



ANN v PWN (Civil Appeal E001 of 2023) [2023] KEHC 19342 (KLR) (27 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19342 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E001 OF 2023
LM NJUGUNA, J
JUNE 27, 2023**

BETWEEN

ANN APPELLANT

AND

PWN RESPONDENT

(Appeal from the judgment of Hon. J.W. Gichimu (S.PM) delivered on 04.01.2023, in SPM'S Court at Runyenjes Children's Case No. E005 of 2022)

JUDGMENT

1. The appeal herein arose from the judgment of Hon. J.W. Gichimu (S.PM) delivered on 04.01.2023, in SPM'S Court at Runyenjes Children's Case No. E005 of 2022, in which suit, the respondent sued the appellant claiming legal custody of the minors EN and PGW .
2. The respondent's cause of action was premised on the fact that the appellant took EN the younger child with him and went with him to Nairobi where he lives. That the appellant thereafter refused to return the child to the respondent and additionally, that the child has since not been going to school. The matter proceeded ex parte and the court delivered its judgment on 14.01.2023 in which the learned magistrate gave the legal custody of the two minors to the respondent. She was also awarded the costs of the case.
3. Being dissatisfied with the said judgment, the appellant filed the appeal herein in which he has listed six (6) grounds of appeal in the memorandum of appeal dated 12.01.2023. A perusal of the grounds of appeal reveals that the appellant faults the trial court for condemning him unheard.
4. The appeal proceeded by way of written submissions. In his submissions, the appellant submitted that he was condemned unheard since he was not properly served with the summons to enter appearance and of the pleadings. That in its judgment, the court noted that the appellant did not enter appearance or file any defence. It was argued that the court allowed the respondent's case on the ground that the respondent's evidence was not challenged by the appellant. That it was clear that the appellant did not



participate in the proceedings and therefore, the judgment by the court was an ex parte judgment. The trial magistrate was faulted for failing to call for the Children' Officer's Report to guide and understand the issues before it, before granting the said orders. Additionally, it was the appellant's submissions that he was condemned unheard for the reason that he did not defend the matter and further, the court did not order that the appellant herein be served a second time.

5. The respondent on the other hand crafted two issues on which she submitted to wit: whether the appellant was duly served and whether the orders issued on 04.01.2023 and the consequential orders should be set aside.
6. On the issue whether the appellant was duly served, the respondent while relying on the case of *Nanjibhai Prabhudas & Co Ltd v Standard Bank Ltd* (1968) EA 670 submitted that the appellant only challenges the service as being improper and that hearing and the subsequent orders was not fair or just. That the service was done timeously and professionally through a certified process server and the summons were received by the appellant's OCS at Central Police Station as evidenced by the affidavits of service, copies of which are in the lower court proceedings. It was argued that the appellant did not seek to have the court process server take the stand for purposes of cross examination as regards the service. Reliance in support of this proposition was placed inter alia on the cases of *Agigreen Consulting Corp Ltd v National Irrigation Board* (2020) eKLR and *Shadrack arap Boiywo v Bodi Bach* KSM CA Civil Appeal No. 122 of 1986.
7. On whether the orders issued on 04.01.2023 and the consequential orders should be set aside, it was submitted that the appellant did not seek to have the judgment and the consequential orders set aside in the trial court but only decried the fact that he was not given an opportunity to participate in the said proceedings. This court was therefore urged to dismiss the appeal herein.
8. The case before the trial court related to the custody of young children. The trial court was required to be guided by article 53(2) of the constitution which provides:-

“(2) A child's best interests are of paramount importance in every matter concerning the child.”

Additionally, the trial court was required 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 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 –
 - i. Safeguard and promote the rights and welfare of the child.
 - ii. Conserve and promote the welfare of the child.”



9. It would therefore seem that the appellant by this appeal seeks to set aside the ex parte judgment and be heard on reconsideration of the custody of the children. The same is provided for under order 12 rule 7 of the Civil procedure Rules, hereinafter the Rules, which provides:-

“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.”

10. That Rule evidently gives the court hearing the matter the discretion to determine whether to set aside such a judgment. The reason given by the appellant is that he was not given a hearing by the trial court and further that, the only reason why the trial court allowed the respondent’s prayers is that the respondent’s evidence was not challenged. It is outright that the appellant faults the trial court for condemning him unheard.

11. I have considered the grounds of appeal and I find that the main issue that this court ought to determine is whether the appeal herein is merited.

12. It is trite that there is already an ex parte judgment in the matter before the trial court. The appellant has filed this appeal to challenge the ex parte judgment which is unprocedural. In my considered view, he ought to have applied to set it aside in the trial court instead of moving this court by way of appeal. Procedurally, he cannot challenge a judgment in proceedings which he did not participate. He ought to have moved the trial court under order 12 rule 7 of the Civil Procedure Rules.

13. Having found that the trial court was properly vested with the mandate and discretionary power to set aside the judgment being contested herein, I find that the appeal is improperly before this court and as a consequence of the same, it is hereby struck out with costs to the respondent.

14. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF JUNE, 2023.

L. NJUGUNA

JUDGE

..... for the Appellant

.....for the Respondent

