



TMN v DMM (Civil Appeal E093 of 2023) [2025] KEHC 9197 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9197 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E093 OF 2023
HK CHEMITEI, J
JUNE 26, 2025

BETWEEN

TMN APPELLANT

AND

DMM RESPONDENT

*(Being An Appeal From The Judgement Dated 11/8/2023
(Hon C.C Oluoch) In Childrens Case No. 315 Of 2020)*

JUDGMENT

1. The Appellant and the Respondent are husband and wife although it appears that at the time of the suit at the trial court their relationship was strained.
2. They were blessed with three children. The first was from a relationship between the Appellant and another woman. At the time of filing the suit she was already 23 years old and therefore an adult. The other two were 14 and 7 years respectively.
3. The Appellant filed suit against the Respondent seeking legal custody of the minors as well as unlimited access.
4. The trial court on 11th August 2023 delivered its verdict in which it made various orders concerning the custody and maintenance of the minors as well as the parties access to them. The Appellant not satisfied with the same has appealed to this court citing several grounds.
5. The substantive grounds raised by the Appellant are that the trial court granted the Appellant prayers yet there was no counterclaim.; that the court granted custody to the applicant during school days yet it was her who forcefully took the children from school; not considering the wishes of the children; burdening the Appellant with heavy responsibilities and the court failing to decide on who shall meet the transport costs for the minors.
6. The court directed the parties to file written submissions which they all complied.



Appellant's submissions.

7. The Appellant submitted that the court granted the Respondent's prayers which ordinarily ought to be granted whenever there was a counterclaim. He submitted that a party is bound by his pleadings as was decided in *Raila Odinga & Another v IEBC & Others* [2017] Supreme Court of Kenya.
8. On the issue of granting custody of the minors to the Respondent he submitted that it was the Respondent who forcefully took the children out of the Appellants custody and that she ought to have approached the court for orders without taking the children away.
9. He also argued that the trial court failed to take into consideration the wishes of the minor especially their desire to stay with the Appellant
10. On the issue of responsibilities for maintaining the minors it was his case that the trial court failed to take into consideration that the duties of parents were to share equal responsibilities and that the responsibilities given to him was much more than the Respondent yet her affidavit of means was good as his.
11. On the school transport issue, he submitted that the court ought to have been categorical on who was to shoulder that responsibility and not the Appellant alone.
12. He therefore prayed for the appeal to be allowed.

Respondents' submissions.

13. The Respondent agreed with the findings of the trial court by submitting that the issue of counterclaim was no longer necessary as there was consolidation of the suit she had filed with the Appellant's suit and therefore the prayers she had sought were considered by the court.
14. It was her case that the trial court considered the best interest of the minors when it delivered its decision and this was exemplified when it considered the evidence taken on camera from the minors.
15. As regards the orders for maintenance she submitted that the court was correct in apportioning the amount to each of the parties considering their affidavit of means.
16. The Respondent therefore prayed for the Appellant's suit to be dismissed.

Analysis and determination.

17. The court has perused the entire proceedings before the trial court as well as the judgement. The responsibility of this court is to simply reevaluate the evidence so far presented at the trial court and come up with independent finding noting that it did not have the advantage of seeing the parties testify unlike the said court.
18. What is not in dispute is the fact that the two minors are the children of both parties herein. They each consequently have a right over them in terms of custody and maintenance. This accords well with the provisions of Section 8 of the Children's [*Act No 29 of 2022*](#). The same states;

“ Best interests of the child

- (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.”

19. I have perused the proceedings under file number MCCHCC/E1058 of 2022 and it appears that on 22nd September 2022 the parties by consent consolidated the same with file number 315 of 2020. There was therefore no need as rightfully submitted by the Respondent to split hairs on the question of counterclaim.

20. In other words, once the two suits were consolidated, one automatically became a counterclaim and therefore the court took care of it in its decision.

21. As regards the other prayers the court in its decision granted legal custody to both of them although actual custody went to the Respondent during school terms and shared custody during holidays.

22. Similarly, the Appellant was given custody on alternative weekends from 6pm on Friday to Sunday 4pm.

23. Against the above decision I have perused the minor's evidence on camera and TZ for example stated among others that:

“I prefer living with dad. I can stay with dad for one week and mum the other week.”

24. The sister on the other hand suggested that she prefers living with the mother and visiting the father.

25. The wholesome reading of their testimonies did not convince me that the children have problems with their parents. As expected, they are young and what they consider preferences may change as they grow and as circumstances change.

26. The trial court ably captured this aspect and having interviewed the minors I find that it formed a better perspective in the circumstances.

27. On this score therefore, I find the holding by the court was in the best interest of the minors considering their tender age. There was no disadvantage to the Appellant as he will have them during alternating weekends as well as school holidays.



28. In any case I doubt whether there is any hinderance of him visiting them in school during normal school days. The court open the door when it stated:-
- “ The only issue that needs to be resolved is after school scheduled in a way that the children do not have to shuttle from one house to another. This arrangement may destabilize the minors but I leave it to the parties to resolve it directly or through their advocates on record. Should they fail to agree they are at liberty to move the court for directions...” (Underlining mine)
29. In my assessment therefore that order was not caste in stone but gave the parties the opportunity to mitigate any issue that may arise during its implementation.
30. As is the norm now there is no definite conclusions in children’s matters as their circumstances always are fluid and that is the essence of ensuring best interest of the child. The parents or guardian for that matter are at liberty to move the court anytime.
31. Concerning the ground for maintenance I do not see any burden imposed on the Appellant that is onerous.
32. The school fees and the related went to him and the defendant other co-curricular and extra-curricular activities. I think these curricular activities include the school transport system. Most of the schools depending on the management will always shoulder this responsibility outside school fees.
33. They are always co related but in view of making a distinction most schools deal with it independently. I state so because in the normal practice some parents need not necessarily take up the school transport system. My observation is of course a general rule.
34. Consequently, and for clarity purposes this burden ought to be shouldered by the Respondent as she takes care of other curricular activities.
35. The issue of medical cover was well explained by the court and I see no need of disturbing the same. It appears the Appellant already had a cover for them.
36. Nothing stops the Respondent in the interest of her children to take an extra medical cover for them.
37. The question of food, clothing’s and shelter was well captured by the court since it gave that responsibility to both parents whenever they were with the children.
39. There was an issue raised by the Appellant concerning the distance between the school and the house where he stays. It was his case that since he stayed not far from school the minors ought to stay with him as they need not travel far from the school.
40. Whereas that line of submission is plausible, there was no evidence that he owned the house he was living in. Even if that was the case, I find that considering the tender age of the minors it was safe for now to have them stay with the Respondent except the days which were set out for him.
41. The issue of transport which is explained above sorts out any fears which the Appellant may have had concerning the said distance.
42. I think I have stated so much to show that save for the issue of school transport the other grounds of the appeal are disallowed and in doing so and as I have stated above the trial court gave room to the parties to make future applications if necessary and to ensure that the minors interest is taken care of.
43. In the premises it is ordered that:-
- (a) The appeal is hereby dismissed with no order as to costs.



(b) The issue of school transport shall be taken care of by the Respondent.

DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 26TH DAY OF JUNE 2025.

H K CHEMITEI

JUDGE

