



**HJMK (as the Next Friend of Minor SEK) v CNK (Civil Appeal 66 of 2018)
[2023] KEHC 2213 (KLR) (Family) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 2213 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL 66 OF 2018
MA ODERO, J
FEBRUARY 10, 2023**

BETWEEN

HJMK (AS THE NEXT FRIEND OF MINOR SEK) APPELLANT

AND

CNK RESPONDENT

*(Being an Appeal against the Ruling in Nairobi Children's
Court Case No 1068 of 2015 on 16th June 2018.)*

JUDGMENT

1. Before this court is the Memorandum of Appeal dated June 25, 2018 by which the Appellant HJMK as next friend of SEK (a minor) seeks the following orders:-
 - “a) The appeal be allowed and the Ruling of the lower court on June 16, 2018 dismissing the Appellants Notice of Motion dated February 26, 2018 be set aside.
 - b) The Honourable court be pleased to set aside the order made on February 6, 2018 dismissing the Plaintiff's/Applicant's suit for non-attendance.
 - c) The Honourable court be pleased to reinstate the Plaintiffs suit and the same be heard and determined on merit.
 - d) Costs of this Appeal be awarded to the Appellant.
 - e) Any other further relief that this Honourable court may deem fit and just to grant.”



2. The Respondent CNK opposed the appeal. The matter was canvassed by way of written submissions. The Appellant did not file any submission whilst the Respondent relied upon her written submissions dated September 21, 2022.

Background

3. The Appellant herein had filed a suit in the Nairobi Children's Court being case No 1068 of 2015 seeking to be granted custody of the daughter he bore with the Respondent in the year 2006.
4. The suit was slated to proceed for hearing on February 6, 2018.
5. When the matter came up for hearing on that date before the Childrens Court, neither the Appellant nor his Advocate were present in court. The trial court then proceeded to dismiss the Appellants suit for want of prosecution.
6. Following dismissal of this suit the Appellant filed in the lower court a Notice of Motion dated February 26, 2018 seeking the following orders:-
 - i. That the Honourable court be pleased to set aside the order made on February 6, 2018 dismissing the Plaintiff/Applicants suit for non-attendance.
 - ii. That the Honourable court be pleased to invoke its inherent powers and in the interest of justice and reinstate the suit and list it for hearing on merit.
 - iii. That costs of this Application be provided."
7. On June 14, 2018 the trial court delivered a ruling dismissing the Appellants application to review and set aside the order of dismissal of his suit.
8. Being aggrieved the Appellant filed this Memorandum of Appeal dated June 25, 2018 seeking to have his suit reinstated for hearing. The Appeal was premised upon the following grounds:-
 - a. The learned magistrate erred in law and in fact in dismissing the Appellant's Notice of Motion dated February 26, 2018.
 - b. The learned magistrate erred in law and in fact in failing to set aside its orders of February 6, 2018 and proceeded to punish the Appellant based on the inadvertent and excusable mistake of his counsel.
 - c. The learned magistrate erred in law and in fact in failing to consider the best interests of the minor herein who will lose out on the support, love and affection of her biological father.
 - d. The learned magistrate erred in law and in fact in failing to consider the Appellant's oral submissions and authorities on record."
9. As stated earlier the appeal was opposed.

Analysis and Determination

10. I have considered the Appeal filed before this court, the record of the proceedings filed in the lower court as well as the written submissions on record.



11. It is evident that on the day the hearing was to proceed inter-parties, neither the Appellant nor his Advocate were in court. The Appellant was aggrieved by the decision of the trial court to dismiss his suit for want of prosecution.
12. The reasons which were advanced for the non-attendance of the Appellant and his advocate were that on the hearing day of February 6, 2018 the Advocate was unwell.
13. The Appellant stated that his Advocate had informed him of his indisposal and had indicated that he would send someone to hold his brief and seek an adjournment. Unfortunately, the person arrived in court after the suit had already been dismissed.
14. From the proceedings it is clear that the Appellant was not an indolent litigant. Both he and his Advocate had fully participated in the proceedings before the Children Court. The Appellant was not in the habit of failing to attend court. In the circumstances, it was precipitate of the learned trial Magistrate to dismiss the suit only on the first occasion of non-attendance by the Appellants Advocate.
15. Moreover the door of justice ought not be permanently close to the Appellant due to the mistake/ omission of her Advocate. The Appellant moved with haste to seek a review of the decision of the lower court and did also file this appeal in a timeous manner.
16. This court cannot ignore the fact that the suit in question involved the welfare of a minor. The Children’s Courts are obligated to give priority to the best interest of the child. Article 53(2) of the *Constitution of Kenya, 2010* provides as follows:-
 - “(2) A child’s best interests are of paramount importance in every matter concerning a child.”
17. Similarly Section 8(1) of the *Children Act, 2022* provide that:-
 - “8.
 - (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—
 - (a) the best interests of the child shall be the primary consideration” (Own emphasis)
18. It was not in the best interests of the child to dismiss the suit in such a casual manner instead of hearing and evaluating all the evidence. The failure of the Advocate to attend court was not due to indolence and/or indifference. We are all mortals and are all Subject to ill health at one time or another. The Appellant ought to have been allowed an opportunity to prosecute his suit.
19. I find that the non-attendance by the Advocate on the hearing date was excusable. It is in the interest of justice and in the Child’s interest that the suit be heard on merit.
20. The reinstatement of the suit will not prejudice the Respondent as she too will be accorded an opportunity to be heard.
21. In conclusion, I find merit in this appeal. The same is allowed and the court orders that –
 - (a) The order made on February 6, 2018 dismissing the Appellants suit for non-attendance as well as the Ruling of the lower court dated June 16, 2018 are both set aside.



(b) The Appellants suit is hereby reinstated to be heard and determined on merit.

(c) This being a family matter each side shall bear its own costs.

DATED IN NAIROBI THIS 10TH DAY OF FEBRUARY, 2023.

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MAUREEN A. ODERO

JUDGE

