

KENYA / JUDGMENT

JL v AL [2026] KEHC 13622 (KLR)

[2026] KEHC 13622 (KLR)**COURT**

High Court

BEFORE

LN Mutende

CASE / FILE NUMBER

Civil Appeal E004 of 2025

Source: new.kenyalaw.org · Research copy typeset by Esheria. Not court-issued or certified.

JL v AL (Civil Appeal E004 of 2025) [2026] KEHC 13622 (KLR) (16 September 2026) (Judgment)

Neutral citation:

[2026] KEHC 13622 (KLR) Republic of Kenya In the High Court at Maralal Civil Appeal E004 of 2025 LN Mutende, J September 16, 2026 Between JI Appellant and AL Respondent

Judgment

1. WL, JL and NR sued the Appellant, JL their father, through the Respondent AL their Mother and next of friend, by a plaint dated 20 th September, 2017. The minors aged 6 years and 2 months; 5 years and 2 months, and 6 months respectively sought maintenance. The court was also asked to determine the question of custody. 2. It was stated that the minors were suffering from stress and want of basic needs; and, that the Appellant had ignored parental responsibility towards the minors. 3. An affidavit was deposed by the next of friend in support of the claim for maintenance. It was deposed that she has struggled to raise the three children with little assistance from the Defendant (Appellant) and after the birth of NR she has single handedly brought up all the children accommodating and catering for them in her modest house within Maralal Township. 4. That her children WL and JL were in their elementary education level having attended nursery school at [Particulars Withheld] Academy and had to miss out on school due to lack of school fees which she was unable to pay as she was not in permanent employment, but engaged in menial work. 5. That despite the Appellant's sound financial position as an ECD Teacher with a job title of Quality Assessor and standard of education with a monthly net salary of Kshs.54,362/- he had shown no interest in maintaining and/or providing for children. 6. Further, that expenses incurred every month per child were as follows; Food Kshs.6,000/- Education Kshs.8,000/- Clothing Kshs.4,000/- Medical cover Kshs.4,000/- Housing Kshs.4,000/- Misc.-books, transport to school Kshs.3,000/- Total Kshs.29,000/- 7. That it would be in the best interest of the children for her to be granted actual custody as well as legal custody. 8. The Appellant failed to enter appearance hence an interlocutory judgment was entered against him for maintenance and custody on 12 th October, 2017. On the date scheduled for formal proof the Appellant was

present. The Respondent presented their case and sought the Appellant's monthly contribution in the sum of Kshs.29,000/- indicating that despite all children being the Appellant's, he had refused to reach an amicable settlement of the matter. 9. On his part the Appellant stated that as a Quality Assurance Officer he earned Kshs.24,000/-. That they were before the children officer and they entered into an agreement. Acknowledging that the Plaintiffs are his children, he urged that he pays their school fees. That he disagreed with their mother. That he built a house for his family which they rented out and AL refused to have their children registered under a medical scheme. He proposed to contribute Kshs.5,000/- per month for food and clothing then undertook to register them under National Health Insurance Fund (NHIF) if AL availed their birth certificates. Also, he committed to take the responsibility of paying school fees directly to school and urged that AL was a business lady hence should provide food for the children to which AL agreed but argued that Kshs.5,000/- was not sufficient. In the result parties entered into a consent which was adopted as the order of the court thus; 1. That the Plaintiff will cater for the children clothing's needs. 2. That the Defendant will ensure that he registers for the children N.H.I.F medical cover and pay their school fees in full. 3. That the Defendant will pay Kshs.7,000/- per month to the Plaintiff to cater for the minors' food and shelter needs." 10. Through a letter dated 16 th April, 2018, AL informed the court that the Appellant had not paid monthly decretal amount for a period of 3 months, February to March, a sum of Kshs.21,000/- per the consent of 15 th November, 2017. That he had also failed to provide clothing and register the children under NHIF scheme per the court order. For that reason, a notice was issued to the Appellant who failed to comply. On 9 th May, 2018 summons requiring attendance were issued against him. Despite being served he did not comply hence a warrant of arrest was issued against him. He appeared in court on 25 th May, 2018 and was released on bond with a surety in the sum of Kshs.100,000/-. 11. When he appeared on 30 th May, 2018 he attributed the delay in payment to delay in payment of salaries in April and May by the County Government. In that regard he sought an order for the funds to be deducted at source and remitted to the Plaintiff's next of friend, AL to which the court ordered that monthly maintenance be attached by way of salary⁶ attachment of the Appellant's salary and to be paid directly to the Respondent. The other orders per the consent were to be complied with. Respective deductions commenced and continued on 17/03/2021 parties came up with another consent which read thus; " By consent; That the Defendant cease to remit monthly sum of Kshs.7,000/- (seven thousand) as ordered by this honourable court on the 15 th November, 2017 with effect from March, 2021." 12. The consent was adopted as the order of the court. 13. This was followed by a chamber summons application dated 6 th May, 2025 seeking orders that the Appellant be ordered to give the Respondent physical custody of the minors, pay fees and school related expenses and to provide for minors monthly maintenance and upkeep. The application was premised on grounds that the Appellant chased away the Respondent, AL, from their home on 19 th February, 2025 forcing her to leave the minors who were of tender age unattended and the Appellant's conducted had negative impact on the minor's social and academic life as it was already disrupted. 14. That following their reconciliation they had been blessed with a forth child. That the Appellant

had denied AL access to the children which was not in the best interest of the children. 15. Service of the application was effected. Parties appeared in court on 13 th May, 2025 whereby the Appellant was granted leave to file a response. The Applicant(Respondent) was granted corresponding leave to file a reply if necessary. They were also granted the opportunity to file submissions. The date for ruling was set at 17 th June, 2025. 16. The court delivered a ruling as scheduled which read thus; “ Vide an application dated 6 th May, 2025 the Applicant herein is seeking the following orders at this juncture that she be given physical custody of the minors and that the Defendant be ordered to pay maintenance of the said minors. The Respondent swore a replying affidavit on 19 th May, 2025 opposing the said application. However, upon perusing the court record it is not very clear from the handwritten proceedings how this matter was determined. This is because interlocutory judgment was entered against the Defendant on 12 th October, 2017. The matter went for formal proof hearing. Then on 15 th November, 2017 the parties herein signed a consent on the court record but the page for the consent terms is missing. Thus, it is not very clear what the terms of that consent judgment were. This is important because I was not the trial Magistrate at that time. Therefore, it will be prudent at this juncture to arrest the delivering of the ruling on this application to enable the proceedings to be typed so that I can ascertain how the issue of custody was determined.” 17. On that note AL sought to be allowed visitation. And, an order was made that she visits the children in school. 18. On 29 th July, 2025, Ms. Kamunya, learned counsel came on record for AL (Respondent herein) and sought to withdraw the application dated 6 th May, 2025, an application that was granted. Further, the court granted an order to AL to have access to the children during weekends and directed the children officer to file a report. 19. On the 2 nd September, 2025 counsel for AL sought leave to amend the plaint, however, the court ruled that there was an interlocutory judgment on record against the Appellant. The court stated thus; “ Upon perusal of the court record, I note that on 12 th October, 2017 interlocutory judgment entered against the Defendant. Matter was then set down for formal proof on 15 th November, 20..... On the aforementioned date the parties came and recorded a consent order on the issue maintenance, clothing, medical needs and educational needs. Thus, the basis of custody and maintenance have already been dealt with by the previous Magistrate and therefore there is nothing this court can do on the issue of custody and maintenance since the interlocutory it has never been set aside and the parties went ahead and entered into a consent in respect to maintenance. The parties concluded to either appeal or seek a review of the interlocutory judgment and consent order.” 20. It was upon that background that the Appellant instituted the instant appeal. Through a memorandum of appeal dated 9 th September, 2025 the Applicant proffered the appeal on grounds that; 1. That the learned magistrate erred in law and in fact by relying on a judgment issued in 2017 by Hon. Gachie without adequately considering the substantial changes in the circumstances surrounding the welfare and custody of the children. 2. That the learned magistrate erred in law and in fact by failing to appreciate that the Appellant has been solely responsible for the full maintenance and welfare of the children, including paying school fees, medical expenses, food, shelter and other daily needs – contrary to the 2017 consent judgment 3. That the learned magistrate

erred in failing to consider the emotional and psychological bond development between the Appellant and the children who have solely been under the Appellant's custody since young age. 4. That the learned magistrate misdirected himself by disregarding the report of the children's officer which accurately reflected the living conditions and welfare of the children under Appellant's custody 5. That the learned magistrate erred in law by delivering judgment contrary to the best interests of the children as required under Article 53(2) of the Constitution of Kenya and Section 4(2) of the Children's Act. 6. That the judgment issued on 2 nd September, 2025 oppressive, unjust, and not supported by the evidence presented in court." 21. Filed simultaneously with the Memorandum of Appeal is a Notice of Motion seeking stay of judgment and/or orders issued on 2 nd September, 2025 and setting aside of the entire judgment. 22. This being a first appellate court, it must reconsider and re-evaluate what transpired in the trial court and reach its independent conclusions bearing in mind the fact of not having heard parties who were before the trial court so as to determine their demeanor. The principle was stated in *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 thus; "...An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanor of a witness is inconsistent with the evidence generally. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must 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 this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally..." 23. In dealing with the matter this court must take into consideration the best interest of the children so as to ensure substantive justice is upheld. 24. When the matter was placed before Ndung'u J. the court approached the appeal through the constitutional mandate of ultimate protector and custodian of the children (upper guardian). It interviewed/examined the three (3) minors who were then aged 14 years (WL), 13 years (JLK) and 4 years (MN) respectively. It directed the parents (JM and AL) to continue co-parenting in the course of proceedings. This followed the argument by the Respondent that the Appellant had refused to abide by directions of the court to let the Respondent have access to the children. 25. On the 27 th February, 2026 a concern was raised that the children were usually left at their auntie's home who brews liquor. Following the application, the court ordered a report to be filed by the children officer. The matter came up on 21 st April, 2026 before Kamau J. where Ms. Kamunye counsel for the Respondent notified the court that parties had reached an agreement and a parental agreement had been filed. 26. The Parental Responsibility Agreement dated 16 th April, 2026 reads thus; " Having held a discussion today in this office we have come into agreement that; a. The first three siblings to continue staying with the father during the school going days (Monday to Friday) and to visit their

mother as from Saturday morning 9am up to Sunday evening 5pm). b. The last-born child to stay and to be under the custody of the mother and to visit the father upon a request from their father. c. During school holidays, the first three children to visit the mother as from Monday morning at 9am to Friday evening 5pm and during the weekends to visit their father as from Friday evening 5pm to Monday morning 9am.” 27. The agreement was adopted as the order of the court. Further directions were given regarding recording of a consent on maintenance and further orders. When the matter came up on 4 th May, 2026 Ms. Kamunye counsel for the Respondent informed the court that when parties appeared before the children’s officer the Respondent raised the issue of custody of the minor daughter who had been staying with the Respondent. It was her wish to continue staying with the minor MN. 28. The report filed by the Assistant Director Children Services, Samburu, dated 30 th April, 2026 indicate the concern raised by the Respondent in respect of MN. There was regression of the case as the two (2) parents were emotional and could not agree. The Respondent portrayed bias on the part of the children office. That notwithstanding the office made recommendations thus; a. The custodial arrangement reached and signed by the two parties earlier on be upheld subject to review by the honourable court. b. The father to cater for school fees and other related educational needs for all the subjects. c. The two parents to share clothing expenses. d. The father to enroll the children under medical insurance cover to cater for medical issues of the children. e. The two parents to cater for food as par the earlier agreement on custody and visitation schedule depending on who has the actual custody of the children at a particular time. f. The honourable court may issue another order in the best interest of the children. 29. During hearing the Respondent’s counsel sought leave to cease appearing for the Respondent therefore during hearing of the appeal the Respondent appeared in person. Both parties agreed to canvass the appeal through oral submissions. 30. It is urged by the Appellant that it is his wish to stay with the children, he will provide for their education, health and other expenses that may arise. That he complied with the court order and released all children to the Respondent but WL and JL returned and MN followed thereafter. 31. On her part the Respondent she submits that following the court order she wanted to take all the four children but the Appellant upon reaching the road took photographs of the children and sent JL to go back with the other two (2) children. That she rang her advocate who advised that she stays with the two (2) youngest children which she did then NL came from school and told her that the Appellant had gone to school and bought for her biscuits, sweets and juice then said he would go for her on Friday. Come Friday she did not see her. When she later saw NL she told her that the Appellant locks her up. 32. It was hence her plea that the two (2) boys JL and WL stay with their father while she could have custody of NL and the youngest child MN because of their tender age and that the Appellant leaves NL alone hence can be preyed upon and abused. 33. Further, that the Appellant has spoiled her biological daughter S his step-daughter, who doesn’t even relate with her but since she is adult, she cannot do anything about it. That she would find the Appellant lying on her daughter and when she raised her concerns he assaulted her and left her unconscious. Then he proceeded to report to the police that she alleged he had raped S. When she left hospital, she was placed in custody by the police and the Appellant left with S,

aged 19 years then. 34. In response the Appellant submits that the Respondent does not have respect for any institution hence should not have custody of the children. 35. At the outset, the Appellant disregarded the court process hence an interlocutory judgment was entered against him. Although a final relief was to be determined through formal proof by the Respondent as the next of friend of the subjects the Appellant lost the right to contest the claim on maintenance and custody of the subjects. They moved ahead and entered into consents but it was apparent that the order remained unvacated. 36. The subsequent consent resulted into parties reconciling and even sired another issue of the marriage. Factually the basis upon which the interlocutory judgment was entered changed as the interlocutory judgment seemed to be compromised. Apparently there was derailment of procedural technicalities but the court should be conceived with the substantive child law by ensuring the best interest of the child are achieved. (See Article 159(2)(d) of the Constitution of Kenya). 37. With regard to custody of the children, the parties entered into a Parental Responsibility Agreement. An interpretation of the Parental Responsibility Agreement filed suggest that the Appellant was to have primary physical/actual custody of the subjects herein during the school going days (Monday to Friday) while the Respondents would have scheduled visitation access during the weekends. Then during holidays, the subjects were to visit the Respondent from Monday morning at 9.00am to Friday 5.00pm then during the weekends. They would be with the Appellant from Friday Evening to Monday morning. 38. Clearly, both parents did take up responsibility of how they would stay with the children. The pleadings were not amended to include the minor who was born following reconciliation of the parties but it was agreed that the Respondent would have primary custody while the Appellant has a right of reasonable access/visitation upon request. 39. The Respondent had change of mind later on and denied having entered into the arrangement. However, prior to adopting the Parental Responsibility Agreement as an order of the court. The trial Judge confirmed whether parties had agreed to the terms. Both of them did agree to the terms per the record. Although the Respondent claims to be illiterate and denies the document upon which she appended a signature it is an order of this court hence enforceable which can only be varied or set aside following a court order. Section 33(3)(4) of the Children Act provides that; (3) A parental responsibility agreement may only be revoked or terminated by an order of the Court made on application by— (a) a person who has parental responsibility over the child; or (b) a child, with the leave of the Court. (4) The Court may only grant leave under subsection (3)(b) if it is satisfied that the child sufficiently understands the nature and effect of the application made to the Court. 40. In *MAK v RMAA & 4 Others* (Petition 2 (E003 of 2022) [2023] KESC 21 (KLR) the Supreme Court held that; “ ... Courts, while making a decision that would impact the child, were mandated to consider all circumstances affecting the child. The following guidelines ought to be considered when balancing a child’s best interests and parental rights and responsibilities: i. The existence of a PRA between the parties. ii. The past performance of each parent. iii. Each parent’s presence, including his or her ability to guide the child and provide for the child’s overall well-being. iv. The ascertainable wishes of a child who was capable of giving/expressing his/her opinion. v. The financial status of each parent. vi. The individual needs of each child. vii.

The quality of the available home environment. viii. Need to preserve personal relations and direct contact with the child by both parents unless it was not in the child's best interests, in which case supervised access to the child was to be granted. ix. Need to ensure that children were not placed in alternative care unnecessarily. x. The mental health of the parents. xi. The totality of the circumstances.” 41. In any decision, the best interest of a child is paramount. Article 53(2) of the Constitution provide thus; "(2)A child's best interests are of paramount importance in every matter concerning the child." 42. Section 8 of the Children Act provides 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; (b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule. (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. (4) The Cabinet Secretary shall issue guidelines to give effect to this section. 43. There is in existence a Parental Responsibility Agreement which is in respect of parental responsibility regarding access and visitation only. This is legally incomplete. Section 30 of the Children Act , 2022 provides thus; "In the applications of the provisions of this Act and in any matter before a court of law concerning a child, due regard shall be had to the duties and responsibilities of a child to— (a) work for the cohesion of the family; (b) respect his parents, superiors and elders at all times and assist them in case of need provided that the child's best interest shall remain paramount; (c) serve his national community by placing his physical and intellectual abilities at its service; (d) preserve and strengthen social and national solidarity; (e) preserve and strengthen the positive cultural values of his community in his relations with other members of that community; (f) attend school unless prevented by factors beyond their ability; (g) not discriminate against other children on account of ethnicity, race, disability, gender, social status or other grounds; (h) protect the environment; (i) not abuse or harm other children; and (j) not destroy any property." 44. Although the Parental Responsibility Agreement is enforceable it is only in respect of access and visitation therefore the question of legal custody remains unaddressed. It is silent on who should make decisions regarding the child's life, welfare and basically making decisions regarding cultural exposure, healthcare and education, etc. 45. I have considered wishes of the minors. WL prefers staying with the Appellant because the house has sufficient space and each child has a bed unlike the Respondent's place where they share a bed. He would just wish to visit her three times a week but not sleep over. Otherwise, he acknowledges that both parents provide for them. That the Appellant pays school fees, buys food. But while he

is away at his place of work, Archer's post which is usually 3 – 4 days the Respondent provides for their food. 46. JL would like to visit the Respondent twice in a week who buys them clothes occasionally but he prefers staying with the Appellant who pays their school fees, buys them food and also gives them pocket money to go for a football match. 47. NL prefers staying with her father the Appellant as compared to her mother. She states that the Appellant buys her snacks clothes and shoes and she has her own bed. 48. The minor expressed their opinion regarding access and visitation which does not differ from the Parental Responsibility Agreement reached, therefore, unless it is raised it will remain as such being an order of the court which will protect and also ensure the children's safety as the case progresses. 49. The question of legal custody and maintenance remains unaddressed. To that, notably children matters are dynamic, circumstances are constantly changing. As afore stated due to failure by the Appellant to defend the suit an interlocutory judgment was entered which is subject to formal proof. The default mechanism and/or judgment was superseded by the subsequent consent and reconciliation which rendered the consent obsolete. The material changes in circumstances varied the order. It was hence erroneous for the trial court to find that it had no jurisdiction on the fresh application that was to be made. For those reasons the appeal is merited and allowed. Therefore, I make orders thus: i. The order by the trial court dated 02/09/2025 be and hereby set aside. ii. The matter is remitted to the Children's Court to determine the pending issue on legal custody and maintenance of the subjects. iii. Each party to bear their own costs 50. It is so ordered. DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16 TH SEPTEMBER, 2026. L.N. MUTENDE JUDGE

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://new.kenyalaw.org/akn/ke/judgment/kehc/2026/13622>

CASE PAGE <https://chat.esheria.ai/case-law/kenya/jl-v-al-2026>

Prepared on 29 October 2026 · Esheria