



REPUBLIC OF KENYA



KENYA LAW
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**MNN v AM (Civil Appeal 159 of 2023)
[2025] KEHC 12447 (KLR) (4 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12447 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 159 OF 2023
HM NYAGA, J
SEPTEMBER 4, 2025**

BETWEEN

MNN APPELLANT

AND

AM RESPONDENT

*(Being an Appeal from the judgement of Hon.T.M.Mwangi in Meru
Children's Case No. E051 of 2022 delivered on 24th August, 2023)*

JUDGMENT

1. The Respondent herein filed a suit against the defendant in the aforementioned Children's Court vide a plaint dated 14th December, 2022, seeking the following prayers: -
 - a. The actual custody, care and control of the minor herein be vested upon the Plaintiff.
 - b. The Legal Custody of the Minor herein be vested upon the plaintiff and the Defendant.
 - c. The Defendant be granted limited, controlled and scheduled access of the minor which should be supervised by the children's officer in charge of the area where the minor resides.
 - d. Costs of the suit.
 - e. Any other better relief the court deems fit and just to grant.
2. The Respondent averred that he was married to the Appellant in the year 2014 but they separated in 2019.
3. It was his case that their marriage was blessed with one issue, J.M, and that immediately after their separation the Appellant was married elsewhere and blessed with other children.



4. It was his averment that after their separation the minor remained under his care when she was 3 years old and that in January,2020, the minor started schooling at [particulars withheld] Primary School in Meru County and he has been catering for her entire needs including school fees, school related items, food, clothing and shelter.
5. He pleaded that he allowed the Appellant to access the minor after their separation and that every time the minor could visit her in Limuru she could come back home very demoralized, stressed and psychologically disturbed.
6. He asserted that he had no objection to the Appellant having access to the minor but requested the court to grant her limited, controlled and scheduled access which should be supervised by the children's officer in charge of the area where the minor resides.
7. In response to the suit, the Appellant raised a Preliminary objection on grounds inter alia that the suit was res judicata as she had instituted a similar suit in a court of same jurisdiction vide Tononoka Children's Court Case Number XXX of 2022; that there were existing orders in the said Tononoka Children's court requiring the Respondent to produce the minor before the said court; & that the suit is frivolous, vexatious and an abuse of the court process.
8. In the said suit at Tononoka Court, the Appellant had prayed for judgement against the Respondent for; a declaration that both the Plaintiff and the defendant have equal parental responsibility for the issue herein namely JM and an order giving that effect; Actual custody of the child do vest in the plaintiff with access to the defendant; an order requiring the Defendant to contribute Ksh.21,667/= per month for the maintenance in respect of the issue herein. The said sum to be remitted to the Plaintiff's account on or before the 5th day of every month; the defendant do cater for the educational needs of the minor herein; the plaintiff do cater for the child's accommodation, medical and utility bills; costs and interests of the suit at court rates; & any other relief that this Honourable court may deem fit.
9. Thereafter, the Respondent filed a Miscelleneous Case No. EXXX of 2022 before this court and vide an application dated 28th December,2022 sought for a transfer of Tononoka Children's Case No. EXXX/2022 to Meru for hearing and determination principally on the ground that the minor herein resides in Meru with him. This court through a ruling dated 26th January,2023 allowed the Application and transferred the said suit to Meru for hearing and determination.
10. The two matters were consolidated with Meru Children's Case No. EXXX of 2022 taken as the lead file.

Evidence

11. The Respondent herein adopted his written statement dated 14th December,2015. He reiterated the averments in his aforesaid plaint. He also added that in the year 2022 the Appellant never bothered to visit the minor, ask for access or call the minor until December,2022 when she started calling demanding to take the minor away but the minor refused. He stated that the Appellant then started threatening to forcefully and secretly take the minor away and he feared for the safety of the minor.
12. In cross examination, he testified that the Appellant resides in Mombasa and he could not tell whether she lived alone. He stated that the Appellant paid the minor's school fees for the final term in the year 2020. He said the Appellant should not be granted custody of the minor since she came to court three years after the child had been living with him and could not confirm whether the Appellant was a drunkard.



13. In reexamination, he stated that Appellant gave birth to another child though he did not know if she was living with another man. He added that the Appellant only paid Minor's school fees for the first term in 2020.
14. The Appellant on her part equally adopted her statement dated 15th December, 2022 as her evidence in chief. In that statement, she stated that she had been residing with the Respondent together with the minor in Mombasa where the minor attended school until sometime in January, 2020 when the Respondent relocated to Meru to start up a business.
15. She stated that they had agreed that the whole family relocates to Meru and the Respondent and the minor were to go first then she could join them later after resigning. However, the Respondent's business did not pick up, he struggled financially and every time she was forced to chip in to an extent of taking loans.
16. It was her testimony that in view of the above, she decided not to tender her resignation, a decision which did not sit well with the Respondent who insisted she must relocate.
17. She stated that the Respondent denied her access to the minor which action she believed was tantamount to denying the minor the right to maternal love and care.
18. In her testimony before court, she said that she had been visiting the child in Meru and the minor being a girl, she needs to be taken care of her instead of the Respondent's grandmother. She prayed to be granted custody of the child and for the child to be visiting the Respondent during holidays. She further stated that the minor had been attending St. Margaret while she was in Mombasa.
19. In cross examination, she stated that she stopped living with Respondent in 2021 and not in 2019 as alleged by the Respondent. She stated that she paid the school fees for the minor to enroll at Consolata Primary School in Meru and added that she has another child, born on 1st April 2022, and that she was not living with the father of her second child.
20. She said that she did not have access of the minor and could not visit her in Meru because her security was not guaranteed.

Trial's Court Judgement

21. The trial court in the judgement dated 24th August, 2024, found inter alia that it was not enough to say that since the minor is a child of tender years, her best interest was to have her in custody of the Appellant. It held so because of the intervening and exceptional circumstances that: -PW1 had been in custody of JM since she was of tender years of almost 4 years old. JM has been attending school for almost 3 years. Although JM is of age of 7 years old which allowed her wishes in respect of custody ascertained, no party sought to have her attend court for that. No evidence or report was presented on the effect of removing JM from her learning environment and that her removal therefrom was in harmony with the best interest of the Child Principle.
22. Ultimately, the court entered judgement as follows: -
 - I. That both parties have a joint parental responsibility for the Child JM.
 - II. That both parents are granted joint custody of the child to be shared as follows;
 - a. That the child's father Andrew Mutuma Kibiti shall have custody, care and control of the child in the school terms of the year.



- b. That the child's mother Mary Nduta Ng'ang'a shall have custody, care and control of the child in the school holidays after the end of each school term.
- III. That in respect of order (II) above the parties herein to be coordinating the modalities of the picking up and handing over of the child from the parent in actual custody to the other parent.
- IV. That the parties shall share equally the education costs of the child.
- V. That the costs of food, shelter and clothing save for those that are strictly related to the education of the child shall be borne by the parent in custody as per orders (2) above.
- VI. That the medical costs of the child to be shared equally save that in the alternative the parties may agree to include the child under their respective medical covers or under a medical cover of one of them.
- VII. That parties are at liberty to apply.
- VIII. There shall be no orders as to costs.

The Appeal

- 23. Aggrieved with the outcome therein, the Appellant preferred the instant appeal challenging the finding by the trial Court on five grounds reproduced verbatim as follows: -
 - I. The Honourable trial Magistrate erred in Law and fact by not considering all the issues raised by the Appellant herein and finding that there be actual/control and custody be with the father/Respondent.
 - II. The Honourable trial Magistrate erred in Law and fact by failing to appreciate the facts and evidence before him and thereby arriving at a wrong decision considering that the minor is a girl of tender age that is below 8 years.
 - III. The Honourable trial Magistrate erred in Law and fact by finding that the Plaintiff herein was entitled to the actual custody/and control of the minor herein without considering the best interests of the child.
 - IV. The Honourable trial Magistrate erred in Law and fact in not taking into account the contribution and investment done by the Appellant towards the minor and the Respondent.
 - V. In all the circumstances of the case, the findings of the Honourable trial magistrate are unsupportable in law or facts on the basis of the evidence adduced hence misleading himself by applying the wrong principles of the law and arriving at a wrong decision.
- 24. The Appellant thus prayed that the Appeal be allowed, Judgement of the lower court be set aside and she be paid costs of this Appeal.
- 25. The Appeal was canvassed through written submissions.

Appellant's Submissions

- 26. The Appellant submitted that the trial magistrate failed to consider the age of the minor, the wishes and the needs of the child, fitness of the parents, wishes of the parents and the best interests of the child among others in awarding actual custody to the Respondent.



27. She argued that there were no extenuating circumstances to warrant the court grant the actual custody to the Respondent. To this end, she relied on the case of *K M M v J I L* [2016] eKLR where the court held that;

“ A child of tender years’ best interest and welfare are where the legal custody is awarded to the mother barring extenuating circumstances that would prevent the mother from providing protection and care of the child. Case law lends credence to the proposition that in cases of a child of tender years of less than 10 years as defined under Section 2(1) of the *Children Act* 2001, custody is granted to the mother”

28. The Appellant submitted that the minor resides and schools at Mombasa where she resides and she prayed that the Decree only be reviewed to the extent of placing the minor actual custody with her with the Respondent having legal custody for the best interests of the minor.

29. The Appellant argued that the Appeal was filed on time owing to Section 79G where the time for obtaining decree is excluded. She argued that technicalities cannot override the substance.

Respondent’s Submissions

30. The Respondent urged this court to strike out the Appeal herein for reason that it was filed eight (8) days out of time and without leave. In support of his submissions, the Respondent placed reliance on Section 79G of the *Civil Procedure Act* and the case of *ADK Technologies Ltd in Consortium with Computer Technologies Ltd v Public Procurement Administrative Review Board & 4 others* (Civil Appeal E598 of 2021) [2022] KECA 407 (KLR) (4 March 2022) (Judgment).

31. The Respondent contended he has been aptly paying school fees and providing other amenities needed by the minor, that he has the best interests of the minor and therefore he is entitled to parental rights and legal custody. In buttressing his submissions, the Respondent cited the case of *FSL v FNK* [2022] eKLR where the court held that interests of the child supersede those of the parties and must at all times be upheld and the case of *MAK v RMAA & 4 others* (Petition 2 (E003) of 2022) [2023] KESC 21 (KLR) (2 March 2023) (Judgment) where the Supreme Court gave guidelines that ought to be considered when balancing a child’s best interests and parental rights and responsibilities as: the existence of a Parental Responsibility Agreement between the parties; the past performance of each parent; each parent’s presence including his or her ability to guide the child and provide for the child’s overall well-being; the ascertainable wishes of a child who was capable of giving/expressing his/her opinion; the financial status of each parent; the individual needs of each child; the quality of the available home environment; need to preserve personal relations and direct contact with the child by both parents unless it was not in the child’s best interests, in which case supervised access to the child was to be granted; need to ensure that children are not placed in alternative care unnecessarily; the mental health of the parents; & the totality of the circumstances.

Analysis & Determination

32. Having considered the Appeal, the record of appeal and the parties’ respective submissions, I discern the following as the issues for determination: -

I. Whether the Appeal should be struck out.

II. If the answer to the above is in the negative, whether the Appeal has merit

33. Section 79G of the *Civil Procedure Act* provides that an appeal to this Court from a subordinate court shall be filed within a period of thirty days from the date of the decree or order appealed against.



34. The Supreme Court considered in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR and held: -

“What we hear the applicant telling the Court is that he is acknowledging having filed a ‘document’ he calls ‘an appeal’ out of time without leave of the Court. Pursuant to rule 33(1) of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court’s Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires..... No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court.”

35. In this case the memorandum of appeal dated 29th September,2023 and filed on 2nd October,2023, challenges the judgment dated 24th August 2023. The memorandum of appeal was filed out of time and without leave of the court of extension of time.

36. There is still no application before the court to extend the time. Applying the aforementioned decision of the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (supra), I find that the said memorandum of appeal dated 29th September,2023 as a nullity and of no legal consequences. It follows that the present Appeal cannot stand. It fails automatically and this court has no basis for considering the merits of the same.

37. I hereby strike out the said memorandum of appeal, but the appellant may remedy the situation by making the necessary application.

38. Given the nature of the dispute, there shall be no orders as to costs. Each party will thus bear its own costs.

39. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 4TH DAY OF SEPTEMBER 2025.

H. M. NYAGA.

JUDGE.

