



REPUBLIC OF KENYA



KENYA LAW
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**JMO v HWL (Family Appeal E013 of 2023)
[2024] KEHC 2751 (KLR) (18 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2751 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
FAMILY APPEAL E013 OF 2023
HM NYAGA, J
MARCH 18, 2024**

BETWEEN

JMO APPELLANT

AND

HWL RESPONDENT

*(Being an appeal against judgment and decree in Nakuru Children's Case
No. E151 of 2023 delivered by Hon. R. Kefa (PM) on 26th July, 2023)*

JUDGMENT

1. HWL (hereinafter referred to as respondent) sued JMO (hereinafter referred to as appellant) in the lower court seeking orders that:
 - a. Legal and actual custody of the minors E.S and A.M be awarded to the plaintiff with unlimited access to the Defendant.
 - b. The costs of the suit be borne by the defendant.
 - c. This honourable court be pleased to make further or other orders as it may deem fit in the circumstances to grant.
2. He averred that he had marital issues with the appellant that could not be resolved amicably leading to their separation after the Appellant removed the two minors A.M and E.S from boarding school in Nakuru County despite having paid for their school fees.
3. He pleaded that the Minor A.M was in standard 8 at Baraka Boys Boarding Primary School in Molo within Nakuru County and that he had had disciplinary issue that led to his suspension after he was found with a laptop in school.



4. He blamed the Appellant for failing to ensure that A.M did not carry anything that was disallowed in school and for failing to report with him to school or release him to him so that he could take him to school as he was required to report with the parent after suspension.
5. He averred that the minors A.M and E.S did not report to school in second term in 2023 and that the Appellant was interfering with their education and spoiling them by not showing them the right way as far as school discipline was concerned.
6. He pleaded that since their separation, the Appellant had blocked communication with him and therefore he was worried about the minors' wellbeing with respect to their education.
7. He was ready and willing to stay with the minors and take care of them well.
8. The Appellant denied the entire claim by the Respondent through her statement of defence dated 17th June,2023.
9. She averred that she had been taking care of the minors and were in school and their education should not be interfered with.
10. She averred that the respondent had not come to court with clean hands and his motive and action was to destroy her image and those of her children who are minors.
11. She averred that the respondent was not ready and had never demonstrated any good motive on how he intended to take care of the minors and his entire family.
12. She believed no cause of action had been raised against her and prayed that the suit be dismissed with costs.
13. The trial court upon hearing the case, delivered its judgement on 26th July,2023. It found that A.M was aged 13 years and thus not a child of tender years whereas E.S and V.W.W were aged 9 years and eleven months respectively hence children of tender years. It therefore granted actual, legal and physical custody of E.S and V.W.W to the Appellant and actual, legal and physical custody of A.M to the respondent for reasons that he was a student at Baraka Boys Boarding School and the Appellant did not act in his best interest by failing to return him to school.
14. The court also granted each party access/visitation rights as may be agreed upon by them and ordered each party to bear their own costs.
15. The Appellant being dissatisfied with the lower court's decision preferred this Appeal on 27th July,2023 raising the following grounds: -
 - a. That the Learned Trial Magistrate erred in law and in fact in allowing a claim that had absolutely no evidential support.
 - b. That the Learned Trial Magistrate erred in law and in fact by relying on documents and exhibits that were suspect.
 - c. That the Learned Trial Magistrate erred in law and fact in allowing the Respondents claim when the law and the facts were in support of the Appellant.
 - d. That the Learned Trial Magistrate erred in law and in fact in failing to find that giving the minors to the Respondent was against the rules of natural justice and the *Children Act*.



- e. That the Learned Trial Magistrate erred in Law and in fact in allowing the Respondent's claim when the pleadings and the evidence were not in support of the claim.
16. The Appellant therefore prayed for the judgment of the lower court to be dismissed with costs and the Appeal to be allowed with costs.
17. On 31st January, 2024, I directed that the Affidavits by the parties will be deemed to be their submissions/address to court.
18. The only affidavits on record are with respect to the Application dated 27th July, 2023 wherein the Appellant was seeking for stay of execution of the lower court's judgement.
19. The Appellant in her Affidavit dated 27th July, 2023 deponed that the judgement and decree would affect minors who are in school and do depend on her.
20. She stated that she is currently employed by the County Government of Busia and thus capable of taking care of the minors.
21. The Respondent in his Replying Affidavit sworn on 15th August 2023 concurred with the judgement of the lower court. He stated that the same was sound and was in the best interest of the minors.
22. The Appellant in her Further Affidavit sworn on 18th August, 2023 deponed that the respondent has demonstrated that he is never available to be with the minor since he works in Baringo and lives in Nakuru hence he cannot take care of the minor.

Analysis & Determination

23. This being the first appeal, this court is obligated to consider all the evidence tendered before the subordinate court and arrive at an independent conclusion. This duty was set out by the Court of Appeal in the case of *Kenya Ports Authority vs Kustbon (Kenya) Limited* (2009) 2EA 212 wherein it was held inter alia, that: -

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”.
24. Having perused the Memorandum of Appeal and the lower court record, the question for determination is whether the trial court erred in granting full custody of A.M to the Respondent.
25. The *Constitution* of Kenya, 2010 requires that in all matters concerning children, the best interest of the child shall be of paramount importance. Article 53 of the *Constitution* provides that: -
 - “(1) Every child has the right—
 - (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and
 - (2) A child's best interests are of paramount importance in every matter concerning the child.”



26. Section 2 of the *Children Act* defines best interest of the child as follows: -
- “best interest of the child” means the principles that prime the child’s right to survival, protection, participation and development above other considerations and includes the rights contemplated under Article 53(1) of the *Constitution* and section 8 of this Act;
27. Section 8(1) (a) and 2 and 3 of the *Children Act* states 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
- (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.”
28. Section 101 of the *Children Act* provides for the principles to be applied in making custody order, which said principles include the best interest of the child.
29. I have re-evaluated the evidence herein. It is a fact that was not contested that the minor herein was aged 13 years old at the time of hearing hence not a child of tender years. It was also undisputed that the Child herein was a class 8 pupil at Baraka Boarding Primary school and had duly registered for his Kenya School of Primary Education there. Further, there was no contestation that the respondent had paid his school fees and the Appellant removed him from the said school and failed to return him. Under these circumstances, the trial court correctly observed that the Appellant did not act in the best interest of the child.
30. The children officer in her report dated September 28, 2023 recommends that the minor herein should be given an opportunity to choose the parent he wants to stay with.
31. There was no evidence led to prove that the Respondent was irresponsible, absentee father/ there was a likelihood he will be an absentee father. It has also not been disputed in this Appeal that A.M wishes to stay with the Respondent.
32. As at the time of writing this judgment, the circumstances have changed in that the child in question herein completed his primary education and has, through his father, secured an admission at Nairobi Road Secondary School in Nakuru. This is evidenced by his Admission form on record. The Appellant



resides in Busia while the Respondent resides in Nakuru. In my view it would be in the interest of the child therefore that he stays with the respondent during school term where he will be in school and then during the school holidays the custody is to be shared equally. This will enable the child to get equal time with each parent.

33. I find no ground to set aside the orders of the Trial Magistrate. She exercised her discretion properly, duly guided by the law and the circumstances of the case.
34. Consequently, I find no merit in the appeal and I dismiss it.
35. Since this is a family matter, each party shall bear own costs.
36. Orders accordingly.

Dated, signed and delivered at Nakuru this 18th day of March, 2024.

H. M. NYAGA

JUDGE

In the presence of;

C/A Oleperon

Parties absent

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