



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 38 OF 2014

J M M.....APPELLANT

VERSUS

P E A.....RESPONDENT

(From the original Children Case No. 15 of 2013 of SPM's court at Ogembo judgment delivered on the 20th February, 2014)

RULING

1. The court is giving a ruling not a judgment for reasons that will become clear as I read the ruling. This an appeal brought by J M M against the judgment of SPM's court at Ogembo Children case No. 15 of 2013. The Respondent is P E A. Both were husband and wife and duly divorced on 20th December, 2005. During this marriage there was one issue of that marriage, a child known as O G M. In case No. 15 of 2013 the case was for custody issue regarding their child, the mother P E A seeking custody of the child.
2. The learned Magistrate vested custody of the child to the mother, arguing that the child aged 7 years and having stayed with the mother all this time, the child's custody should vest and remain with the petitioner.
3. The father now brings an appeal, appeal No. 38 of 2014, from this judgment of SPM at Ogembo. He sets out grounds of appeal:
 1. *That the learned trial magistrate erred in law and in fact in not giving the appellant access to the child.*
 2. *That the learned trial magistrate erred in law and fact that the appellant did not give the court enough reasons why the child should be in his custody.*
 3. *That therefore the court be pleased to get aside the judgment of the lower court dated 20th February, and grant his access to his child.*
4. The appellant is acting in person on this appeal, he was previously represented by the firm of M/s Richard Miencha & Associates Advocates, at the lower court trial.
5. Now, the Respondent raises a preliminary objection to the presence of the appellant acting in person. His presence offends order 9 rule 9 of the Civil Procedure rule. The appellant appears in person in his memorandum of appeal filed on 30th June, 2014. Neither notice of change, nor leave of court is sought and granted by the appellant. This is mandatory under Order 9 rule 9 of the Civil

- Procedure Rules, since there is a judgment on record of the lower court at Ogembo.
6. It is therefore true that the appellant by acting in person without following the proper procedure is a stranger to these proceedings and the court cannot listen to his appeal without him first regularizing his standing on record of this appeal.
 7. He needs to bring an application to seek leave and order of the court to act in person. In doing so he needs to serve or notify his previous advocates. He may successfully persuade to give consent that he should act in person if they deem it fit. There are ample authorities to support the Respondent's contention, see;

1. *Miscellaneous Application No. 936 of 2000, Angela Nyawira Njagi vs. Sarah Njoki Kihara.*
2. *Civil Case No. 16 of 1998, at Machakos High Court, Peter Kamwathi vs. John Mutula Nyenze.*

In both those cases, the court held that the applicant was “**not properly on record and thus has no standing**”.

8. This objection is so fundamental that it precludes the court from deciding the merits or demerits of the appeal under consideration, until the issue of being properly on record is resolved.
9. Thus objection is well founded, the court cannot waive the irregularity and is therefore bound to declare the presence of the appellant on record as struck out.
10. Until and unless the appellant regularizes his representation in accordance with law, the appeal record is irregularly on record and cannot be interrogated. Once regularized, the merit of the appeal will be delved into. The costs to the Respondent.

Dated and delivered at KISII this 19th day of December, 2014.

C.B. NAGILLAH,

JUDGE.

In the presence of:-

J M in person.

Miss Mobuche for the respondent

Edwin Mongare Court Clerk