



**CK v KA (Civil Appeal E039 of 2023) [2024] KEHC 4137 (KLR) (Civ) (26 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4137 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E039 OF 2023**

**PM NYAUNDI, J**

**APRIL 26, 2024**

**BETWEEN**

**CK ..... APPLICANT**

**AND**

**KA ..... RESPONDENT**

**RULING**

1. The Application for determination is Notice of Motion dated 2<sup>nd</sup> August 2023 presented under Article 53 of the Constitution of Kenya, 2010 and Sections 8,33,34,99,198 and the First Schedule of the Children Act, 2022, Section 1A,1B, 3, 3A of the Civil Procedure Act in which the Applicant seeks the following orders
  1. Spent
  2. That pending the hearing and determination of this Appeal, the Respondent be compelled to allow the child video call access by the Applicant and the child's other maternal relatives.
  3. That pending the hearing and determination of this Appeal, the Respondent be compelled to allow the Child physical access by the Applicant and the child's other maternal relatives when in Ghana
  4. That these orders be enforceable in any jurisdiction in which the child resides
  5. That the Court do grant any other and further order in the best interests of the child.
  6. That the costs of this Application be provided for
2. The Respondent opposed the Application and has raised a preliminary objection *vide* notice dated 23<sup>rd</sup> October 2023 based on the following grounds



1. That this Honourable Court lacks jurisdiction to entertain the Application as the child is resident in Ghana
2. That in any event the Application is premature and therefore an abuse of the court process.
3. Both parties complied with the directions to canvass the Application by submissions and have filed their respective submissions.

### Summary Of Applicants Submissions

4. The Applicant is the maternal aunt to the minor (sister to the biological mother, now deceased, of the minor) while the Respondent is the biological father to the minor. At the time of filing the Application the Respondent had taken custody of the minor pursuant to the judgment of the trial court delivered on 27<sup>th</sup> April 2023.
5. The Applicant identifies the following as the issues for determination
  1. Whether this Honourable Court has jurisdiction to entertain the suit
  2. Whether the prayers sought are made for the best interest of the minor herein?
6. On the 1<sup>st</sup> issue it is submitted that the minor is a Kenyan Citizen having been born on 17<sup>th</sup> January 2019 and having been in the Country up to 27<sup>th</sup> April 2023. Reliance is placed on the decision of the Supreme Court in *MAK V RMAA & 4 Others* (Petition 2 (E003) of 2022) on the desirability of having the both parents involved in a child's life and the need for the Court to guard its sovereignty in adjudicating in matters involving Kenyan Citizens. The Court is reminded of its jurisdiction as provided for under Article 165 of the *Constitution* of Kenya, 2010.
7. It is further submitted that the Appeal is properly before the Court vide Section 99 of the *Children Act*. It is submitted that allowing the Application will ensure that the Child's rights to identity, nationality and family relations as provided for under Article 8 of the *United Nations Convention on the Rights of the Child* will be safeguarded.
8. On the 2<sup>nd</sup> Issue it is submitted that the Application is made in the best interests of the Child and that parental rights should not trump the interests of the Child. It is argued further that granting the orders will fulfil the wishes of the biological mother who intended that the Child be raised in Kenya.
9. It is argued that the Applicant has demonstrated that she can act in the interests of the minor by ensuring that he received the right treatment and support as he is autistic. It is urged that it is important that the minor maintain his Kenyan ties. The Applicant cites the decision in *Ramadhan Ali Athman v Peter Mwingo Chirima* [ 2020] eKLR in which the Court gauged it to be in the best interests of the minors to grant custody to a grandparent.

### Summary Of Respondnet's Submissions

10. The Respondent frames the following as the issues for determination
  1. Whether this Honourable Court has jurisdiction to hear the matter
  2. Whether the Appellant has the legal basis to seek the prayers sought
  3. Whether the prayers sought are in the Child's best interests.
11. On the 1<sup>st</sup> issue it is submitted that the Court has no jurisdiction as the child has permanently relocated to Ghana pursuant to the Judgment delivered on 27<sup>th</sup> April 2023. Further it is argued that the issue of



access is presented prematurely before this Court as it ought to have been presented before the Trial Court and therefore runs afoul of the doctrine of exhaustion of remedies. Reference is made to the decision in *EAO vs SON* [2014] eKLR

12. The Respondent urges that the court be guided by the Supreme Court decision in *Samuel Kamau Macharia vs Kenya Commercial Bank & 2 Others*, Application No. 2 of 2011 on the Constitutional or Statutory mandate of Courts.
13. It is submitted that the Appellant has facilitated access to the Appellant and therefore this Application not necessary.
14. On the 2<sup>nd</sup> Issue whether the Appellant has legal basis to seek the prayers sought it is submitted that she does not as she is neither a testamentary or court appointed guardian.
15. On the 3<sup>rd</sup> issue whether the orders sought are in the child's best interests it is submitted that given the special needs of the child it is not in his interests to grant the prayers sought reference is made to the decision in *KMN v Children's Court, Tononoka & Another* [2015] eKLR.
16. Finally the Respondent distinguishes the decision in *MAK versus RMAA & 4 Others* ( Supra) and submits that the decision related to the Parental Responsibility agreement and its treatment by the English Court.

### **Analysis And Determination**

17. Having considered the pleadings filed herein, submissions filed, authorities cited and relevant law I consider the following to be the issues for determination
  1. Whether the Court has jurisdiction
  2. Whether it is in the best interests of the minor to grant the orders sought
18. On the 1<sup>st</sup> issue, the Jurisdiction of this Court is as provided for under Article 165 (3) of the *Constitution* of Kenya and with regards to Children, this jurisdiction is to be exercised in accordance with Article 53 (2) of the *Constitution*, that is, in a manner that ensures that the best interests of the Child are the paramount consideration.
19. I am well guided by the decision in *Samuel Kamau Macharia vs Kenya Commercial Bank & 2 Others* (Supra) in considering whether the Court has jurisdiction to hear the matter. It is contended that the Child is outside of the jurisdiction of the Court and that the prayers sought are premature.
20. On the issue as to whether the Child being outside of the Country ousts the jurisdiction of the Court, this issue was considered by the Court in *Republic v Senior Resident Magistrate Mombasa ex parte H L & another* [2016] eKLR where Emukule J. stated as follows-

The fundamental question here is the rights of the child. Under the *Constitution* of Kenya, and the relevant legislation, namely the *Children Act* (Cap 141, Laws of Kenya), which embodies and gives effect to the international *Convention on the Rights of the Child*, and the *African Charter on the Rights of the Child*, the courts of Kenya have the jurisdiction to give effect to the rights of the child, irrespective of the origin of such child. It does not matter that child came from the howling sands, and winds of the Sahara Desert, the depths of the Congo forests, the Miombo woodlands of Tanzania, the wind swept Drakensberg mountains of the South of the continent, the steppes of outer Mongolia or the fringes of the world's oceans and seas, the courts of Kenya will give shelter and succour to that child. Under our *Constitution*, the rights of the child are paramount. It would be unworthy of our *Constitution* if jurisdiction were denied to our courts.



21. Accordingly, I find that this Court does have jurisdiction to hear the matter but is limited to granting orders that can be enforced and supervised by this Court otherwise the Court would be acting in vain.
22. The Courts jurisdiction is also challenged on the basis that the orders sought are premature and that the Applicant should first seek the orders in the trial court. It has been demonstrated that the Applicant has filed an appeal and the orders are sought pending the hearing and determination of the Appeal. For this reason, I would also disallow this second limb of the preliminary objection and find that the Court does have jurisdiction to hear the Application. For the above reasons the Preliminary objection is dismissed.
23. On the merits of the Application and whether it is in the interests of the minor to grant the orders sought. The orders sought are on an interim basis. The minor is currently in Ghana with his father. The child is autistic and both parties are agreed that for this reason stability is a primary concern. The Respondent has expressed a willingness to grant access based on the minor's schedule. It is not lost on me that the Respondent is the biological parent of the minor.
24. It has not been demonstrated that the Child is at any risk or disadvantage to necessitate the Court to intervene at this interim stage. It has not been demonstrated to me that maintaining the status quo pending the hearing and determination of the Appeal would be detrimental to the best interests of the child.
25. It is evident that the status quo is painful to the Applicant/ Appellant however at this stage it is the interests of the minor that are paramount and not those of the maternal relatives. At the hearing of the Appeal, the Appellant will have an opportunity to demonstrate that she has an enforceable right with regard to accessing the minor. At the interim stage and in the absence of aggravating circumstances I am disinclined to issue the orders sought and will therefore dismiss the Application and make the following orders-
  1. Observing that the Record of Appeal is ready, I proceed to direct that the same is admitted to hearing. If not yet served the Appellant will serve the same on the Respondent within 7 days. The Appeal will be canvassed through written submissions.
  2. The Appellant to file written submissions within 21 days of service of the Record of Appeal on the Respondent. The Respondent to file submissions within 21 days of service of the Appellants submissions. The Appellant granted leave to file supplementary Submissions within 7 days of service.
  3. The matter will be mentioned on 3<sup>rd</sup> July 2024 to confirm compliance and take a date for judgment
  4. Each party will bear their own costs

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF APRIL 2024.**

**P M NYAUNDI**

**JUDGE**

In the presence of:

Ms. Mbetsa h/b for J. Thongori Advocates for the Applicant

Paul Muchiri h/b for Ms. Kiguatha Advocates for the Respondent

Sylvia Court Assistant

