



REPUBLIC OF KENYA



**KENYA LAW**  
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**MNK v EGK (Civil Appeal E009 of 2023)  
[2023] KEHC 22933 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22933 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E009 OF 2023  
LM NJUGUNA, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**MNK ..... APPELLANT**

**AND**

**EGK ..... RESPONDENT**

*(Appeal from the ruling and orders of Hon. Lucy N. Ambasi CM in Chief Magistrate's Court Embu Children's case No. 23 of 2007 delivered on 13th February 2023)*

**JUDGMENT**

1. The appellant has filed a memorandum of appeal dated 20<sup>th</sup> February 2023 being dissatisfied with the abovementioned decision, seeking orders that:
  - a. The appeal be allowed;
  - b. The orders by the Hon. Lucy N. Ambasi dated 13<sup>th</sup> February 2023 be quashed and or set aside;
  - c. This court be pleased to order the applicant to pay the school fees for the minor as per the agreement dated 05<sup>th</sup> October 2022; and
  - d. Costs of the appeal be to the appellant.
2. The appeal is premised on the grounds that the learned magistrate erred in law and facts by:
  - a. Ordering the appellant to proceed with hearing of the application when he was not ready and by declining to grant the appellant time to respond to the application dated 25<sup>th</sup> January 2023;
  - b. Ordering the appellant to clear the school fees within 14 days and totally disregarding the agreement for payment of school fees between the appellant and the school;



- c. Ordering the appellant to pay Kshs. 6,100/= as school related expenses, a claim that was not proved by evidence
  - d. Failing to consider that the appellant had paid the minor's school fees as per the agreement with the school and that the minor was not at risk of being sent away from the school for lack of school fees;
  - e. Ordering that the appellant pay all the school fees within 14 days without considering the appellant's economic status; and
  - f. Condemning the appellant unheard.
3. The respondent had filed an application dated 25<sup>th</sup> January 2023, seeking orders inter alia, that the appellant herein provide school related expenses amounting to Kshs. 6,150/= and that he complies with orders issued by the court on 24<sup>th</sup> April 2022 or be held in contempt. The court proceeded to make orders, inter alia, that the appellant pays the amount of Kshs. 6,150/= for school related expenses and Kshs. 24,335/= being school fees within 14 days.
  4. In his written submissions, the appellant stated that he has since paid the school fees arrears and the Kshs. 6,150/=. That the pending issues are future school fees and school related expenses, the appellant's right to fair hearing and costs of the suit. That the court declined to grant the appellant 3 days within which to file his response and ventilate the facts from his perspective. For this argument he relied on the case of *SM v. HE* (2019) eKLR and Article 50(1) of *the Constitution* of Kenya 2010. That the court directed the appellant to visit the minor's school and reach an agreement with the administration on school fees payment.
  5. In this appeal, the court directed that the parties file their written submissions. Only the appellant complied.
  6. The appellant reported back to court on 05<sup>th</sup> October 2022 that he had reached an agreement with the school that he would pay Kshs. 3,500/= monthly towards school fees until the minor completes Form 4, meaning that the issue of school fees has since been settled. That the court granted orders that had not been prayed for, by ordering the appellant to pay Kshs. 8,000/= for the minor's education and yet there was an existing agreement dated 30<sup>th</sup> September 2022 with the school. That the trial magistrate did not give reasons for her findings and yet the prayers sought in the application were not substantiated. That parties are bound by their pleadings and the court cannot grant prayers not prayed for. That the best interests of the child are paramount but the correct procedures should be followed in achieving this.
  7. The issue for determination herein is whether the appellant's right to fair hearing was infringed when he was denied 3 days to file his response to the application.
  8. To begin with, this court is cautioned that the matter herein regards a child and so I am well mindful of the provisions of *the Constitution* of Kenya 2010 and the *Children Act*. Article 53(2) of *the Constitution* provides:

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

The *Children Act* provides at Section 4(3) that:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”



9. When the application in question was filed, it was placed before Hon. RG Mundia in chambers on 26<sup>th</sup> January 2023 and the said magistrate certified it as not urgent. While at it, he ordered that the application be served upon the respondent and be mentioned before Hon. Lucy N. Ambasi on 13<sup>th</sup> February 2023. On that mention date, the appellant prayed for 3 days within which to file a response to the application. The court denied this request and directed that the matter proceed to hearing. Between the time when the application was served upon the appellant and the next hearing date was 2 weeks within which the appellant should have put in his response. In the court record, the respondent's counsel did not at any point state that he was not served with the application and in fact he referred to it when making the submissions in court. The timeline for responding to any application is 3 clear days before the hearing date failing which the same may be determined ex parte. This is provided under Order 51 Rule 14 of the [Civil Procedure Rules](#) 2010 as follows:
1. Any respondent who wishes to oppose any application may file any one or a combination of the following documents —
    - a. a notice preliminary objection: and/or;
    - b. replying affidavit; and/or
    - c. a statement of grounds of opposition;
  2. The said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.
  3. Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with the leave of the court, file a supplementary affidavit.
  4. If a respondent fails to file to comply with subrule (1) and (2), the application may be heard ex parte.
10. The issues raised in the application directly affect the child and granting the appellant 3 days in addition to the 2 weeks he had within which to file a response, would prejudice the interest of the school-going child. The appellant would have meaningfully rebutted the arguments presented by the respondent but he was not vigilant enough to put in his reply in good time. In the case of [Amina Karama vs Njagi Gachangua & 3 others](#) [2020] eKLR the court held:
- “It has been held that equity aids the vigilant and not the indolent. It has also been held that delay defeats equity. In the case of *Ibrahim Mungara Mwangi vs Francis Ndegwa Mwangi* [2014] eKLR the court quoted the following passage from Snell's Equity by John MC Ghee Q.C. (31<sup>st</sup> Edition) at page 99:
- “The Court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where the court is passive, and does nothing.”
11. The appellant has submitted that the issues of school fees have already been addressed and are no longer an issue in this appeal. In my view, these are issues of evidence and should be ventilated exhaustively in the interest of the child especially considering that there is an existing agreement with the school regarding payment of school fees.



12. Notwithstanding the foregoing, it would be beneficial to order a retrial in the circumstances so as to accord both parties an opportunity in the suit to express themselves in the best interests of the child. Further, this court sitting as an appellate court cannot go into issues of evidence.

13. Therefore, I find that this appeal is merited and I do order as follows:

- i. The application dated 25<sup>th</sup> January 2023 be heard before a different magistrate at the lower court;
- ii. The appellant to continue paying for the child all school related expenses and school fees according to the agreement he has with the school pending hearing and determination of the application;
- iii. The application shall be prosecuted within 90 days from the date of this ruling; and
- iv. There shall be no order as to costs.

14. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent

