



**Ngeny v Chepkirui (Civil Appeal E061 of 2022)
[2024] KEHC 13334 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13334 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E061 OF 2022
JR KARANJA, J
OCTOBER 31, 2024**

BETWEEN

MARK KIPCHUMBA NGENY APPLICANT

AND

JOSEPHINE CHEPKIRUI DEFENDANT

JUDGMENT

1. In the memorandum of appeal filed on the 29th November, 2022 by the firm of M/s Kadet & Co. Advocates on behalf of the Appellant, Mark Kipchumba Ngeny, it is indicated that the appeal is against a ruling delivered on the 23rd November, 2022 by the Senior Resident Magistrate in Kericho Children's Case No. 21 of 2016 in which the Appellant was the Defendant and the Respondent, Josephine Chepkirui, was the Plaintiff.

The matter revolved around the welfare of two children, Thierry Kipkigen and Terry Jelagat, belonging to both the Appellant and the Respondent.

2. The prayers sought in the appeal include that the said impugned ruling be set aside and substituted for other appropriate orders and that the original suit file be transferred to another Trial Court. the decree emanating

from the impugned ruling was filed alongside the memorandum of appeal and other documents and was signed on the 23rd November, 2022.

3. It was thus ordered and decreed that;-

1. The defendant do pay monthly arrears of Ks 585,000/-(five hundred and eight five thousand) for the upkeep and maintenance of minors.
2. The Defendant be and is hereby directed to pay monthly contribution of Ksh 30,000/= to 40,000/=.



4. As may be deciphered from the record several interlocutory applications were made by the Appellant even before the appeal was listed for directions on the hearing date and mode of hearing assuming that the record of appeal was already in place and served upon the Respondent. Along the way, the Appellant filed a notice to act in person after seemingly “firing” his erstwhile legal representatives i.e messrs Kadet & Co. Advocates.
5. Be that as it may, when the matter was firstly mentioned before this court on the 26th April, 2023, in relation to the hearing of the appeal both the Appellant and the Respondent did not appear in court and the matter was stood over to the 28th June, 2023, which was a public holiday and was therefore re-scheduled to 5th July, 2023. In the meantime, this court noted that the matter was not ripe for directions as the record of appeal had not been filed.
6. The court also noted that an application vide the notice of motion dated 14th April, 2023 was pending hearing.

On the 5th July, 2023, the matter was mentioned before Dr. J.K. Serгон Judge with the Respondent being present in court and not the Appellant. It was then ordered that the application dated 14th April, 2023 be fixed for hearing on 27th July, 2023 on which date it was adjourned to the 25th September, 2023, due to the absence of the Appellant/Applicant.
7. 25th September, 2023, the matter was mentioned before the Deputy Registrar in the absence of the parties and was carried forward to the 4th December, 2023. However, the matter was brought forward on the 11th October, 2023 and fixed for mention on 23rd October, 2023 when it was mentioned before the Honourable Justice Sergon and fixed for hearing on 5th November, 2023.
8. The parties did not attend court on that 5th November, 2023, thereby causing the court to adjourn the hearing of the Application dated 14th April, 2023, to the 4th December, 2023, when the parties failed to appear prompting the Deputy Registrar to fix the matter for hearing on 18th March, 2024.

But, the matter was brought forward to 20th December, 2023 when it was adjourned to 1st February, 2024, for inter- parties hearing of a fresh application dated 20th December, 2023.
9. On the 1st February, 2024, the matter was mentioned before this court for hearing of the application dated 20th December, 2023, which was nevertheless withdrawn on that date (1st February, 2024) by the Applicant through his counsel, the late Kefa Omari, holding brief for M/s Chepkirui Jessica.

Thereafter, the matter resurfaced on 18th March, 2024 as previously ordered by Deputy Registrar.
10. On that 18th March, 2024, before Sergon Judge and in the presence of the Respondent and absence of the Appellant the withdrawn application dated 20th December, 2023 was erroneously fixed for hearing on 20th March, 2024, when it was noted that the application dated 14th April, 2023 had not been fixed for hearing and was therefore fixed for hearing on 6th May, 2024.
11. On 6th May, 2024, both the Appellant and the Respondent appeared in person before the court (Sergon Judge) and whereas the Appellant indicated that the main appeal should be heard, the Respondent indicated that the application was marked as settled.

Consequently, the court admitted the appeal to hearing before a single judge and ordered that the Appellant be given three (3) days to file and serve written submissions and the Respondent to have three (3) days from the date of service to file and serve written submissions.
12. The court further ordered that the matter be placed before this court for oral highlights on 27th May, 2024.



So, on the 27th May, 2024, both parties appeared in person before this very court and whereas the Appellant indicated that he had already filed his submissions, the Respondent indicated otherwise. The matter was then adjourned for hearing on 23rd September, 2024, but was on that date re-scheduled to the 28th October, 2024, due to the absence of the Respondent.

13. Both parties appeared before this court on the 28th October, 2024, and after it was confirmed that both had filed their respective submissions which they were relying on in support of their respective positions vis-à-vis the appeal, the Respondent was allowed to make brief oral highlights before today's date (31st October, 2024) was set for judgement or on presupposition that the appeal was proper and competent for hearing and determination.
14. However, going by the record and the chronological events aforementioned it would follow that this appeal is defective, improper and incompetent, for hearing and determination which would invariably require a re-consideration or revisit of the evidence presented at the Trial Court for this court to arrive at its own conclusions in allowing on dismissing the appeal as was held in the case of Sielle vs Associated Mow Boat Co. [19]EA.
15. The defect, impropriety and incompetence of the appeal is clearly reflected by the lack of a complete or any record of appeal. Further, the original primary file No. 21 of 2016 at the Children's Court Kericho, in which the impugned ruling was made was not annexed to this present file and/or availed in court at any stage. Instead, Misc Civil/Children Application file No. 14 of 2018 was availed although it was not intended for purposes of this appeal.
16. With such defect, the memorandum of appeal would be founded on "quick said" as the substratum of the appeal lies in the record of appeal. In the circumstances, the defect is so fatal that Article 159(2) (d) cannot come to the aid of the Appellant.

In sum, this appeal turns on dismissal as it was technically "dead on arrival." It is therefore dismissed for being fatally defective, incompetent and improper before this court.

The parties shall bear their own costs of the appeal.

17. Ordered accordingly.

DATED AND DELIVERED ON THIS 31ST DAY OF OCTOBER, 2024.

J.R. KARANJAH

JUDGE.

In the presence of the Appellant and the Respondent.

