



REPUBLIC OF KENYA



**PKG v MWW (Appeal E119 of 2024) [2024] KEHC 15926 (KLR)
(Family) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15926 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
APPEAL E119 OF 2024
H NAMISI, J
DECEMBER 18, 2024**

BETWEEN

PKG APPELLANT

AND

MWW RESPONDENT

(Being an Appeal from the Ruling of Hon. A. Githinji Munene, Principal Magistrate delivered on 18 September 2024 in Nairobi Children's Case No. MCCHCC E544 OF 2023)

JUDGMENT

1. This appeal arises from a matter in the Children's court. The Respondent herein filed a suit seeking the following orders:
 - i. Full legal custody of the minor;
 - ii. Joint shared actual custody of the minor;
 - iii. Maintenance of the child in the sum of Kshs 75,000/- per month and school fees as per fees structure;
 - iv. Kshs 213,000 being amount owing due to the current maintenance not remitted as at to date;
 - v. Costs of the suit
 - vi. Any other/further orders the court deems appropriate
2. In response thereto, the Appellant, acting in person, filed his Defence and Counterclaim seeking the following orders:



- i. The suit should be dismissed in toto;
 - ii. No determination on custody should be made, and in any event sole legal custody should not be granted to the Plaintiff;
 - iii. An assessment of the unmet needs of the child should be made by this Court before a maintenance order is made;
 - iv. An ascertainment of means for both parents should be done by this Court so as to determine quanta in fulfilling the unmet needs of the child, and in any case, before any maintenance order is made;
 - v. A residence order for both parents should be made requiring the child to spend equal time between his two homes that are kept by both his parents;
 - vi. An Access order should be made for both parents requiring the parent not at the time residing with the child to access the child;
 - vii. A non-interference order should be made restraining either and both parents from:
 - a. Transferring the child from the jurisdiction of the court, that is the Republic of Kenya, without the written consent of either and both parents, or leave of this Court;
 - b. Transferring the child from the current school (Whitestar Academy) without the written consent of either and both parents or by the leave of the Court;
 - c. Having the child admitted to any school without the written consent of either and both parents or by leave of the Court;
 - d. Transferring the child's home and resident from the County of Nairobi without the written consent of either and both parents or by the leave of the Court
 - viii. Without Prejudice to the foregoing an Order for shared or joint legal and actual custody in favor of the Plaintiff and the Defendant be made;
 - ix. Any other orders the court may deem fit;
 - x. Costs to be provided for
3. The Appellant then filed a Notice of Motion dated 8 August 2024.
4. In the Ruling of 18 September 2024, the trial court was faced with a Preliminary Objection on the jurisdiction of the Court as well as prayers for variation of the interim orders issued on 31 May 2023. In its Ruling, the trial court made the following orders:
- i. The Preliminary Objection dated 12 June 2023 is dismissed;
 - ii. The Plaintiff/mother to retain actual custody, care and control. Defendant father to have access on alternate weekends from Friday 5pm to Monday morning. He is to drop the child in school and pick up the minor on Friday;
 - iii. Parties granted joint legal custody and further extend access to the Defendant for the 1st half of school holidays;
 - iv. Each party shall maintain a phone for access to the minor when the minor is not in their custody;



- v. On apportionment of the parent responsibilities, the Plaintiff is to continue providing shelter, medical cover, clothing;
 - vi. The Defendant is to continue providing school fees, school related expenses and kshs 10,000 food voucher every month, Defendant shall be at liberty to provide a shopping voucher of Kshs 10,000/= in compliance with this order;
 - vii. The minor shall not be taken out of country without the leave of the court or consent by the parties;
 - viii. I note the proposal by the Defendant to have matter referred to court annexed mediation, I will refer the matter to court annexed mediation to give parties a chance to see whether they can settle the issues herein thought mediation.
5. Aggrieved by the Ruling of the trial court, the Appellant lodged this appeal on the following grounds:
- i. That the Learned Trial Magistrate misdirected himself by ruling on 2 grounds of my Preliminary Objection dated 12th June 2023 which were already spent, and failing to rule on the ground of lack of legal sufficiency and specificity of the Respondent's pleadings for legal custody which was before him.
 - ii. That the Learned trial magistrate erred in law and in fact in not finding that the Respondent's pleadings for legal custody were legally insufficient and legally nonspecific and thus could not support a cause of action.
 - iii. That the Learned Trial Magistrate erred in law and in fact by vesting the Respondent / Mother with sole actual custody of the minor while both the Appellant/ Father and the Respondent/ Mother have pleaded for joint actual custody of the minor.
 - iv. That the Learned Trial Magistrate misdirected himself by vesting sole actual custody on the Respondent/ Mother while none of the parties had pleaded for either of them to be vested with sole actual custody, nor had the Lower Court sought any external assistance to determine the issue.
 - v. That the Learned Trial Magistrate erred in law and in fact by relying on the Tender Years Doctrine while vesting the Respondent with sole actual custody, a doctrine that has been rendered bad in law by *the Constitution* of Kenya 2010, the Children's Act 2022 and subsequent stare decisis.
 - vi. That the Learned Trial Magistrate erred in law and in fact by failing to consider the Best Interests of the Child when vesting sole actual custody on the Respondent / Mother.
 - vii. That the Learned Trial Magistrate erred in law and in fact, and further misdirected himself for not allocating Equal Residence Time of the minor with each of his parents.
 - viii. That the Learned Trial Magistrate misdirected himself by relying on bad case law and failing to consider the authorities and the submissions provided by the Appellant.
 - ix. That the Learned Trial Magistrate misdirected himself in failing to find that the Custody Order issued on 31st May 2023 had lapsed by virtue of application of law.
 - x. That the Learned Trial Magistrate misdirected himself by failing to make a distinction between a Custody Order and a Maintenance Order while purporting to extend the Custody Order.



6. Parties were directed to canvass the appeal by way of written submissions. Whereas the Appellant filed his submissions dated 9 October 2024, I note that the Respondent did not participate in these proceedings, despite evidence of service.

Analysis and Determination

7. It is now well established that the role of the first appellate court is to re-evaluate, re-assess and re-analyze the evidence tendered at the trial in a bid to reach its own independent conclusion. This principle was well captured in the case of *Abok James Odera t/a A.J. Odera and Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR where the Court of Appeal held that:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority versus Kuston (Kenya) Limited* (2009) 2EA 212 wherein the Court of Appeal held inter alia that:-

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

8. The same principle was enunciated by the Court of Appeal in the case of *Nation Media Group Ltd & 2 others v John Joseph Kamotho & 3 others* [2010] eKLR where it was held that:-

“It is trite law, and we accept Mr. Kiragu’s submission that this Court is not bound necessarily to accept the findings of fact by the court below and that 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 allowances in this respect. See *Selle and Another v Associated Motor Boat Company Limited and others* [1968] EA 123.”

9. In lodging this appeal, the Appellant filed a Record of Appeal dated 21 September 2024 which includes the following:

- i. Appellant’s Notice of Motion dated 8th August 2024;
- ii. Appellant’s Amended Preliminary Objection;
- iii. Respondent’s Chamber Summons dated 30 March 2023
- iv. Respondent’s Complaint dated 30 March 2023;
- v. Appellant’s Defence and Counterclaim dated 12 June 2023;
- vi. Ruling dated 18 September 2024;
- vii. Exhibits

10. I note that the impugned Ruling herein is in respect of Notice of Motion dated 8 August 2024. The trial Court makes reference to a Supporting Affidavit dated 8 August 2024. The said Affidavit is missing from the Record of Appeal. The Ruling also makes reference to Preliminary Objection dated 12 June



2023, which actually forms part of prayer (i) of the Notice of Motion. The said Preliminary Objection is missing from the Record of Appeal.

11. Further, the trial Magistrate noted that he had read the filed submissions dated 22 August 2024. Unfortunately, I did not have the benefit of reading the same in order to appreciate the trial's court analysis since they are not contained in the Record of Appeal.

12. Section 65(1) of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya forms the basis of appeals from the subordinate courts to the High Court. It provides as follows: -

Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court-

- (a) (Deleted by 10 of 1969, Sch.);
- (b) from any original decree or part of a decree of a subordinate court, other than a magistrate's court of the third class, on a question of law or fact;
- (c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.

13. Order 42 Rule 13(4) of the Civil Procedure Rules provides as follows: -

Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record and that such of them as are not in the possession of either party have been served on that party that is to say:

- (a) the memorandum of appeal;
- (b) the pleadings
- (c) the notes of the trial magistrate made at the hearing;
- (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal;

Provided that-

- (i) a translation into English shall be provided of any document not in that language;
- (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

14. Courts have severally dealt with the issue of incompleteness of the Record of Appeal. In *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* (2014) eKLR the Supreme Court stated as follows:

(16) For a competent appeal to lie before this Court it must comply with the provisions of Rule 33(1) of the Supreme Court Rules, 2012 which provides that:



An appeal to the Court shall be instituted by lodging in the registry within thirty days of the date of filing of the notice of appeal –

- (a) a petition of appeal;
- (b) a record of appeal; and
- (c) the prescribed fee.

(17)

(36) The use of the word ‘shall’ in Rule 33(1) suggests the mandatory nature of the rule, requiring strict adherence to the completeness of the rule. Thus, a strict reading of rule 33(1) leads to the conclusion that an appeal comprises the Petition

(37)

(38) The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it.

(39) If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine ‘the appeal’ on the basis of these two, such an appeal would be incomplete and hence incompetent. Indeed, this is the gist of Rule 33(1) of the Supreme Court Rules.

15. The provisions of Order 42 Rule 13 (4) are clear. Whereas a Judge may dispense with the production of documents or part of documents, certain documents must be contained in the Record of Appeal for the same to be considered complete. These are: the Memorandum of Appeal, the pleadings and the Judgement, Order or Decree appealed from. This is not something that an Appellant can simply wish away. Much as I appreciate that the Appellant is acting in person and may not fully comprehend the intricacies of appeal documents, a complete Record of Appeal must be placed before the court to enable the court understand and appreciate the factual or legal controversies before it.

16. I, therefore, find that the Record of Appeal is incomplete, hence the Appeal is incompetent. The appeal is, therefore, struck out, with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 18 DAY OF DECEMBER 2024

HELENE R. NAMISI

JUDGE

Delivered on virtual platform in the presence of:

Appellant in person

N/A for the Respondent

