REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CHILDREN APPEAL NUMBER 12 OF 2016

N K suing throughher mother and next friend V A ---------- APPELLANT

-VERSUS-

P K W ----------RESPONDENT

JUDGMENT

1. This is an appeal against the orders of Court in CMCC Children Case Number 105/2016 (J. N. Nthuku Senior Resident Magistrate).

2. The grounds of appeal as gleaned from the record of appeal are:

1. **THAT** the learned trial magistrate erred in law by arriving at her judgment without affording the appellant an opportunity to be heard.

2. **THAT** the learned trial magistrate erred in law by arriving at a judgment without hearing the parties.

3. **THAT** the learned trial magistrate erred in law and fact by failing to consider the evidence supplied by the plaintiff hence ended up arriving at a wrong finding.

4. **THAT** the learned magistrate erred in law and in fact in disregarding the Appellant's proposal hence arriving at an erroneous finding.

5. **THAT** the learned magistrate erred in law and in fact in failing to consider and apply the best interest of the minor **N K**.

6. **THAT** the learned magistrate erred in law and in fact in failing to appreciate the standard of proof of Children's Civil Suit hence arriving at an erroneous finding.

3. Directions were taken that the appeal be disposed of by way of written submissions. Both parties complied.

The Appellant's Submissions

4. It is the Appellants case that she instituted Nakuru Children Case No. 105 of 2016 on 30th August 2016 seeking;

a) An order compelling the defendant to pay Kshs. 40,000/= every month.

b) An order compelling the plaintiff to take a mandatory medicalcover for the minor.

c) Costs of the suit.

d) Interest on (a) and (b).

e) Any other relief that this Honourable Court may deem fit to grant.

5. Together with the plaint, the appellant took out an application under certificate of urgency seeking maintenance of the minor pending the hearing and determination of the suit.

6. The application was compromised on 20th September 2016 with the Court making orders as follows;

"The case will take long if I dwell on the application I will do away with the application. Parties to attempt out of Court settlement but if they do not agree hearing on 11th October 2016".

7. On 11th October 2016, the trial Court's record at page 26 of the record of appeal ordered as follows;

"Having looked at the proposal by the plaintiff and the offer by the defendant judgment on 1/11/2016".

8. Judgment was delivered on 1/11/2016.

9. The Appellant is aggrieved by the said judgment principally on grounds of denial of opportunity to be heard, failure to consider evidence, disregarding the Appellant's proposal and failing to apply the best interest of the minor.

10. It is urged that the record of court does not indicate that the trial court gave direction either asking parties to file written letter proposal for disposal of the suit nor were directions taken on disposal of the suit by way of written letter proposals.

11. The Appellant was thus greatly prejudiced as she had not filed a letter on proposals as the Respondent had done. She was condemned unheard.

12. No defence had been filed by the Respondent and therefore the judgment was in error.

13. It is urged that the Appellant was denied the right to be heard as enshrined under Article 50. The procedure adopted is unknown in Law.

14. I am referred to the decision in **Savings and Loan (K) Limited – vs – Odonyo (1987) eKLR** on the right to be heard.

15. It is submitted at length that most of the findings reached by the court were based on evidence while some were against averments in the plaint which averments were not controverted.

16. It is urged that the judgment of the court was errorneously obtained. The same ought as a matter of course to be set aside and substituted with an order for a retrial of the suit before any other children's court other than the trial court.

The Respondent's Case

17. It is the Respondent's case that in an attempt to expedite a quick disposal of the matter herein, the Hon. Magistrate ordered the interlocutory application to be done away with and ordered the parties to attempt an out Court settlement in default of one, matter to be heard on 11/10/2016.

18. The Respondent vide a letter dated 23/9/2016 addressed to the Appellant's Advocates and copied to

court proposed as follows;

a) The Defendant to pay school fees and all other related educational expenses of the minor.

b) The Defendant to take education policy of the minor.

c) The Defendant to have unlimited access to the minor in order to monitor the educational and psychological development of the minor as well as to offer fatherly guidance.

19. Further the Respondent proposed that the appellant cater for;

a) The custody of the minor.

b) Shelter, food, home clothing, medical expenses, entertainment and other personal needs of the minor.

20. The Appellant did not reply to the proposals but offered the same orally in Court when the matter came up for hearing on the 11/10/2016 proposing;

a) That the Appellant to cater for food, clothing and utility bills.

b) The Respondent to cater for shelter, school fees, medical expenses and house help as well as school related expenses.

c) The Respondent to have supervised access of the minor on Saturday and Sundays.

21. Parties were thus in agreement on;

a) Custody of the minor.

b) Food, clothing and utility bills.

c) School fees and related expenses.

22. Outstanding issues were;

a) Access to minor whether limited or unlimited.

b) Shelter.

c) Medical expenses.

d) House help.

23. It is urged that the Court analysed the pleadings and proposals by the parties and made findings.

24. The Respondent submits that the children court is not bound by the strict application of the law of evidence. The issues before the Court were simple and clear and did not require inquisitive evidence.

25. It is urged that the Respondent duly filed a defence and a counter claim contrary to the assertion that there was no defence on record.

Analysis and Determination

26. I have had occasion to consider the appeal herein and the response thereto as articulated in the memorandum of appeal and submissions on record. I have had regard to the record of the lower court.

27. I note that both parties and more so the Respondent has invited me to look at the merit of the decision by the Learned Magistrate.

28. I am however reluctant to venture into that for the simple reason that the fundamental question is whether in arriving at the decision made both parties were accorded the opportunity to ventilate their respective cases.

29. Children cases are special category of cases. The need for expeditious disposal cannot be gainsaid. This explains why the Children Court is given a wider latitude in disposal of these cases by freeing it from the shackles of strict rules of evidence and procedure. This enables quick disposal of the cases.

30. That said, the above latitude cannot be interpreted to give a licence to run away from the basic tenets of a fair hearing as we know it. As held in **Savings and Loan (Kenya) Limited – vs – Odonyo [1987] eKLR;**

> **"The very foundation upon which our judicial system rests is that a party who comes to court shall be heard fairly and fully. A judge who does not hear a party before him or the party's advocates offends that fundamental principle and it then becomes the duty of this court to tell him so. People come to Court as a last resort and we Judges are employed to hear them and then determine their cases".**

The Court further stated;

> **"It is a fundamental principle of justice that parties who appear in Court should be heard and determination of their grievances given. If there will be right of appeal, then the aggrieved party can appeal. The grounds of appeal should attack what there is on record....."**

31. Whilst the trial magistrate could be commended for her efforts to dispose of the case quickly, the procedure she adopted failed the test of law and known procedure.

32. I observe that she rightly dispensed with the hearing of the interlocutory application, a method I would recommend to any Children Court to enable the resolution of the real issues in controversy with finality, quickly and expeditiously.

33. However, noting that the trial Court only asked the parties to attempt an out of Court settlement in default of which there was to be a hearing and in absence of a clear direction on written proposals from both sides, and in view of the multifaceted contested issues, there was need to call for evidence whose veracity would have been tested at the trial.

34. The trial magistrate thus fell in error when she purported to rely on proposals (one written without such directions and the other orally made on an ad hoc basis in court) to reach a final finding through a written judgment.

35. In essence the said judgment cannot meet the requirements of a judgment as known in law.

36. The right of the parties to be heard was muzzled and it would be a travesty of justice to have the judgment stand.

37. Consequently, I find the appeal herein meritable and I allow it. I set aside the judgment of the Court and remit this matter for hearing before any other Court other than the trial Court.

In the circumstances of this appeal, each party to bear its own costs.

Dated and Signed at Kisii this 10th day of January, 2018.

A. K. NDUNG'U

JUDGE