



**JKK v HKK (Appeal E125 of 2024) [2026] KEHC 3539 (KLR)
(Appeals) (13 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3539 (KLR)

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

APPEALS

APPEAL E125 OF 2024

H NAMISI, J

MARCH 13, 2026

BETWEEN

JKK APPELLANT

AND

HKK RESPONDENT

(An appeal against the Ruling by the Honourable Magistrate A.N. Sisenda, delivered on 9 September 2024 in Milimani Law Courts, Children's Case No. E420 of 2024)

JUDGMENT

1. The matter before this Court is a first appeal emanating from the interlocutory ruling of the learned trial Magistrate, Hon. A.N. Sisenda. The original suit was instituted by the Appellant herein, who is the biological father of the two minors at the centre of this acrimonious dispute. The Respondent is the biological mother of the said minors.
2. This Court is acutely aware that disputes concerning the custody, maintenance, and access to children are among the most delicate and consequential matters that come before the Judiciary. They require a delicate balancing of the inherent rights of biological parents against the overarching, constitutionally mandated imperative to safeguard the welfare and best interests of the children involved. The present appeal encapsulates a profound conflict between the strict application of civil procedure rules regarding pleadings and evidence, as advanced by the Appellant, and the sui generis, protective jurisdiction of the Children's Court, as championed by the Respondent and applied by the learned trial Magistrate.
3. The jurisdiction of this Court to entertain this appeal is properly invoked. As a first appellate court, the duty imposed upon this Court is not merely to rubber-stamp the findings of the lower court, nor is it to lightly interfere with the discretionary powers exercised by the trial Magistrate. The guiding jurisprudential North Star for a first appellate court in Kenya was eloquently articulated in the seminal



decision of *Selle v Associated Motor Boat Co Ltd* EA 123. In that case, it was conclusively established that a first appellate court must subject the entire evidentiary record presented before the trial court to a fresh, exhaustive, and independent evaluation and analysis. The appellate court is mandated to weigh the conflicting evidence and draw its own independent conclusions, bearing in mind that it did not have the distinct advantage of observing the demeanour of the witnesses firsthand.

4. This principle of appellate review is further buttressed by subsequent jurisprudence, which cautions that an appellate court should not substitute its own factual findings for those of the trial court unless the trial court's findings are based on no evidence, are founded upon a misapprehension of the evidence, or unless it is demonstrably clear that the trial court acted upon wrong principles. The heavy burden, therefore, rests upon the Appellant to demonstrate, to the requisite legal standard, that the Ruling of Hon. A.N. Sisenda was legally untenable, procedurally fatally flawed, or perverse in its appreciation of the facts and the law.

Brief Background

5. The Appellant and the Respondent commenced their cohabitation following a traditional marriage ceremony conducted in the year 2018. During the subsistence of their union, they were blessed with two children: a daughter, , born on 6 September 2020, and a son, born on 18 August 2022. The record indicates that the initial stages of their cohabitation were relatively stable, with the parties residing first in the servant's quarters of the Appellant's parents' compound in Garden Estate, Nairobi, and subsequently moving to a larger residence within the same compound.
6. However, the evidentiary record reveals a steady deterioration of the relationship, fuelled primarily by allegations of chronic substance abuse, emotional volatility, and an abdication of domestic and financial responsibilities by the Appellant. The relationship formally ruptured in January 2023. Following a brief relocation to a rented premises in Thindigua, the Appellant vacated the matrimonial home, ostensibly to attend a six-month promotional course at the Kiganjo Police Training College. The Respondent later discovered that the Appellant had instead returned to his parents' residence. Upon this separation, the Respondent retained actual physical custody of the two minors and assumed the entirety of their financial, medical, and emotional care.
7. The Appellant's narrative, as captured in his pleadings and his interview with the Children Officer, diverges significantly regarding the cause of the breakdown. He attributed the marital discord to disrespect and insubordination from the Respondent following her employment at the National Intelligence Service (NIS). The Appellant asserted that following the separation, the Respondent deliberately and maliciously frustrated all his attempts to gain access to his children, thereby unilaterally depriving him of his inherent parental rights and denying the minors the opportunity to bond with their biological father.
8. Faced with this alleged denial of access, the Appellant moved the Children's Court at Milimani, seeking specific, limited interlocutory reliefs: primarily, an order granting him access to the children during the weekends, specifically between 9:00 a.m. on Saturdays and 5:00 p.m. on Sundays, pending the hearing and determination of the main suit.
9. In opposition to the motion, the Respondent filed a Replying Affidavit dated 18 March 2024. The Respondent did not categorically oppose the Appellant's right to access but fundamentally contested the safety and propriety of unsupervised access. She detailed the Appellant's history of major depression, anxiety disorder, and severe alcoholism. The Respondent highlighted specific instances where the Appellant, while inebriated, had physically endangered the toddlers, exhibited suicidal ideation, and left hazardous substances within the children's reach. Consequently, the Respondent



- prayed that the court grant her full custody and limit the Appellant's interaction with the minors to strictly supervised visits until he could empirically demonstrate psychological and emotional stability. Furthermore, the Respondent placed before the court the assertion that the Appellant had completely neglected his financial obligations towards the children since their birth, leaving the burden entirely on her shoulders.
10. Recognizing the complex and volatile nature of the dispute, the trial court wisely invoked its statutory powers and directed the Sub-County Children Officer for Kiambaa to conduct a comprehensive social inquiry and file a report. The ensuing report, dated 13 March 2024, provided the court with an independent, objective assessment of the familial dynamics, the living conditions of both parties, and the specific needs of the minors.
 11. The Children Officer concluded the report by confirming that both parties possessed the financial stability required to care for the minors. The Officer recommended that the Respondent remain the primary caregiver, that the Appellant be granted structured access on alternating weekends and shared school holidays, and critically, that both parents equally share the responsibility of providing food, clothing, medical care, and education.
 12. Upon a holistic evaluation of the pleadings, the competing affidavits, the submissions of counsel, and the independent Children Officer's report, the trial court delivered the impugned ruling on 9 September 2024. The learned Magistrate anchored her decision squarely on the best interests of the child principle as codified in section 8 of the *Children Act* and Article 53 of *The Constitution*.
 13. The trial court issued interlocutory orders pending the final determination of the sui. The court granted joint legal custody to both parents, affirming their mutual right to participate in major decisions concerning the children's education, religion, and medical care. Actual physical custody of the minors was retained by the Respondent.
 14. Acknowledging the Appellant's ongoing journey to recovery and the tender age of the children, the court granted the Appellant supervised access in the interim. This access was scheduled for every alternate Saturday from 10:00 a.m. to 1:00 p.m., to be conducted in a public space in the presence of a familiar guardian or minder. Virtual access via technology was also permitted.
 15. Emphasizing the principle of equal parental responsibility under section 32 of the *Children Act*, the court ordered a division of financial obligations. The Appellant was ordered to cater for the minors' school fees, all school-related expenses, health expenses, and a monthly upkeep sum of Kshs. 30,000/= . The Respondent was ordered to cater for all other needs, including food, shelter, and entertainment, with the cost of clothing to be shared.

The Appeal

16. The Appellant, deeply aggrieved by the breadth and nature of the trial court's orders, filed a Memorandum of Appeal raising eight distinct grounds. The grounds can be summarized as asserting that the trial Magistrate erred in law and fact by granting unpleaded reliefs, determining financial contributions without formal evidence of means, issuing punitive and disproportionate financial orders, misdirecting herself in ordering supervised access in a public place, and relying on unsubstantiated evidence.
17. The Appellant's written submissions forcefully advance the doctrine of pleadings. The Appellant argues that his application was strictly confined to a prayer for weekend access. By unilaterally introducing and adjudicating upon matters of child maintenance and imposing restrictive, supervised access conditions, the trial court allegedly engaged in judicial overreach and violated the Appellant's



constitutional right to a fair hearing under Article 50(1) of *the Constitution*. To buttress this argument, the Appellant relies heavily on the jurisprudential precedent set in *Galaxy Paints Co Ltd v Falcon Guards Ltd* 2 EA 385, in which the Court of Appeal emphatically held that issues for determination in a civil suit generally flow from the pleadings, and a trial court can only pronounce judgment on the issues arising from those pleadings or issues framed by the parties.

18. Regarding the financial orders, the Appellant argues that determining a contribution of Kshs. 30,000/ = without a formal Affidavit of Means offends section 107(1) of the *Evidence Act* and section 114(2) of the *Children Act*. The Appellant contends that judicial findings on financial liability must rest on concrete documentary evidence, not assumptions, rendering the trial court's order arbitrary and punitive.
19. In her submissions, the Respondent defends the trial court's ruling as a meticulously reasoned exercise of judicial discretion that properly prioritized the safety and welfare of the children over procedural rigidity. The Respondent argues that under Article 53(2) of *The Constitution*, a child's best interests are of paramount importance. She contends that a court handling a children's matter cannot ignore glaring evidence of neglect, substance abuse, and potential danger simply because the initiating party chose to frame their application narrowly.
20. The Respondent relies on sections 31 and 32 of the *Children Act* to emphasize that parental responsibility includes the mandatory duty to maintain a child. Therefore, ordering the Appellant to contribute financially is not a punitive measure, but the enforcement of a strict statutory duty. The Respondent further cites the decision in *M A A v A B S eKLR*, asserting that in all matters concerning children, the interests of the parents are entirely secondary to the paramount interests of the child.

Analysis and Determination

21. This Court identifies three primary issues that fall for determination:
 - a. Whether the trial court erred in law and fact by granting reliefs that were allegedly unpleaded, thereby violating the doctrine of pleadings and the right to a fair hearing.
 - b. Whether the trial court erred in assessing and apportioning child maintenance obligations in the absence of a formal Affidavit of Means, and whether the ordered financial contribution is punitive and disproportionate.
 - c. Whether the trial court misdirected itself in restricting the Appellant's access to the minors to supervised visits in a public place.

The Doctrine of Pleadings versus the Sui Generis Nature of Children's Proceedings

22. The Appellant's primary grievance strikes at the heart of civil procedure. He argues that because his Notice of Motion was limited solely to a prayer for access, the trial Magistrate had no jurisdictional competence to delve into matters of financial maintenance or to attach supervisory conditions to his access. The Appellant relies on *Galaxy Paints Co Ltd v Falcon Guards Ltd* 2 EA 385, a foundational case regarding the sanctity of pleadings.
23. It is trite law that in standard civil and commercial litigation, parties are strictly bound by their pleadings. The rationale behind the doctrine of pleadings, as enunciated in *Galaxy Paints* and myriad subsequent authorities, is to define the exact issues in dispute, to preclude a party from being taken by surprise, and to ensure that the adversarial process is conducted fairly and transparently. In a commercial dispute involving a breach of contract or an action in tort for negligence, a court that wanders outside the pleaded issues commits a fatal jurisdictional error.



24. However, it is a fundamental misapprehension of the law to transplant the rigid procedural strictures of commercial litigation into the highly specialized, sensitive, and protective arena of family law and children's rights. Proceedings concerning the welfare of a child are not mere adversarial contests between two aggrieved adults; they are sui generis proceedings where the court exercises an overriding parens patriae jurisdiction. In this jurisdiction, the court acts as the ultimate guardian of the vulnerable minor, possessing the inherent power and statutory duty to intervene actively to protect the child from harm and ensure their holistic welfare.
25. The jurisprudential shift away from procedural rigidity in children's matters was crystallized by the promulgation of *The Constitution*. Article 53(2) elevates the child's welfare to a constitutional imperative, stating unequivocally:

A child's best interests are of paramount importance in every matter concerning the child.
26. This constitutional dictate is operationalized by the *Children Act*. Section 8(1) mandates that in all actions concerning children undertaken by courts of law, the best interests of the child shall be the primary consideration. Section 8(2) compels all judicial institutions, when exercising any powers conferred under the Act, to adopt a course of action calculated to safeguard, promote, and conserve the welfare of the child, and to secure such guidance and correction as is necessary.
27. When the Appellant filed his application seeking access, he effectively placed the entire existential reality of the children before the jurisdiction of the court. Access is not a standalone legal concept; it is inextricably linked to the physical safety, emotional well-being, and financial sustenance of the minor. It is a fundamental absurdity to suggest that a Children's Court, when presented with credible allegations in a Replying Affidavit that a parent seeking access is a violent alcoholic who has financially abandoned his children, must ignore those allegations simply because the father did not plead them in his initiating motion.
28. Furthermore, the issues of maintenance and supervised access were not conjured by the Magistrate from thin air; they were squarely joined as issues in controversy through the Respondent's Replying Affidavit. The Respondent explicitly detailed the Appellant's financial neglect and prayed for supervised access and full custody. The comprehensive report filed by the Children Officer further laid bare the financial and psychological dynamics of the family unit.
29. The Court has consistently frowned upon the use of procedural technicalities to defeat the substantive rights of a child. In cases involving child maintenance and custody, the courts have frequently issued comprehensive orders that address the reality of the child's needs, even if not elegantly pleaded by the lay parties or their counsel. The duty to maintain a child is a mandatory statutory obligation under Section 32 of the *Children Act*, which dictates that parents have equal parental responsibility. This duty cannot be evaded by clever procedural drafting.
30. In *M N v T A N & another* [2015] eKLR, the Court dealt with a father attempting to utilize procedural manoeuvres to stay a maintenance order, emphasizing that the statutory duty to maintain a child is mandatory and that courts will prioritize the child's best interests over technical applications. Similarly, in *D K N v E W M* [2013] eKLR, the Court rejected an applicant's attempt to rely on perceived ambiguities in a judgment to avoid maintenance payments, noting that such actions deliberately deprive children of essential support and violate parental obligations.
31. Therefore, the Appellant's reliance on *Galaxy Paints Co Ltd v Falcon Guards Ltd* is entirely misplaced in the context of a child welfare hearing. The trial Magistrate did not violate the right to a fair hearing; rather, she correctly identified that the competing claims regarding access, safety, and financial



provision were inextricably intertwined. To grant access without simultaneously addressing the mechanisms for safe implementation and the corresponding legal duty of maintenance would have constituted a grave dereliction of the court's constitutional duty under Article 53(2). This ground of appeal is accordingly dismissed.

The Evidentiary Threshold for Determining Child Maintenance

32. The Appellant vehemently attacks the financial orders issued by the trial court, arguing that the order mandating him to pay Kshs. 30,000/= monthly, alongside school fees and health expenses, was plucked from the air without any formal evidence of means. The Appellant contends that in the absence of a sworn Affidavit of Means detailing his income, assets, and liabilities, the trial court's apportionment of financial responsibilities was speculative, punitive, and contrary to section 107(1) of the *Evidence Act* and section 114(2) of the *Children Act*.
33. It is, indeed, correct that section 114(2) of the *Children Act* requires the court, when determining the amount of maintenance to be paid, to consider various factors, primarily the income, earning capacity, property, and other financial resources of the parties, as well as the financial needs of the child. It is also standard practice for courts to direct parties to file Affidavits of Means to provide a transparent, documentary baseline of their respective financial capacities.
34. However, the absence of an Affidavit of Means does not necessarily render a maintenance order fatal, provided the court had sufficient alternative evidentiary material upon which to ground its assessment. In this matter, the trial court was not operating in an evidentiary vacuum. The court had the distinct advantage of the comprehensive Social Inquiry Report prepared by the Sub-County Children Officer.
35. Section 76 of the *Children Act* empowers Children Officers to conduct investigations, visit homes, interview parties, and present reports to the court to assist in determining matters of custody and maintenance. The report dated 13 March 2024 served as a vital, independent evidentiary tool. Through direct interviews and home visits, the Children Officer established and documented several critical facts regarding the financial standing of the parties: The report confirmed that the Appellant is employed in a highly specialized, lucrative profession as a Pilot in the Kenya Army. The Respondent is employed at the National Intelligence Service (NIS). The home visits revealed that both parties maintain a high standard of living. The Appellant resides in a well-equipped, fully furnished servant's quarter within his parents' expansive estate, which features modern amenities. The Respondent resides in a spacious, rented three-bedroom master en-suite house.
36. Based on these observations and interviews, the Children Officer explicitly concluded in her official recommendations that both parties are financially stable to take care of the minors.
37. The Appellant complains of a lack of evidence regarding his means, yet he conspicuously failed to file any documentary evidence—such as a payslip or a bank statement—to rebut the findings of the Children Officer or to demonstrate that he is financially incapacitated. It is a well-established legal principle that a party cannot intentionally withhold evidence that is exclusively within their knowledge and possession, and subsequently complain on appeal that the court made findings in the absence of that evidence. If the Appellant, a military pilot, genuinely lacked the capacity to contribute Kshs. 30,000/= per month towards the upkeep of his two children, the burden was upon him to place that evidence before the court.
38. Furthermore, the Appellant's categorization of the financial award as punitive and disproportionate is demonstrably false when the totality of the trial court's order is subjected to objective scrutiny. The concept of equal parental responsibility under section 32 of the *Children Act* does not necessarily



mean an exact mathematical fifty-fifty split of every receipt; it means an equitable sharing of the overall burden of child-rearing based on capacity and circumstance.

39. A detailed tabular analysis of the responsibilities apportioned by the learned Magistrate reveals a highly balanced and equitable distribution:

Parental Responsibility	Apportionment by Trial Court	Rationale and Practical Implication
Actual custody and daily care	Respondent	The Respondent bears the immense, unquantifiable daily physical, emotional, and logistical burden of raising two toddlers full-time.
Housing/Shelter	Respondent	The Respondent must independently finance a suitable three-bedroom home for the children, a significant monthly expenditure in Nairobi
Food	Respondent	The continuous daily cost of feeding two growing children.
Education	Appellant	The Appellant must cover school fees and related educational expenses
Healthcare	Appellant	Appellant must provide medical cover or pay out of pocket expenses
General Monthly Upkeep	Appellant	A fixed sum of Kshs 30,000/=
Clothing	Shared equally	Both parents contribute as the need arises

40. When viewed holistically, the financial equivalent of the Respondent's obligations far exceeds the Appellant's ordered contribution of school fees, medical expenses, and a modest Kshs. 30,000/= monthly stipend. The trial Magistrate properly applied the principles of section 114 of the *Children Act*, balancing the demonstrated high earning capacity of the Appellant against the extensive daily responsibilities borne by the Respondent. The orders are neither punitive nor arbitrary. Grounds 2, 4, 5, and 8 of the appeal are, therefore, devoid of merit and are dismissed.

The Propriety of Supervised Access in a Public Place

41. The final, and perhaps most contentious, issue for determination is whether the trial Magistrate misdirected herself in limiting the Appellant's access to the minors to strictly supervised visits, to be conducted in a public place. The Appellant vehemently protests this restriction, arguing that it



is extraneous, punitive, and constitutes an unjustifiable infringement on his constitutional right to interact freely with his children.

42. While the Act establishes the default position of equal parental responsibility, the practical implementation of that responsibility—especially regarding physical access—must be meticulously tailored to ensure the absolute safety and psychological well-being of the child. The Supreme Court, in *MAK v RMAA & 4 others* (Petition 2 (E003) of 2022) [2023] KESC 21 (KLR) (Civ), has provided invaluable guidance on the factors courts must consider when balancing a child's best interests against a parent's right to access. These factors include the past performance of each parent, the quality of the available home environment, the mental health of the parents, and the totality of the circumstances. The guidelines explicitly mandate the court to consider the:

“Need to preserve personal relations and direct contact with the child by both parents unless it is not in the best interests of the child in which case supervised access to the child must be granted.”

43. This principle recognizes that while preserving the parental bond is generally beneficial, it cannot be pursued at the expense of the child's physical safety or emotional stability. This approach is further aligned with the modernized interpretation of the “Tender Years Doctrine.” Historically, this doctrine provided an almost irrebuttable presumption that children of tender years belonged with their mother. However, recent jurisprudence has nuanced this position. In the landmark case of *S M M v A N K eKLR*, the Court clarified that while the tender years doctrine is no longer an inflexible rule of law and must yield to the overarching Best Interests of the Child principle, the extreme developmental vulnerabilities of infants and toddlers remain a critical, heavily weighted factor in determining custody and access modalities.
44. In the present matter, the court is dealing with two children of extremely tender age, born in September 2020 and August 2022. At the time of the parties' separation in January 2023, the youngest child was a mere five-month-old infant. The vulnerabilities of children in this age bracket demand the highest level of judicial scrutiny regarding the environment they are exposed to during access visits.
45. The evidentiary record placed before the trial court regarding the Appellant's suitability for unsupervised access was profoundly disturbing. In her Replying Affidavit, the Respondent detailed a harrowing history of the Appellant's chronic alcoholism and substance abuse dating back to 2017. She provided specific evidence that the Appellant has been diagnosed with major depression and an anxiety disorder, leading to multiple, prolonged admissions to various rehabilitation facilities. The Respondent deposed that during the Appellant's periods of severe intoxication, he exhibited highly erratic and dangerous behaviour, including leaving hazardous items like alcohol and lit cigarettes within the reach of the toddlers. Most alarmingly, the record reflects allegations of violence, where the Appellant would physically assault the Respondent and, while staggering in a drunken state, strike the toddler without exhibiting any subsequent remorse.
46. It is noteworthy that the Appellant did not file a Further Affidavit to substantively rebut these grave allegations. Furthermore, the independent report prepared by the Children Officer corroborated the Appellant's ongoing struggles with mental health, noting his active participation in counselling and adherence to a medication regime to manage his depression.
47. Faced with this uncontroverted evidence of severe substance addiction, untreated psychological volatility, and a history of physical endangerment, the trial Magistrate was legally obligated to implement protective measures. In *KBH v HMI* (Civil Appeal E109 of 2022) KECA 172, the Court of Appeal upheld a trial court's decision to grant only supervised access at a police station to a parent



who had a demonstrated history of neglect, dishonesty, and harmful conduct, emphasizing that the child's welfare supersedes parental desires for unfettered contact. Similarly, in *K W M v R N* [2015] eKLR, the Court reiterated that while consistent communication with both parents is encouraged, it must be curtailed if it is demonstrated to be contrary to the child's best interests.

48. The learned trial Magistrate executed a masterful balancing act in her Ruling. She did not sever the parental bond; rather, she recognized the Appellant's fundamental right to access while simultaneously acknowledging the empirical reality of his ongoing medical and psychological fragility. Her reasoning was explicit and compassionate:

"In order to re-build and foster a healthy relationship between the applicant and the minors, the applicant is granted supervised access in the interim. This is due to the fact that the Applicant is still on the journey to recovery, and that the minors are still children of very tender years, and it would be in their best interests to have their relationship built gradually. The same is to be done in a public place where the minors will feel safe, and with a guardian whom they are conversant and free with."

49. This Court unequivocally affirms the trial Magistrate's reasoning. The order for supervised access in a public space is not a punitive measure; it is a vital, proportionate, and temporary safeguarding mechanism. Subjecting vulnerable toddlers to unsupervised, overnight access with a parent who is actively battling major depression and chronic, relapsing alcoholism would constitute a gross dereliction of the court's constitutional mandate under Article 53(2).
50. Furthermore, the Appellant's contention that he was denied a fair hearing because the access order was final in nature is legally flawed. The trial Magistrate explicitly prefaced her orders with the caveat that they were issued "pending hearing and determination of the suit". These are interlocutory, protective orders designed to govern the status quo and ensure the children's safety until the substantive merits of the allegations can be rigorously tested through oral evidence and cross-examination at a full trial. Interlocutory orders in family law are inherently subject to review; should the Appellant demonstrate sustained, documented recovery, complete rehabilitation from substance abuse, and consistent psychological stability, it remains entirely open to him to petition the trial court for a variation of the access terms to allow for unsupervised or overnight visits. Until such empirical evidence of rehabilitation is provided, the supervised access regime must remain in force. This ground of appeal is dismissed.
51. In view of the foregoing, this Court finds that the Appellant has failed to discharge the heavy burden required to warrant appellate interference with the interlocutory ruling of the lower court. Accordingly, the appeal is hereby dismissed. Each party shall bear their own costs.
52. The original lower court file is hereby remitted back to the Milimani Children's Court for the expeditious scheduling of the pre-trial conference and the full hearing and determination of the substantive suit on its merits.

DATED AND DELIVERED AT NAIROBI THIS 13 DAY OF MARCH 2026

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For Appellant: Mr Mariatte h/b Gikunda

For Respondent: N/A



