



**NS v FAM (Civil Appeal E016 of 2023)  
[2024] KEHC 13021 (KLR) (Family) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13021 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPEAL E016 OF 2023  
PM NYAUNDI, J  
OCTOBER 24, 2024**

**BETWEEN**

**NS ..... APPELLANT**

**AND**

**FAM ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon F. Terer, Senior Resident Magistrate at Nairobi Children’s Case No. 864 of 2022 delivered on 10th February 2023)*

**RULING**

1. Before this court for determination is the Appeal filed by NS (the Appellant) through a Memorandum of Appeal dated 23<sup>rd</sup> February 2023. The Appeal arises out of a Ruling delivered on February 10, 2023 by Hon F. Terer, Senior Resident Magistrate in Nairobi Children’s Case No. 864 OF 2022.
2. The Appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 7<sup>th</sup> December 2023. The Respondent’s submissions are dated 20<sup>th</sup> May 2024.

**Background**

3. The Respondent herein filed a suit (as Plaintiff) in the Children’s Court in Nairobi being Suit No. 864 of 2022 seeking the following orders against the Appellant who was the Defendant in the Children’s case.
  - i. A declaration that the Defendant has parental responsibility over the minor until she reaches the age of 18 years.



- ii. A declaration that upon confirmation of paternity of the minor confirming the Defendant as the biological father, both the Plaintiff and the Defendant to share joint legal custody of the minor while physical custody do vest in the Plaintiff with reasonable access to the Defendant.
  - iii. An order compelling for the monthly maintenance of the minor's needs in the sum of Kshs. Forty-three thousand, eight hundred and eighty-three (Kshs. 43,883)/= only.
  - iv. An order compelling the Defendant to take up medical cover for the minor with a suitable and reliable insurance institution to cater for the minor's needs until the age of 18 years.
  - v. An order compelling the Defendant to immediately take up the educational insurance policy for the minor at the current expense of Kshs. 1000/= per month and cater for half of educational expenses of the minor until the age of 18 years.
  - vi. Costs of this suit plus interest on (ii) above from the date of filing.
  - vii. Any other relief that this Honourable Court may deem just and fit to grant.
4. On 12<sup>th</sup> July 2022, the court ordered the Appellant to provide a sum of Kshs. 300 daily for the upkeep of the minor. On 8<sup>th</sup> September 2022, the court ordered him to provide Kshs. 15,000/= per month towards the upkeep of the minor. The Appellant did not comply with the said orders prompting the Respondent to take out Notice to Show Cause. The Appellant did not respond to the NTSC. Instead, he insisted that an application for review for warrants of arrest and maintenance be heard first.
  5. On 10<sup>th</sup> February 2023, Hon. F. Terer declined to lift the warrants of arrest issued on 30<sup>th</sup> November 2022. The court also declined to review maintenance orders from Kshs. 15,000/= to Kshs. 3,000/= monthly.
  6. Being dissatisfied with this Ruling of 10<sup>th</sup> February 2023, the Appellant (Defendant) filed a Memorandum of Appeal dated 23<sup>rd</sup> February 2023 in which she listed four (4) grounds of appeal as follows:
    1. The Learned Magistrate erred in law and in fact by dismissing the Defendant's application to lift the warrant of arrest dated 30.11.22 and review the maintenance orders of 08.06.22 without due regard to the Appellant's right to be heard and right to liberty.
    2. The Learned Magistrate erred in law and fact in failing to lift the warrants of arrest against the Appellant despite the defendant giving reasons for his delayed response to the NTSC.
    3. The Learned Magistrate erred in law and fact in failing to factor the defendant's means to satisfy the court orders and failing to appreciate that the plaintiff had not demonstrated in any way that the defendant was capable of raising Kshs. 15,000/= per month.
    4. The Learned Magistrate erred in law and fact in failing to appreciate that the Appellant had demonstrated good will and was paying the Plaintiff Kshs. 3000/= per month albeit with the help of his family as he was jobless.
  7. The appellant prayed that the appeal be allowed; the orders of 10<sup>th</sup> February 2023 be set aside and replaced with the orders allowing the Appellant's application dated 30.11.22; the NTSC dated 23.11.22 and the ensuing Warrants of Arrest of 30.11.22 be set aside/lifted.
  8. While the appeal was pending for hearing, the Appellant approached the Court by his application dated 23<sup>rd</sup> February 2023 seeking an order to pay Kshs. 3000 per month instead of Kshs. 15,000.



He further sought an order that the court do lift the trial court's warrants of arrests issued on 30<sup>th</sup> November 2022 pending determination of the appeal.

9. On the 15<sup>th</sup> June 2023, I issued an order for stay of proceedings and execution of orders of the lower court specifically the warrants of arrests on the condition that the appellant do pay Kshs. 9,000 per month to the Respondent payable on the 30<sup>th</sup> day of each month effective from 30<sup>th</sup> June 2023.

#### **Appellant's Submissions.**

10. The Appellant submitted that the warrants for arrest were issued without being given an opportunity to explain why he had not complied with the court orders on maintenance. He further submitted that the court made an order directing him to pay Kshs. 15,000 without proof of his inability to pay that amount. According to him, he had given evidence that he was able to pay Kshs. 200 per day. That in the absence of any other evidence, the trial court should have considered his evidence in determining what reasonable provision was.

#### **Respondent's Submissions.**

11. The Respondent submitted that the Appellant was in constant contempt of the court orders in the trial court. That the Appellant's election not to respond to the NTSC was not in the best interest of the minor. That the court in declining to allow his application was in the best interest of the minor.

#### **Analysis and Determination.**

12. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and draw its own conclusions. This principle was well articulated by the Court of Appeal in *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] 1EA 123 that:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v. Ali Mohamed Sholan*, (1955), 22 E.A.C.A. 270).”

13. It was also held in *Mwangi v Wambugu* (1984) KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

14. Dealing with the same point, the Court of Appeal in *Kiruga v Kiruga & Another* (1988) KLR 348, observed that: -

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”



15. Having considered the Appeal and the submissions by the parties, I do find that the issue for determination is whether the Appellant was denied a fair hearing.
16. The fundamental right to a fair trial is enshrined in Article 50 of *the Constitution* of Kenya 2010. The article provides:
- “ 50. Every person has the right to have any dispute that can be resolved by the  
(1) application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
17. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v. Attorney General* [1986-1989] EA 456). There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. (See *Sangram Singh v. Election Tribunal, Kotah*, AIR 1955 SC 664, at 711 – Supreme Court of India)
18. In *Ridge v Baldwin* (1964) AC (1963) 2 ALL ER 66 the court, while discussing the right to fair hearing observed as follows;
- “The principle of fairness has an important place in the administration of justice and is also a good ground upon which courts ordinarily exercise discretion to intervene and quash the decisions of a tribunal or subordinate court made in violations of right to a fair hearing and due process.”
19. The record shows that a Notice to Show Cause was issued against the Appellant why execution should not issue for default in paying maintenance. As a result of further default, the Appellant filed an application for review and to set aside the Notice to Show Cause. It is my finding that the lower Court being satisfied that the Appellant has failed to make payment of a financial provision under the maintenance order, issued the warrants of arrest, all in the best interests of the children herein.
20. *The Constitution* of Kenya 2010 provides at article 53 (2) that:
- “(2)A child’s best interests are of paramount importance in every matter concerning the child.”
21. Likewise *Children Act* at section 4(2) provides as follows:-
- “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”.
22. Having evaluated the evidence and the law relevant in this matter in totality, I find no reason to interfere with the decision of the learned Magistrate. The Appeal herein lacks merit and the same is hereby dismissed with costs to the Respondent. My earlier orders are therefore vacated and the Appellant to pay the amount of Kshs 15000 as monthly maintenance effective 30<sup>th</sup> November 2024.
23. Before I conclude however, I wish to state that the matter herein concerns children. Children cannot wait. Any delay in determining questions relating to children is likely to be prejudicial to their welfare.



It is a general principle that proceedings relating to children must be determined expeditiously to avoid occasioning prejudice to the children on account of delay. Section 76(2) of the [Children Act](#) provides:

“In any proceedings in which an issue on the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child.”

24. Accordingly, the file is returned to the trial court so that the main suit can be heard on a priority basis.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF OCTOBER, 2024.**

**P M NYAUNDI**

**JUDGE**

In the Presence of

Fardosa Court Assistant

