



HM v AWM (Civil Appeal 41 of 2022) [2023] KEHC 19330 (KLR) (27 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19330 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 41 OF 2022
LM NJUGUNA, J
JUNE 27, 2023**

BETWEEN

HM APPELLANT

AND

AWM RESPONDENT

*(An appeal from the ruling of Hon. Ouko R.M delivered on June 30, 2022
in the Resident Magistrate's court at Runyenjes Children's Case 7 of 2016)*

JUDGMENT

1. The appeal herein arose from the ruling of Hon. Ouko R.M delivered on June 30, 2022 in the Resident Magistrate's court at Runyenjes Children's Case 7 of 2016. Being dissatisfied with the said ruling, the appellant filed the appeal herein in which he listed five grounds of appeal in the memorandum of appeal dated July 27, 2022.
2. The grounds of appeal are as enumerated on the face of the memorandum of appeal.
3. Reasons wherefore the appellant prayed for orders that:
 - i. The appeal herein be allowed and the judgment and order issued on June 30, 2022 be set aside.
 - ii. Any further relief this Honourable Court may deem fit to grant.
4. In the matter before the trial court, the respondent sued the appellant seeking for orders inter alia that she be given the custody of their two minor children namely CM and PA, GM and the appellant be compelled to contribute towards the maintenance of the minors. The case was heard *ex parte* as the appellant failed to file a defence. After consideration of the evidence that was adduced by the respondent, the law and the facts, the learned magistrate ordered that the appellant's salary be attached to the tune of Kes. 17,713.00 per month being child maintenance. The appellant having been dissatisfied by the determination of the trial magistrate, filed the appeal herein.



5. The court gave directions that the appeal be canvassed by way of written submissions and when the matter came up to confirm compliance before Hon. Nyakweba, the learned magistrate noted that the submissions for respondents were allegedly drafted by one James Kamau, a person not trained as an advocate.
6. In reference to the above, this court finds it prudent to deal with the issue whether the said submissions should be struck out as previously ordered by the learned magistrate Hon. Nyakweba.
7. Article 48 recognizes the right of access to justice for all, it provides:

“The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”
8. Article 50 gives the right to a fair hearing. Article 50(2)(h) provides:

“Every accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.” [Emphasis added]
9. In this regard, the court finds that the appellant was not heard on the issue of whether the person who prepared for him submissions was qualified or not which was prejudicial to him and which is highly irregular. For that reason the court will proceed and consider his submissions.
10. The appellant faulted the trial magistrate for failing to note that he had been providing for one CM till completion of his education. That the trial court at one particular time ordered that the parties herein should ensure that they share the costs of the child maintenance. He averred that there was no particular time that the said CM was ever sent home for school fees as averred by the respondent. Additionally, he stated that the judgment by the trial court was unfair to him for the reasons that he was rendered financially embarrassed. That the trial magistrate acted in error in making conclusive finding in that there was no evidence to show that the school fees was in arrears or that the appellant defaulted in paying the child’s maintenance. He further denied being served with the Notice to Show Cause and if at all the same issued, whether the correct procedure was followed resulting into the unfair deductions from his pay slip. That he was not given a chance to be heard and therefore the said orders are not tenable.
11. In the same breadth, he argued that CM is a grown up and AM not being his biological child, he should therefore not be obligated to provide for the same minor. He contended that the biological father to the said minor is known by the respondent and further, he has since remarried and therefore, with more family obligations, and his little earnings, this court should set aside the order of the lower court.
12. I have considered the grounds of the appeal herein and the submissions filed by the appellant and I find that the main issue for determination is whether the appeal herein is merited.
13. The court notes that the matter before the trial court proceeded ex parte; and the appellant in this appeal is challenging the service of a Notice to Show Cause upon him. The judgment of the trial court is still intact and the appellant has not challenged the same before the trial court. Instead, he preferred the appeal against the said judgment. Ordinarily, the normal procedure would be for the appellant apply to set aside the judgment being appealed against and its consequential orders rather than appeal against it. [See *KCB Bank Kenya Limited Vs Odidio Spark Limited* [2021] eKLR].



14. In the same breadth, the grounds of appeal herein and the submissions by the appellant ought to have been the grounds in support of an application to set aside the judgment and its consequential orders as delivered by the trial court.
15. In the end, I find that the appeal herein is incompetent and the same is hereby struck out with no orders as to costs.
16. 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

