits be supervised and that the children are not disrupted and or moved from the current school and town as they joined and adapted well to.
15. The Respondent contended that the Applicant herein has exhibited violence toward her in the presence of the children, forcing her to flee. She added that she has marks and healed bruises on her body. She also has reports she made to the police and treatment chits from the hospital she received treatment at.
16. The Respondent is apprehensive that should the Applicant be granted access to the minors, being of Somali descent and having roots in Somalia, he might leave with the minors and that she would be left distraught as to their whereabouts.

Further Affidavit

17. The Applicant filed a Further Affidavit dated 16/12/2024 wherein he reiterated the contents of his Supporting Affidavit and added that the Respondent took away their children and he has never been allowed to see or talk to them since 2003 and that he has dedicated his time and resources to look for the minors and Respondent to no avail.
18. The Applicant reiterated that he was not aware of the orders of the Kadhi's Court and only became aware of their existence when the Respondent produced the said orders in the Children's Court.
19. The Applicant maintained that he was the primary provider of the minors since they were born, prior to the unprecedented moved by the Respondent, that he enjoyed the company of the children as did they. That he wishes to be able to spend ample time with the minors as is his right and for the well being of the minors. He reiterated that that the minors have a right to access both their parents.
20. He further deposed that he is a devoted father and would do anything within his power to see that his children are well provided for. The Applicant reiterated that the Respondent has denied him access to



the minors whether physically or via phone and that his advocate on record has tried to negotiate access terms with her previous advocates and current advocates but their request went unanswered.

21. The application was canvassed by way of written submissions. The Applicant's Counsel filed submissions dated 16th December 2024 and the Respondent's Counsel filed submissions dated 24th January 2025.

The Submissions

22. It is important for the court to point out at this stage that upon my perusal of the Applicant's submissions dated 16/12/2024 and filed on 28/01/2025 and the Respondents submissions dated 24/01/2024 and filed on 28/01/2025, I note that the said submissions are with respect to an earlier Application dated 15/04/2024 and not the present Application dated 22/10/2024. The Hon Justice R. Nyakundi exhaustively and conclusively dealt with the Application dated 15/04/2024 in his Ruling dated 16/07/2024. As the matter now stands, parties did not file any submissions in respect of the application 22/10/2024. Nevertheless, the Court will proceed to render a determination.

Determination

23. I have carefully considered the pleadings on record. I also take cognisance of the fact that it is the responsibility of every Court, when addressing issues related to children, to take into account the provisions of Article 53 of *the Constitution* of Kenya, 2010. The said Article 53(2) provides as follows:

“(2) A child's best interests are of paramount importance in every matter concerning the child.”

24. Further to this Constitutional provision, Section 8(1)(2)&(3) of the *Children Act*, 2022 provides as follows: -

“(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—

(a) the best interests of the child shall be the primary consideration

(b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.

(2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers 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 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; 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) In any matters affecting a 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.”

25. It is trite law therefore that in making any decision affecting children, it the court must be guided by the best interest of a child. In the case of MAA v ABS [2018] eKLR, the Court held as follows: -

“While considering this matter, this Court is alert to the welfare of the children herein who are of tender years. The matter is not about the applicant/appellant and the respondent; and their interests are secondary to those of the child. The foregoing provisions require this Court to treat the interests of the child as the first and paramount consideration and must do everything to inter alia safeguard, conserve and promote the rights and welfare of the child herein. Acting in the best interest of the children in question”

26. Further, it is a well-established Constitutional principle that parental responsibility is a shared obligation between both parents in regard to their child or children as the case maybe and neither parent shall be regarded as having a preferential or superior claim over a child as compared to the other. In P.K.M vs A.N.M (2020) eKLR, Aroni J stated that;

In my view therefore, one need not go further to look at what parents need to do for a child and to what extent. In this instance the parties have joint responsibility towards their son and no one is superior to the other...”

27. It is common ground that the Applicant and Respondent are the parents of the minors the subject matter of this Application. Having considered the facts deposed in both the Affidavit of the Applicant and the Respondent, it is my finding for the record that the fact of shared parental responsibility of the children as stated by the Applicant is acknowledged by the Respondent who states that she has no objection to the Applicant having access to the children save that it be under supervision because the Applicant has assaulted her previously in the presence of the children. I note that in the further Affidavit by the Applicant, this deposition was not rebutted, denied and or controverted by the said Applicant.

28. I have herein stated that the above observation is for the record for reasons that the issue of having the children stay with the Applicant for half the school holiday as sought in prayer (2) of the instant Application is now moot in light of the fact that the said prayer was related to a specific school holiday which has since passed. However, on the rest of the orders sought, in light of my conclusions on both Statutory and Case law as herein summarised, I find merit in the application by the Applicant and the same is now hereby allowed as follows;

- a. That an order is now hereby issued that the Plaintiff/Applicant be and is now hereby allowed unlimited phone access to the subject minors.
- b. That the Defendant/Respondent be and is now hereby directed to forthwith provide through her Advocate on record a phone number where the Plaintiff/Applicant can have unlimited phone access to the subject minors which number is to be shared with Applicant's Advocate on record for the benefit of the Applicant.
- c. The order seeking that the OCS of the nearest Police Station enforces these orders is denied for the simple reason that this is a matter involving minors and it is my considered opinion that police involvement is unwarranted.



d. The costs of the Application to be in the cause.

READ DATED AND SIGNED AT ELDORET ON 26TH MARCH 2025

E. OMINDE

JUDGE

