



REPUBLIC OF KENYA



KENYA LAW
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**NK v AOM (Family Appeal E021 of 2022)
[2025] KEHC 1203 (KLR) (19 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1203 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E021 OF 2022
G MUTAI, J
FEBRUARY 19, 2025
IN THE MATTER OF DA, LEA & KEA (MINORS)**

BETWEEN

NK APPELLANT

AND

AOM RESPONDENT

JUDGMENT

1. The appellant and the respondent are the parents of DA, LEA, AND KEA. The proceedings in the court below led to the filing of several matters in the High Court, among which is this appeal.
2. This appeal arises out of the decision of the children’s court delivered on 20th July 2022. In the said decision, the children’s court found as follows:-

“The same ought to have been served upon the other party for the other party to file a response. The memorandum of appeal was filed way back in December 2022. It is now over 7 months, and nothing has been done to it either by service or fixing the appeal for hearing. The plaintiff’s conduct is clear to the effect that she is enjoying stay orders to continually delay the matter. Litigation should come to an end, more so in children’s cases, where disposal should be done without delay. To ensure that the appeal is fast-tracked and the litigation comes to an end I order the plaintiff to deposit the insurance policy money of a sum of Kes.1,013,000/- in an interest-earning joint account to be opened in the names of both counsels for the plaintiff and the defendant within 10 days from today’s ruling...”

3. The court declined to commit the plaintiff and her counsel to civil jail and advised the respondent to file a notice to show cause against the plaintiff’s employer for the court to decide whether any sanction should be visited on Safaricom Ltd.



4. The appellant was aggrieved by the said decision and filed the instant appeal. The memorandum of appeal has 20 grounds. What the appellant seeks through the instant appeal is:-
 - a. The ruling delivered and orders made on 30th July 2022 in Tononoka Children’s Court Cause No 129 of 2020; *NK v AOA* be set aside in their entirety;
 - b. The orders previously made on 16th March 2022, Tononoka Children’s Cause No 129 of 2020; *NK v AOA* be reinstated in their entirety;
 - c. A declaration do issue to the effect that Tononoka Children’s Court has no jurisdiction to interfere with /or chaperone/supervise the conduct of the appellate proceedings in Mombasa High Court Civil Appeal *No E042 of 2021; NK v AOA*;
 - d. An order do issue restraining the respondent, whether by herself, her agent /servants / employees /assigns, from engaging in any and all acts and or omissions amounting to and capable of construction to amount to harassment and or intimidation and or threats to the operations, business and or properties of the appellant;
 - e. An order do issue to the effect that all/any other necessary proceedings in Tononoka Children’s Cause No 129 of 2020; *NK v AOA* be taken/conducted before a duly gazetted judicial officer other than Hon V Yator, PM and Hon. L N Sindani, SRM; and
 - f. Costs of this appeal be paid by the respondent in any event.
5. The decision that the court below delivered on 20th July 2022 was with respect to the application dated 25th April 2022 that sought the review of the ruling that the court below made on 16th March 2011.
6. It is necessary that I set out herein the ruling delivered on 16th March 2022. It stated as follows:-

“The plaintiff’s main reason for the orders is that she has filed an appeal against the ruling of the court, and the same is pending before the High Court. I have considered the application together with the affidavit in support. I have also considered the responses thereto. I have also considered the oral arguments by the parties’ counsel on record. In as much as I agree with the defendant’s contention that the plaintiff is underserving of the court’s audience because of being in contempt and lacking the intention to comply, I am persuaded to issue a conditional stay just for reasons that there is a pending appeal touching on the issues raised in the application and not for any other reason. As such, I make the following orders:-

 - i. That there be a stay of execution of warrants of arrest issued on 6th January 2022 pending hearing and determination of the High Court appeal;
 - ii. The plaintiff to continue paying fees and related expenses for the child D A;
 - iii. The log book of motor vehicle KCZXXXXXX to remain under the court’s custody pending the determination of the High Court appeal; and
 - iv. Prayers 2 (iv) and 3 are disallowed for not being merited.”
7. I have set out the ruling in extenso as the pendency, or the lack thereof, of the Mombasa High Court Civil Appeal No E042 of 2021; *NK v AOA* before this Court is at the heart of this matter.
8. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. The Court must, however, keep at the back of its mind that a trial court, unlike



the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first-hand.

9. The duty of the first appellate Court was settled by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of *Selle & another v Associated Motor Boat Company and others* [1968]EA 123, where they stated as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

10. Further, in the case of *Peters v Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different.”

11. The appeal was canvassed by way of written submissions. Both parties filed their written submissions. I shall provide a summary of each party’s submissions in the succeeding paragraphs of this Judgment.
12. The submissions of the appellant are dated 18th July 2024.
13. In his submissions, the counsel for the appellant contended that the court below failed to dispense justice and did nothing as the respondent, who it was urged is an extremely violent person constructively evicted the appellant from what used to be the matrimonial home, to wit, Tittle No Mombasa /Mwembelegeza/340 and made decisions that the appellant termed as being confounding, to wit, the ruling/orders of 6th April 2020, 26th May 2020, 2nd June 2020, 13th July 2020, 8th March 2021, 30th June 2021, 17th August 2021, 8th December 2021, 7th January 2022, 16th March 2022 and 20th June 2022.
14. Counsel for the appellant urged that it was common ground that the final judgment in the children’s cause was delivered by the subordinate court on 31st March 2021.
15. Counsel submitted that being the first appeal, this court was bound to accept the findings of fact of the court below. In support of this contention, reliance was placed on the decision of the court in *Selle & another v Associated Motor Boat Company and others* [1968]EA 123, among other cases.
16. This court was invited to look at the record of appeal and see for itself what was stated to be carnage caused by the respondent “as he tried to kill/maim the appellant on the night she escaped from the matrimonial home.”
17. Counsel submitted that in hearing the impugned decision the court below unnecessarily delved into an interpersonal contract between her and Britam Assurance Company Ltd. It was contended that there was no reason to do so as the judgment did not require her to pay school fees and or school-related expenses for any of the minors. The decision was thus wholly excessive, grounded upon irredeemably erroneous and wrong principles of law and should be set aside wholly.
18. The appellant submitted that the court below could not chaperone the High Court on the hearing of an appeal. Having done so, the decision of the court below ought to be disturbed and set aside.



19. The appellant relied on the following cases in support of its appeal; *McFoy v United Africa Ltd* (1961) 3 ALLER 1169 at p1172, *Omega Enterprise (Kenya) Limited v Kenya Tourist Development Corporation Ltd and Others* [1998] eKLR, *MNW v LNN* [2021]eKLR, and *ENM v SKM* [2021]eKLR.
20. It was therefore urged that the appeal be allowed.
21. The submissions of the respondent are dated 11th July 2024. in the said submissions the respondent gave the history of the matter.
22. Counsel for the respondent submitted that the issue before the court was whether the appeal had merits.
23. Regarding prayers 1 and 2 of the memorandum of appeal, it was urged that there was no ground to allow the appeal as the trial court did not err in its decision. It was urged that HCFA No. 42 of 2018 was not a live matter and that its supposed pendency was used to obtain court orders unjustly.
24. The respondent's counsel submitted that the lower court had no jurisdiction to supervise the appellate court nor to interfere with its proceedings. It was submitted that it is the high court that can supervise the subordinate court. Counsel, however, denied that there was an attempt to supervise the High Court. She submitted that the appellant had the duty to show that the appeal was in existence.
25. Counsel also submitted that the court's directions were predicated on Section 73 of the *Children's Act* which allows the court to make any necessary orders to safeguard the welfare of the children.
26. It was urged that there was no proof that the respondent was violent or that he committed an act of violence.
27. Regarding recusal, counsel submitted that the Tononoka Children's Court was now differently constituted, and for that reason, the prayer for recusal had been overtaken by events.
28. I have perused the decision of the court below as rendered by the trial court. I have taken into account my duty as the first appellate court and reappraised the factual basis of the impugned decision.
29. It is evident that the basis of the decision of the court below was its view that there was in existence at the time it made its decision, an appeal to this court being Mombasa High Court Family Appeal No E042 of 2021. Although the court expressed its doubt on the pendency of the said matter and reluctance to issue orders, it nevertheless did so.
30. I note that the court below expressed itself on questions it had no business determining such as when an appeal may be deemed to be filed and how the parties should prosecute appeals. It does, however, appear to me that its actions were driven by a desire to procure a quick and just resolution of the dispute.
31. Being a children's matter, the court was bound by the provisions of Article 53 (2) of the *Constitution* of Kenya, 2010 and Section 8 of the *Children Act*, both of which declare that in children's matters, the best interests of the child(ren) is a paramount consideration. The Court below was, therefore, required to adopt a procedure calculated to result in an outcome that would be in the best interest of the children involved.
32. This court notes that the appeal was in respect of the ruling of the court delivered on 20th July 2022 and not the main appeal. The foregoing, notwithstanding the Record of Appeal, was extremely (and unnecessarily) voluminous.



33. The appellant is aggrieved by the decision of the lower court, especially to the extent it seems, to her, that it is chaperoning this court, probably on the account that the lower court took umbrage at the length of time the appeal had taken (7 months, which no obvious move to prosecute it). The court below appears to have been concerned that the appellant had no motivation to prosecute the appeal as she was enjoying interim orders. The Children's Court would appear to me to have made a decision to motivate the appellant to fast-track the appeal by ordering her to deposit the insurance policy money in the sum of Kes.1,013,000/- in an interest-earning joint account within 10 days of the date thereof.
34. Did the foregoing amount to the chaperoning of the High Court by the subordinate court? I do not think so. The learned magistrate made no directions to his court; to the contrary, it issued an order that would ensure that even if the appeal took time, the education needs of the children would be ring-fenced. I cannot fault the trial court for the said decision.
35. I can't fault the trial court for seeking to have the matter heard quickly and effectively.
36. It should be noted that this court may only disturb the decision of the trial court if it finds that the trial court misdirected itself. I do not see how that can be said to be the case in this matter.
37. In the case of *Mbogo and Another v Shah* [1968] EA 93, the Court stated:
- “...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
38. As this is an appeal against the ruling of the court below, this court is called upon to consider whether the Court below properly exercised its discretion. In my view what I am asked to do is akin to consideration of a second appeal. The duty of a second Appeal was set out in the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR, where it was held that: -
- “This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below-considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: *Stanley N. Muriithi & another v Bernard Munene Ithiga* (2016) eKLR).”
39. With respect to the appellant, I am unable to see how the decision of the court below was perverse. In my view, the subordinate court took into account all the relevant matters and arrived at a decision that was very measured.
40. In the circumstances, I am unable to agree that a case has been made justifying the overturning by this court of the impugned decision.
41. During the time this matter has been pending at the High Court, there have been transfers of the judicial officers serving at the Tononoka Children's Court. Once remitted back to Tononoka, the matter will be heard by magistrates other than those who previously heard it.
42. This court has looked at the CTS portal. From the portal it is evident that Mombasa High Court Family Appeal No E042 of 2021 was terminated on 22nd January 2022 when it came up before Onyiego, J. The orders of 10th March 2022, which I am asked to revive, are based on the existence of an appeal that,



in the true sense, didn't exist then. The orders of 10th March 2022 were therefore made on the basis of erroneous appreciation of facts. Clearly, if I allowed the appeal, I would be issuing orders in vacuo.

43. In the circumstance, I find and hold that the appeal has no merit. It is my view that the same is calculated to delay the fair trial and conclusion of the children's cause before the court below. The same is therefore dismissed.
44. As this is a matter regarding the custody and maintenance of children, it is my view that it would not be in the best interest of the children concerned/affected, and the parties, for an order of costs to be issued. Consequently, each party shall bear his or her own costs.
45. I, therefore, discharge all the existing conservatory orders. I direct, in the exercise of my supervisory jurisdiction under Article 165(6) and (7) of the Constitution of Kenya, 2010, that all pending applications before the trial court be concluded within 6 months of the date hereof. The best interest of the children would be served by the conclusion of all the pending matters before the trial court.
46. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 19TH DAY OF FEBRUARY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Ngonze, for the Appellant;

Ms Mukoya, for the Respondent; and

Arthur – Court Assistant.

