PKK v GNK (Minors Suing through Next Friend) (Civil Appeal 53 of 2023)
[2024] KEHC 11518 (KLR) (Civ) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11518 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CIVIL

CIVIL APPEAL 53 OF 2023

CM KARIUKI, J

SEPTEMBER 26, 2024

BETWEEN

PKK ..... APPELLANT

AND

GNK ..... RESPONDENT

MINORS SUING THROUGH NEXT FRIEND

(Being an Appeal against the Ruling of Honourable C Muhoro Senior Resident Magistrate delivered on 8th July 2022 in the Chief Magistrate Court at Nyahururu Children Case No. 9 of 2020.)

JUDGMENT

1. This is an appeal against the order of Honourable C Muhoro Senior Resident Magistrate in Nyahururu Children Case 9/2020 delivered on 8/7/2022 where Respondent in Lower court orders various reliefs vide plaint; custody of minors, school fees, medical, food, clothing, house help, and rent.
2. After hearing the case, the Plaintiff/ Respondent was granted custody of the minors. Appellant was directed to be responsible for the following:School fees, education,food, and items of personal use Kshs. 10,000/= per monthclothing was to be shared.
3. Court globally said total Kshs. 10,000/= per month, being aggrieved by the said verdict. The Appellant appealed.
4. The matter was heard exparte as the Appellant is said to have failed to file appearance and defense.
5. He sought to set aside Judgment vide application dated 6/5/2022.

6. The Appellant's grave man of application was that he was not served with the summons and was later eager to call the Process Server and even the document examiner to verify signatures.

7. The other point was that the matter was filed in Nyahururu, yet both parties reside there.

8. The Ruling of the trial Magistrate vide pages 5-8 states as follows;

> The record shows that the Applicant attended Court on 13th March 2020 when parties were directed to attempt an out-of-court settlement. The Applicant again attended Court on 22nd January 2021, when he was granted seven (7) days to file and serve his defense and a mention date was issued in his presence to confirm compliance.
>
> When the case came up for mention for compliance on 5th February 2021, the Applicant was absent and had not filed his defense. The case was certified as ready for hearing, and a hearing date was issued. The Applicant was still granted time to file and serve his defense before the hearing date. The case came up for hearing on 26th February 2021, and the Applicant was absent. Having satisfied itself that service of the hearing notice was effected upon the Applicant via WhatsApp, the Court proceeded to hear the case ex-pane. However, according to the Defendant/Applicant, service of the hearing notice and Notice of Delivery of Judgment was never effected upon him. A perusal of the court records reveals that the Applicant was well aware of the present case, having appeared in Court on two (2) occasions. He was granted time to file and serve his defense, and to date, the said defense does not form part of the court records. Therefore, the service of the Plaintiff, Summons to Enter Appearance, and the hearing notice were effected in adherence to the stipulations of the rules of procedure set out in the *Civil Procedure Rules* (Order 5 Rule 17 and Rule 19).
>
> Having found that the Summons to Enter Appearance and Plaint were duly served on the Defendant, the default judgment was regularly entered. Moreover, where that is the case, it is trite that the Court ought to be slow in setting it aside.
>
> As stated above, the Defendant/Applicant has never filed a defense. Defendant has simply denied being the biological father of the first subject herein and contends that he had never taken up parental responsibility over the said subject. Based on the material before me, the Plaintiff and Defendant met in 2009, whereas CN was born in 2005. It is contended by Plaintiff that Defendant accepted the said subject and even authorized the use of his name on the subject's Birth Certificate. The plaintiff produced a copy of the first subject's Birth Certificate, indicating the subject's father's name as Defendant. From the evidence on record, it is clear that since 2009, when the plaintiff met the Defendant, the Defendant took in both the plaintiff and the first subject. The Defendant, therefore, assumed parental responsibility over the minor (CN). Section 24 (5) of the *Children Act* provides that "a person who has parental responsibility for a child at any time shall not cease to have that responsibility for the child.
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> Section 25 (2) of the *Children Act* provides as follows:
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> "Where a child's father and mother were not married to each other at the time of his birth but have after such birth cohabited for a period or periods which amount to not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that the mother and father have not made a parental responsibility agreement of the child. "

From the above provisions of the law and the evidence on record. The Defendant/Applicant had assumed parental responsibility over the minor CN. Even if Plaintiff and Defendant separated in 2019, it shows that Defendant had assumed parental responsibility over CN for more than twelve (12) months, and he shall not cease to have that responsibility.

The Defendant was well aware of the suit against him. He did not attempt to defend the suit within the stipulated time. He failed to file his defense and did not attend Court when the case came up for hearing. The Judgment herein was delivered on 12th March 2021. He failed to exercise due diligence by following up on the suit's progress against him. The application herein was filed in May 2022. This inordinate delay has not been explained. The Defendant was present in Court on 22nd January 2021 when the Court directed him to file the necessary documents as negotiations between the parties had failed. The Defendant never complied with the directions and even disappeared, only to apply herein after his arrest. The Defendant's conduct and this application are aimed at denying the plaintiff the fruits of her Judgment. Therefore, claims by the Defendant/Applicant that he was never allowed to defend himself and that his defense has triable issues are unfounded.

Consequently, having looked at the relevant law, the above-cited authorities, the affidavits sworn by the Applicant and Respondent, and the annexures, I will disallow the application dated 6th May 2022 and consequently dismiss the same for lack of merit. Each party is to bear its costs.

9. Thus, instant appeal parties were directed to file a submission to canvass it.

10. Appellant's Submissions

11. Whether Judgment ought to be set aside

12. When it comes to children matters, the Court is allowed to apply leniency to the rules of procedure as the minor's best interest always comes first.

13. Article 53(2) of *the constitution* which provides: -

> "(2) A child's best interests are of paramount importance in every matter concerning the child

14. Additionally, the trial court needed to consider the provisions of Section 4(2)(3) of the *Children's Act* as follows: -

> "(2) In all actions concerning children, whether undertaken by public or private welfare institutions, courts of law, administrative authorities, or legislative bodies, the child's best interests 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:-
>
> i. Safeguard and promote the rights and welfare of the child.
>
> ii. Conserve and promote the welfare of the child. "

15. The Appellant initially requested that the matter be settled out of Court when he first appeared before Court. He, on his part, tried his best to settle the matter amicably. The Respondent, on her part, refused to have a sit down with the Appellant, a fact that she did not refute when this Court had an opportunity to all parties, and it was then that she proceeded to Court and fixed the matter for hearing in the absence of the Appellant.

16. It was against the belief that parties had been allowed to settle the matter out of Court and that the Appellant, acting in person at the time, thought the matter would not proceed. When the Respondent appeared in Court, she indicated that negotiations failed but failed to disclose to the Court that she was the one who refused to sit down with the Appellant. The hearing notice was never served, nor was the Notice of Entry of Judgment.

17. What is quite interesting to note is that the suit was filed in Nyahururu Law Courts, yet both parties reside in Nairobi County. The Respondent has been determined to ensure that the Appellant suffers the wrath of the Court as even before the civil proceedings instituted herein, she had initially moved the Court through the criminal Court before the matter was suspended, and she was advised to file civil proceedings through the Children's Court.

18. The Respondent indicates that the Notice to Show Cause service was affected. The affidavit of service clearly shows that the documents were not served. The rules of procedure under Order 5 Rule 22c of the *Civil Procedure Rules* provide for two blue ticks where service has been effected via WhatsApp. The two blue ticks suffice as proper service, but that was not the case in the instant case. We submit thus that there was no proper.

19. For a court to set aside exparte Judgment, the following ought to be taken into account;

20. Whether the Judgment was regular

21. There is no dispute that Judgment was regular as the Appellant attended Court when the matter was being mentioned. However, what is now in contention is that the hearing notice was not served. It was the duty of the Respondent to ensure that service was correctly effected, mainly because the hearing date had been taken exparte.

Whether the Appellant has a defense raising triable issues

22. The Appellant has raised issues touching on his financial position, custody, and maintenance of the minors. He had been accused of not maintaining the minors and having abandoned them. He has raised a defense, and in fact, he even had an opportunity to address this Court as to how he ended up leaving the minors with their maternal grandmother after the request of the Respondent's parents and herself when they separated. Thus, the issue of whether or not he abandoned the minor was raised, which is triable on its own. Furthermore, the minor was shocked to learn that his father never abandoned him, as he thought was the case. The Court had an opportunity to hear that from him.

23. The issue of abandonment has a bearing on the issue of custody, of which the Appellant seeks joint custody too of the minor, which is an issue that ought to have been interrogated.

24. The Appellant told the Court that he was suffering financially. In fact, the Respondent also admitted that even before the separation, he had already been auctioned by the bank. The issue has a significant bearing on the issue of maintenance of the minor and sharing of responsibilities.

25. He was accused of neglecting his parental responsibilities, for instance, failing to pay school fees, which he indicated he had been paying diligently, a fact that was admitted by the minor. These are issues that ought to have been interrogated, too.

26. Thus, I submit that the Appellant raised triable issues in his defense.

27. In the case of *David Kiptanui Yego & 134 others v Benjamin Rono & 3 others* [2021] eKLR where the Court has this to say;

> " 27. I have also enjoyed reading through the draft defense; in my opinion, they raise triable issues. In this scenario, it would be in the interest of justice if the parties were heard fully on the merit of their respective claims. I, however, suggest that the matter be heard expeditiously so that justice is seen to be done. "

28. Justice would only be served if both parties were heard on merit, including the interrogation of the minor.

Who will suffer prejudice?

29. The Appellant was condemned unheard. He has already been committed to civil jail, having been unable to satisfy the decree ordered by the Court. What benefit does it benefit the minor if his father is punished for being unable to meet the obligations set by the Court? He ought to at least have a say and state his capabilities without being condemned unheard and put in a situation where he is bound to fail and be recommitted to civil jail again. He has already lost his job; thus, we submit that the Appellant stands to suffer prejudice.

Was the application seeking to set aside Judgment filed expeditiously?

30. The Appellant became aware of the existence of the exparte Judgment on his arrest and committal to civil jail on 28/4/2022. He applied to set aside the matter on 6/6/2022; thus, the delay was not inordinate.

31. The law on setting aside ex parte orders is found under Order 12, rule 7 of the Civil Procedure Rules, 2010, which provides thus:

> " Where under this Order judgment has been entered, or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

32. The Applicant sufficiently explained that he believed that the opportunity to settle the matter out of Court would mean the matter would be resolved amicably. Furthermore, the COVID-19 pandemic scaled down the court procedures at the time, which is another reason the Appellant thought the out-of-court settlement would be advocated for rather than the court hearing. In the case of *PMM v JNW* [2020] eKLR, the Court had this to say;

> "

> " 7. In Ongom vs. Owota (supra), the Court stated thus:
> "...However, what constitutes "sufficient cause," to prevent a defendant from appearing in Court, and what would be "fit conditions" for the Court to impose when granting such an order, necessarily depend on the circumstances of each case."

33. In the case of *The Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government & Others* Civil Appeal No. 147 of 2006, the Court of Appeal of Tanzania, while deliberating on what constitutes sufficient cause opined thus:

> " It is difficult to define the meaning of "sufficient cause." It is generally accepted, however, that the words should receive a liberal construction to advance substantial justice when no negligence, inaction, or want of bona fides is imputable to the Appellant."

34. The Appellant herein has given sufficient Cause to warrant setting aside the Judgment.

35. Respondent's Submissions

36. In a ruling dated 08/06/2020, the trial court observed that the Applicant was in Court on 13/03/2022 when the parties were directed to attempt an out-of-court settlement, and also matter came again in Court on 22/01/2021 when both parties attended and as there was no settlement, the Applicant was given seven days to file a defense of both parties to conform compliance; however, the Applicant still did not comply or attend Court by the mentioned date 05/02/2021. The Court fixed a hearing date on 26/02/2021, and the Applicant was served via WhatsApp but opted not to attend Court nor file a defense. Thus, the matter proceeded to expatriate. The Applicant has skirted the above finding and holding of the trial court in his supporting affidavit. He only insists that he was not served with a hearing notice and was condemned unheard.

37. Since August 2019, the Respondent has been taking the above responsibilities single-handedly without any help from the Appellant since she claims her client is not in an excellent financial position yet can hire a lawyer and also bought a car under KCWxxxT after selling the bus we bought as a family registered KBU NO—xxx G (PSV) fleet No. xxx city shuttle. The Appellant has claimed that the Respondent and the children have been living in the house he built, yet it was our matrimonial home. I came back on 20/01/2021 when I was informed by one of his women that he wanted to sell the house. l sought security from OCS KBC police station, and I was granted permission to move in with my children. When the Appellant heard we were back, he started threatening us, and that is when I went to Joska Police Station and reported. All the OBs are in my lower court file. The OCS warned him not to threaten the peace of the children.

38. Issues, analysis, and determination

39. Upon perusal of the pleadings submissions and the trial court record, I find the issues are:

    a. Whether the Applicant was served as required by the law?

    b. If the above is negative, does he have justifiable grounds for setting aside the trial court judgment?

    c. What are the just orders in all circumstances of the matter?

    d. What is their order as to costs?

40. On the issue of the serve of Notice for the hearing of the suit, it is alleged that the Appellant was served via WhatsApp under Order 5 rule 22 C CPR 2010 as amended in 2020.

41. According to the affidavit of service of Daudi Kipkosgei, the service of hearing Notice was effected on 16/2/2021 at 12.30 p.m. electronically via telephone No. 0738xxxxx, which is undenied to belong to the Appellant. However, the Process Server did not annex any evidence (electronic) that would prove

service, such as a screenshot of the sending of the hearing notice from the service provider, such as Safaricom, would bear averment of service of hearing Notie suffice?

42. Section 107 of the *Evidence Act* states that he who avers must prove in the instant that matter is on a balance of probabilities. This is because the Appellant denied service and demanded proof of the service.

43. The trial court should have interrogated that aspect of proof of service of the service electronically.

44. This ground alone enables the Court to set aside the ex-parte Judgment. We must be alive to the provisions of Articles 25 and 50 of *the Constitution* of Kenya on elements of the fair trial in Court, which is one of the rights that cannot be derogated or limited.

45. However, this being a matter involving children, considering Article 53 on the interest of children is paramount in every matter concerning the child. See also section 4(2)(3) *Children's Act.*

46. The Court will adjust the terms to govern the situation as the matter goes for a de novo hearing. The Court notes the arrangement where the Appellant took custody of one minor, and the Respondent has custody of the other issue; thus, the Court will therefore make the orders as follows:

    i. The exparte Judgment of the trial court dated 12/3/2021 is set aside, and the matter is to be heard denovo by any other magistrate except Hon Ms. Muhoro SRM.

    ii. The actual custody of CK minor shall vest in the Appellant, subject to respondent visitation rights, including one (1) week of custody during the school holidays, or as parties may agree, pending the hearing of the suit denovo.

    iii. The custody of CN as far as she is in school is with the Respondent, plus responsibility for food, clothes, and health while the Appellant takes care of her education pending the hearing of the suit denovo. .

    iv. Orders i and ii above will be in force until the suit is re-heard and determined by any other Magistrate except Honourable Ms Muhoro – Senior Resident Magistrate.

    v. No orders as to costs.

    vi. Parties have the liberty to apply before the trial court.

JUDGMENT, DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 26TH DAY OF SEPTEMBER 2024

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C. KARIUKI

JUDGE