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| Date Delivered: | 29 Jul 2021 |
| Case Class: | Civil |
| Court: | High Court at Nairobi (Milimani Law Courts) |
| Case Action: | Ruling |
| Judge: | Stella Ngali Mutuku |
| Citation: | HR v NJAC [2021] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | Family |
| History Magistrates: | - |
| County: | Nairobi |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Application dismissed |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

DIVORCE CASE NO 206 OF 2014

HRPETITIONER/RESPONDENT

VERSUS

NJAC RESPONDENT/APPLICANT

RULING

The Applicant's Case

NJAC, the Applicant, has brought this application by way of Chamber Summons under Certificate of Urgency dated 27th February 2020, seeking the following orders:

- 1. This matter be certified urgent and heard ex parte in the first instance.***
- 2. The Respondent herein be restrained from removing the children namely DR and DR from the Applicant's care and control without the applicants written consent and or leave of the court pending hearing and determination of this application***
- 3. The Respondent herein be restrained from removing the children namely DR and DR from the Applicant's care and control without the applicant's written consent and or leave of the court.***
- 4. The Respondent herein be restrained from removing the children namely DR and DR from Kenya without the Applicant's written consent and or leave of the court pending hearing and determination of this application.***
- 5. The Respondent herein be restrained from removing the child namely DR and DR from the applicants care and control without the Applicant's written consent and or leave of the court.***
- 6. The Respondent herein be restrained from removing the child namely DR from school and or otherwise interfering with the child's education by making unwarranted appearances and demands from school pending the hearing of this application.***
- 7. The Respondent herein be restrained from removing the child namely DR from school and or otherwise interfering with the child's education by making unwarranted appearances and demands from school.***
- 8. That the Respondent be compelled to deposit his Iraqi and Australian passports with the court during his periods of access to the children namely DR and DR pending hearing and determination of this application.***
- 9. The Respondent be compelled to deposit his Iraqi and Australian passports with the court during his periods of access to the children namely DR and DR.***
- 10. The Respondent be granted structured access to the children namely DR and DR.***
- 11. The Respondent be compelled to provide adequate maintenance for the children namely DR and DR according to their present and future maintenance needs pending hearing and determination of this application.***

12. The Respondent be compelled to provide adequate maintenance for the children namely DR and DR according to their present and future maintenance needs.

13. The Respondent be compelled to reimburse the Applicant for maintenance expense incurred for the children DR and DR from November, 2018 to date at the rate of \$3100 per month pending the hearing and determination of the suit.

14. This honourable court be pleased to make such further or other orders as it may be appropriate in the best interest of the children.

15. The costs of this application be provided for.

This application is based on the grounds that the parties are divorced vide decree absolute dated 22nd September 2015 and that the Applicant has had custody of the children while the Respondent has access rights. Further that DR has autism spectrum disorder which he is being treated for but has degenerated since 2018 and is in a catatonic state; that the Respondent abdicated his parental responsibility since November 2018 causing immense pressure on the Applicant who has to provide for the children; that the respondent caused disturbance at (place withheld) where DR was in school and continues to make random disruptive appearances at (place withheld) where the child is currently enrolled. Additionally that the Respondent is an Iraqi/Australian national who resides in Iraq and Turkey and came to the country without prior information and went to DR's School causing disturbance and that the Applicant believes that unless restrained, the Respondent would forcibly take the child out of the jurisdiction. Lastly that the Respondent has been writing vexatious emails to hospitals treating DR without care, actions which go against the best interest of the children.

This application is supported by an affidavit sworn by the Applicant on 27th February 2020 and a Supplementary Affidavit sworn on 18th September 20120. The Applicant reiterates the grounds in her application and further states that the Respondent used to send a sum of \$3500 towards the children's maintenance on a monthly basis but ceased doing so in November 2018 causing her to incur a sum exceeding Kshs. 3,000,000/- towards DR's medical needs and fees. She also states that she is unable to work as she is a fulltime care giver for DR who cannot cater for himself. In the supplementary Affidavit she stated that their older son DR is 14 years 7 months and suffers from Autism spectrum disorder (ASD) which he's been treated of from 4 years old and that in November of 2018, he entered a catatonic regression deteriorating functions causing difficulty in voluntary movements increasing and he requires constant assistance from her (his full time care giver) and physiotherapy. She avers that her current husband helps her with DR's expenses.

HR, the Respondent, filed a Replying Affidavit sworn on 8th March 2021 deposing that he is the biological father to DR and DR and that at the time of their birth he and the Applicant lived in Dubai; that the Applicant moved to Kenya with the children in 2012; that in 2014 he petitioned for divorce which was granted and that he only agreed to the Applicant having physical custody of the children because they were young at the time. He states that the Applicant refused him access to the children without supervision and would not allow him to take the children to his house; that after finalization of their divorce he was denied access to the children unless under strict timeliness and that he could not make decisions regarding the children. He avers that he has a strong bond with his children despite the Applicant acting like she has sole custody and making decisions on the children unilaterally without informing him; that the Applicant has denied access to school and medical records of the children. He states that he was surprised when he was asked to pay fees for DR at (place withheld) despite being excluded as the child's father in the school records and that the Applicant sidelines him as a parent but asks for payments after decisions have already been made. He avers that on 2nd November 2018, he demanded to fully participate in the children's upbringing but the Applicant refused but she sends bills promptly when there is urgent need causing him stress and panic due to tight timelines. The Respondent denies that he comes to the country without prior knowledge of the Applicant. He states that he communicated to the Applicant through his lawyers and requested for meaningful modalities of access to his children but was informed that he could only see the children in the Applicant's matrimonial home which was not conducive or acceptable to him as the Applicant constantly interrupts them. He states that he too has legal custody of the children and that he has no intention of depriving the Applicant physical custody of the children. Further, he states that surrendering his passport upon arrival in Kenya would not be practical as he uses them for identification when in Kenya. Also that he plans on coming to Kenya at least three to four times a year so that he can re-bond with the children.

Additionally he avers that that he is ready to cater for DR's medical needs and that with time he can take the children out of the country to visit their paternal family and return them in accordance with court orders. He states that he is not averse to contributing towards child maintenance and upkeep but the same should be fair and that he ought to be included in decision making. He denies that he doesn't contribute towards the children's maintenance and further states that there is no consent or court order for

maintenance thus the Applicant cannot claim reimbursement of monies she claims she has spent on maintain the child.

The Applicant filed a Further Affidavit sworn on 10th March 2021 where she states that they agreed to co-parent in the best interest of the children and that the Respondent would cover children's expenses but he abdicated and DR had to transfer to a cheaper school. She denies that she moved DR from (place withheld) due to misunderstanding between them and without informing the Respondent. She also denies refusing the Respondent access to the children and states that he even took them to Diani and Dubai. She agreed that the Respondent demanded that they co-parent but went ahead to state that he would not provide financially unless the said agreement was signed. She avers that she informs the Respondent of all the children's needs promptly without delay and as they arose and the Respondent makes excuses as to why he cannot foot the bills. She states that the Respondent has had access to DR since November 2020 and that she did not ambush him with an emergency medical bill as it was for an emergency that had just arisen. She avers that because the Respondent travels a few times to see the children, his access to the children should be supervised especially due to DR's condition as he doesn't know how to handle his needs and she has hired a nurse to help with the care. She further states that it made sense for the Respondent to visit the children at home because of Covid 19 and that she and her husband have never interfered with this access to the children. Additionally that she is hesitant of the Respondent taking the children out of the country as he has threatened to take the children to live with them in a war torn court which is not in the best interest of the children.

Submissions

This court directed that the Chamber Summons be disposed of by way of written submissions. Parties have filed their submissions. The Applicant's Submissions are dated 3rd June 2021. In her submissions, she has identifies four issues for determination as follows:-

- i. Should the respondent have structured access and should the Respondent be compelled to deposit his passports with the courts during periods of access"*
- ii. Should the respondent be compelled to provide maintenance for the children"*
- iii. Should the Respondent be compelled to reimburse the Applicant for maintenance expenses incurred for the children from November 2018 to date"*
- iv. Who should bear the costs for the Application"*

On the first issue she has submitted that she has physical custody of the children and that she and the Respondent had agreed to co-parent; that she has never denied him access to the children when he visits; that the Respondent should have structured access because he visits Kenya 2 or 3 times a year and is not part of the children's daily routine nor is he privy to DR's needs; that modalities are important to avoid distracting DR's learning and for his safety and also that removing the children from Kenya would be detrimental as DR requires constant care by someone who understands his condition to avoid further regression.

She submitted further that she is not denying the Respondent an opportunity to bond with his children but only wishes for there to be schedules for the same and that due to the Corona Virus pandemic it is prudent that the visits be at home as both children have compromised immune system and that the Respondent is not contesting structured access and thus court should grant the same and set up a system for gradual access and proper communication prior to visit to allow proper preparation by Applicant and rebuilding of trust. She relied on section 4(2) of the Children Act to support her case.

Additionally she submitted that the Respondent should deposit his passport with the courts or as the court may direct to ensure he does not leave the country with the children and that he can use a copy of his passport as identification.

On the 2nd issue she relied on Section 98 of the Children Act which provides that:

A court shall have power to make an order and to give directions regarding any aspect of the maintenance of a child, including but not limited to, matters relating to the provision of education, medical care, housing and clothing for the child; and in this behalf may make an order for financial provisions for the child.

She submitted that the Respondent does not contest not having provided maintenance for the children since November 2018 yet he has had access to them when in the country. She submitted that she is unemployed due to DR's needs for round the clock care and thus has no income and has to rely on her husband for the children's care yet the biological father is a man of means. She relied on section 94 (1) Children Act which provides that:

The Court may order financial provision to be made by a parent for a child including a child of the other parent who has been accepted as a child of them family and in deciding to make such an order the court shall have regard to the circumstances of the case and without prejudice to the generality of the foregoing, shall be guided by the following considerations—

- (a) The income or earning capacity, property and other financial resources which the parties or any other person in whose favour the court proposes to make an order, have or are likely to have in the foreseeable future;*
- (b) the financial needs, obligations, or responsibilities which each party has or is likely to have in the foreseeable future;*
- (c) the financial needs of the child and the child's current circumstances;*
- (d) the income or earning capacity, if any, property and other financial resources of the child;*
- (e) any physical or mental disabilities, illness or medical condition of the child;*
- (f) the manner in which the child is being or was expected to be educated or trained;*
- (g) the circumstances of any of the child's siblings;*
- (h) the customs, practices and religion of the parties and the child;*

It is her submission that the Respondent doesn't deny being a man of means and is capable of providing maintenance for the children. She also relied on the case of **C.I.N Vs. J.N.N (2014) eKLR** where the court held that:

“ It will not do for the respondent to say that she has an uncertain source of income and therefore the responsibility of maintaining the children should only be borne by the Appellant. The respondent must establish to the satisfaction of the court that she has also made effort to provide for upkeep of the children. The above constitutional requirement is a game changer. Parties seeking the intervention of the children's court to secure maintenance for the upkeep of the child or children must also indicate what support they are making toward the child or children. This is because both the mother and the father have equal responsibility towards the upbringing of the child or children. Of course in making such orders of maintenance the children's court must take into consideration the unique aspect of parenting that nature has endorsed on the mother of the child. This includes the role that the mother plays in nursing and nurturing a child or children of young and tender years. This function does not accrue naturally to fathers”

On the 3rd issue she submitted that that it is true there was no written agreement for maintenance between her and the Respondent and neither is there a court order but the Respondent had been sending \$3500 towards the children's upkeep a sum they agreed to after the divorce. Further that the Respondent stopped sending money without warning and has not done so since then thus failing to provide maintenance for his children. She relies on section 91 Children Act that provides that:

Any parent, guardian or custodian, of the child, may apply to the court to determine any matter relating to the maintenance of the child and to make an order that a specified person make such periodical or lump sum payment for the maintenance of a child, in this Act referred to as a “maintenance order,” as the court may see fit

Lastly it is her submission that the Respondent should bear the cost of this application.

The Respondent's submissions are dated 30th June 2021. In his submissions he has identified 3 issues for determination as follows:

- i. Should both parents be vested with legal custody of their children”*

ii. Should meaningful modalities of access be put in place"

iii. How should the maintenance of the children be handled"

On the first issue, he submitted that he is the children's biological father and by dint of section 24(1) Children's Act, he has parental responsibility of his children but the Applicant has taken a superior stance over the children and relegated him to a wallet dad only calling when money is needed but otherwise preventing his access to the children. He relied on Section 6 of the Children Act which provides that children be cared for by their parents. He contended that legal custody denotes the right and duty to make decisions as well as safeguard the interests and welfare of the children. He urged the court to accord both parents parental responsibility over their children and also joint legal custody. He relied on the cases of *P.M.W Vs C.M.M (2015) eKLR* where the court held that:

"In the absence of any adverse conduct of any of the parents of the children of the marriage or any exceptional circumstances that adversely impact the welfare of the children of the marriage..... both parents are entitled to joint legal custody. He also relies on the definition legal custody as per the black's law dictionary that, 'the authority to make significant decisions on a child's behalf including decisions about education, religious training and healthcare. He submits that he is equally entitled to joint legal custody of the children."

Regarding meaningful access modalities he submitted that the Applicant has tried to frustrate his meeting with his sons and is using DR's condition to alienate him yet he is ready, able and willing to share his love and experiences with his children. He contends that he has never once tried to remove the children from their mother's care and using geographical location as a hamper for access to his children would be discriminatory and would deny the boys love and support of their father. He also submitted that meeting his children at the Applicant's home is not conducive because they do not have any privacy as the Applicant is always in the room and interjects and interrupts them. He stated that he craves a wholesome relationship with his children and the children are entitled to it. He urged the court to grant him access to his children for at least one or two weeks when he is in Kenya.

On the 3rd issue he submitted that the details on maintenance were not finalized but he is ready and willing to provide financially provided it is within his means and that he is involved in decision making so that he can give input and confirm affordability of decisions. He also submitted that he is willing to pay for DR's education at (place withheld) as long as he recognizes him as his father and can access the school and recognized as the child's father. He contends that he is ready for mutual consultation and agreement on DR's education but is unwilling to make back payments on schools fees as demanded as he was not consulted when transferring him to (place withheld) but is nevertheless willing to take up payment once he is recognized in the school and not blacklisted. He also submitted that he is willing to cater for DR's medical expenses as long as he is given due recognition as the father and be involved in decision making. Additionally he contends that he should not be made to compensate moneys used yet he was restrained from parental connection with his children.

Analysis and Determination

I have considered this matter. I have also read the Judgment delivered on 19th June 2015 granting divorce to the parties herein and issuing orders on custody and maintenance of the two children. I have noted the issues each party has identified for determination. I have condensed the two sets of issues requiring determination which, in my view, are the following:

- (i) Legal custody of the children.**
- (ii) Access by the Respondent to the children and the modalities of that access.**
- (iii) Maintenance of the children.**
- (iv) Removing children from jurisdiction.**
- (v) Costs of this Application.**

Given that the issues raised in (i) to (iv) all-inclusive are intertwined, I will discuss them together before pronouncing myself on each in my determination. The law is clear that in all matters and in all decisions touching on children, the paramount consideration

is the best interests of the child. Article 53 (2) of the Constitution, Section 4(2)(3) of the Children Act and International Instruments on the rights of children lay emphasis on this. Article 53 of the Constitution, the Supreme Law of the Republic, is loud on this requirement especially under Article 53 (1) (e) which lays emphasis on **the child's right 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** (*emphasis added*).

Section 4 (2) of the Children Act is categorical on this issue. For emphasis it provides that:

4 (2). In all actions concerning children whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.

(3) All judicial and administrative institutions and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act, 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.

There are numerous precedents on the same point and indeed in this matter both counsel submitted on the impact of the best interest of the child in this matter. In the case of **Bhutt vs. Bhutt HCCC No. 8 of 2014**, the court stated that:

“The best interests of a child are superior to rights and wishes of parents, and they incorporate not just the physical comfort of the child but the welfare of the child in its widest sense.”

Divorce generally causes emergence of new and intricate issues especially in regard to children where the divorced parties had children and where they differ on the issues touching on the children. The dynamics in this matter are that the parents of the two children subject of these proceedings are divorced, the mother has remarried another man and the father lives outside the jurisdiction and further that one child has autism and requires specialized handling. The issues raised here all point towards parental responsibility under the circumstances I have mentioned. In determining this matter I take refuge in the fact that I am not reinventing the wheel. The law and judicial pronouncements come to my aid in the form of beautiful legislation and precedents that give guidance on how best to protect the children. The law under the Constitution and the Children Act succinctly sets out parental responsibilities of each parent of a child. Section 23 of the Children Act gives the Definition of parental responsibility as follows; -

(1) In this Act, “parental responsibility” means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child’s property in a manner consistent with the evolving capacities of the child.

(2) The duties referred to in subsection (1) include in particular—

(a) the duty to maintain the child and in particular to provide him with—

(i) adequate diet;

(ii) shelter;

(iii) clothing;

(iv) medical care including immunisation; and

(v) education and guidance;

Section 24 goes further to apportion that responsibility as follows;

(1) Where a child's father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility."

Regarding Legal Custody, it refers to rights and responsibilities that are conferred on by a custody order. It is the right to make decisions relating to the welfare of the child. The rights included in legal custody are all the duties, rights, powers, responsibilities and authority which a parent has in relation to the child. These include the responsibility to maintain a child and provide them food, shelter, medical care, education, clothing and duty to protect the child from neglect, discrimination and abuse.

Section 83 of the Children's Act sets out the following principles guiding the court in making a custody order. The court must consider the following:

- 1. The conduct and wishes of the parent or guardian of the child***
- 2. The ascertainable wishes of the relatives of the child***
- 3. The ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his/her home in the last 3 years before the application to the court.***
- 4. The ascertainable wishes of the child.***
- 5. Whether the child has suffered any harm, or is likely to suffer any harm if the order is not made,***
- 6. The customs of the community to which the child belongs.***
- 7. The religious persuasions of the child***
- 8. Whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether or not those orders remain in force.***
- 9. The circumstances of any sibling of the child concerned; and of any other children of the home, if any.***
- 10. The best interest of the child.***

It is not lost to me that some of the above wishes or circumstances are not ascertainable at this stage given that this matter was canvassed through written submissions. However, I wish to make it clear that this court has inherent powers and discretion to make orders that take into account the best interest of the child. When it becomes necessary for the orders of this court to further the best interest of the children in this matter and to protect them, this court will not shy away from taking that extra mile to ensure that this is achieved.

From my reading of the Judgment of this court, differently constituted, delivered on 19th June 2015, it is clear to me that there is no dispute regarding the physical custody of the children. The orders of this court contained in that Judgment granted physical custody to the Applicant who was the Respondent in the Divorce proceedings. The father, Respondent herein, was granted access rights but the order for access did not address the dynamics of the circumstances of this case. Maintenance was not specified with the court stating that maintenance of the children may be canvassed upon each party filing affidavits of means. This is a live issue. I hasten to add that both parties are in agreement that the Applicant maintains physical custody of the children. The parties also agree that they should both have parental responsibility over their children. It is clear to me that the issue of legal custody of the two children remains unresolved.

There is mention that both parties came to an understanding and agreed that in as much as the children remain with their mother their father would have legal custody and be involved in the children's lives. It is evident to me after reading the rival submissions that both parents are still squabbling over the issue of access, legal custody and maintenance of the two children. Parental responsibility is premised on Article 53 (e) of the Constitution of Kenya, which accords all children the right to parental care and

protection which includes equal responsibility of the mother and father whether married or not. Taking into consideration the unique needs of one of the children due to autism, it is important that this court consider his welfare. Seeing that there are no exceptional circumstances warranting exclusion of the Respondent from the children's lives, it is important that the children have care and protection of both parents bearing in mind the special needs of the child affected by autism. In my view it is prudent to grant, which I hereby do, legal custody of both children to the two parents. The two children's welfare remains with both biological parents of the two children and it is in the best interests of the two children herein that both the Applicant and the Respondent have legal custody of the children.

On the issue on maintenance, this court recognizes that maintenance is an aspect of parental care and is the responsibility of both parents of a child. Section 94(1) of the Children Act stipulates the considerations by which the Court shall be guided when making an order for financial provision for the maintenance of a child as follows:

- (a) The income or earning capacity, property and other financial resources which the parties or any other person in whose favour the court proposes to make an order, have or are likely to have in the foreseeable future;*
- (b) the financial needs, obligations, or responsibilities which each party has or is likely to have in the foreseeable future;*
- (c) the financial needs of the child and the child's current circumstances;*
- (d) the income or earning capacity, if any, property and other financial resources of the child;*
- (e) any physical or mental disabilities, illness or medical condition of the child;*
- (f) the manner in which the child is being or was expected to be educated or trained;*
- (g) the circumstances of any of the child's siblings;*
- (h) the customs, practices and religion of the parties and the child.*

Bearing in mind that the best interests of the child are of paramount importance in every matter concerning a child, it is my view that a clear maintenance order will be one which encompasses the duties and responsibilities of the parents, and the rights of the child, putting at the center of it all the best interests of the child.

It is the constitutional duty of both parents to provide maintenance for their children. In the present case, the Applicant submitted that the Respondent stopped providing maintenance in November of 2018 and she has been struggling to provide for them with the help of her current husband. The Respondent on the other hand did not dispute this contention but submitted that he would be willing to provide for the children as long as he would be allowed to have legal custody of the children uncurtailed. As mentioned above in matters concerning children, the rights of the parents are secondary to those of the children.

The Applicant filed an affidavit of means where she claimed to be struggling as she is unemployed due to round the clock care she gives her child. She pegged monthly expenditure in relation to the children at Kshs 408,222/- . The Respondent however did not file an affidavit of means. That notwithstanding, both parties agree that the Respondent used to provide \$3500 for maintenance but stopped in November of 2018. This court can therefore deduce that the Respondent is a man of means and based on their children's lifestyle he tried to maintain their level of comfort by remitting said amount. Further, through the Respondent's submissions it is clear he only stopped providing said maintenance as he felt he was not allowed proper access to the children. As stated above, the Respondent's grievances against the Applicant are a non-issue in this children's matter therefore the Respondent should forthwith provide maintenance for the children based on their needs. As far as housing goes, the children live in the Applicant's matrimonial home as she has physical custody. This arrangement should be maintained and should not be disturbed unless the court is successfully moved to make such an order. Further it is my view that the Applicant provides housing and food while the Respondent caters for school and medical expenses. To this extent, the Applicant is directed by this court to remove any restrictions she may have placed in the schools where the children attend to allow school visitation of the Respondent with prior notice to the Applicant and the school. To that end the school authorities shall be notified that the Respondent is authorized to visit the children in school but on prior notice but is not authorized to remove the two children or any of them from school unless a court of competent jurisdiction has ordered so or the Applicant has given written consent to such arrangement and such visitation does not adversely

affect the child's attendance to class or school activities. The Applicant is further ordered to include the Respondent's name as the father of the children in the school records.

Regarding refund to the Applicant of the maintenance of the children from November 2018 to present, it is my considered view that both parties have parental responsibility towards their children. In the absence of one party providing for the children, the other party ought to step in and ensure the children's rights are protected. As noted, the order for maintenance was not specific on what each party should provide in this regard. I see no need to grant an order for refund of the money allegedly used by the Applicant in maintaining the children.

The issue on access to the children is a delicate one and ought to be handled as such. The starting point for this court is that it is in the children's best interests to have both parents in their lives. To my mind, the child's best interests is not just about money, but about the complete welfare of the child: the child's feelings, his or her needs, the capacity of the parents or any other person to provide child's needs etc. This court does not have evidence regarding where the Respondent lives when he in Nairobi visiting. For instance, does he have a home in Nairobi" Where does he live" Does he have workers who can assist with taking care of the children, cooking and cleaning for them" Does he have rooms where each child can have their space" Is he able to accommodate the autistic child and his care giver" These are the questions that the court ought to get answers to and satisfy itself before it can grant the prayer for access of the children especially for an overnight stay with the Respondent. However this does not mean that the Respondent is denied access. Care must however be taken to ensure that the children are comfortable and their rights protected. It is my view that it does not give the Respondent a conducive atmosphere to be with his children and bond with them in their step-father's home. For this reason I will, for now subject to review, allow the Respondent day access to the children within Nairobi from 10.00am, pick-up time, to 4.00pm, drop-off time, two days a week Saturdays and Sundays during school terms and any day of the week during holidays as may be agreed upon between the Applicant and the Respondent when the Respondent is within the Country. When it becomes necessary to have the care giver present during those visits for the autistic child, then the caregiver should accompany the child. The Applicant and the Respondent are cautioned that they should not hamper the smooth running of this order and should facilitate this structured access without difficulty. This order can be reviewed when the circumstances change. The prayer to take the children outside the jurisdiction of Kenya is denied for now. The Respondent is also cautioned that he should not make surprise visits to pick the children but should communicate his presence in the country in advance.

Further to the above orders, the prayer to confiscate the Respondent's passports is denied. The Respondent is also denied the prayer to take the children outside Jurisdiction. The children's travel documents should be kept away by the Applicant. This court further directs that the Director of Immigration be served with this order to the effect that the Respondent is not authorized to take the two children out of the country without orders of a court of competent jurisdiction or consent of the Applicant.

In conclusion, the prayers sought in this application are not allowed as sought. Instead I issue the following orders:

1. Legal custody is awarded to both parents in the manner explained in this judgment.
2. Maintenance is granted to be provided by both parents as follows: (a) The Applicant shall provide housing, food and other incidentals as may be necessary; (b) The Respondent shall pay school fees and school related expenses, medical cover, and continue to paying \$3500 as he was doing earlier (it is not specified whether per month or annually. The same arrangement shall continue).
3. The Respondent is granted access to the children in the manner best explained in the judgment with visitation in school as explained above.
4. Prayer to have the Respondent deposit his passports in court is denied.
5. Prayer to take children outside the jurisdiction is denied. This is more explained in the judgment.

Orders shall issue and each party is at liberty to apply.

Dated, signed and delivered this 29th July 2021.

S. N. MUTUKU

JUDGE



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