



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

JAL v FWA (Family Appeal E006 of 2022) [2023] KEHC 22226 (KLR) (7 July 2023) (Ruling)

Neutral citation: [2023] KEHC 22226 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA**

FAMILY APPEAL E006 OF 2022

F WANGARI, J

JULY 7, 2023

BETWEEN

JAL APPELLANT

AND

FWA RESPONDENT

(Being an appeal from the whole judgment of the Principal Magistrate, Hon. Viola Yator in Tononoka Children Case No E090 of 2021, delivered on 19th day of January, 2020.)

RULING

1. This is an appeal from the whole judgment of the Principal Magistrate, Hon. Viola Yator in Tononoka Children Case No E090 of 2021, delivered on 19th day of January, 2020.
2. There are seven grounds of appeal. The court of appeal while dealing with such grounds in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR, held as follows;

“We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of Rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:

“We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of



prolixious grounds of appeal do not in anyway enhance the chances of success of an "

3. On the of grounds of appeal, the Appellant basically is alluding to bias and lack of a fair trial in court. The appeal basically is on two grounds
 - a. That the appellatant was a better father
 - b. Evidence of the children officer and the Appellant were ignored.
4. To enable me make a decision that is lawful, I will bear in mind the dictates of Article 53(2) of the Constitution orders that at all times the act and make decision in the best interest of the children. However, it is sometimes impossible to know when the interest for our children starts and end.
5. The duty of the 1st Appellant Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of Selle and another vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows; -

“An appeal from the High 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.”

6. In Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as follows;

“Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”

Background

7. The parties herein got married on April 4, 2014 and as a result begot 2 minors JMM and AFJ. The appellatant pleaded that he was paying fees and catering all the need of the minors, whenever needed. He moved the lower court under Certificate of Urgency alleging that the respondent abandoned the minors at her parent home. Issues of maintenance, infidelity arose. The parties allegedly parted ways when the appellatant demanded that they go for VCT.
8. The parties agree that as they negotiated over the children, the children should proceed to a school in Mombasa. The most dramatic events giving rise to this case arose between March 4, 2021 and by March 19, 2021, when the Appellant moved the court.
9. In her response, the respondent avers that the marriage was not a bed of roses. The appellatant had denied the respondent conjugal rights and as a result a good neighbour helped to dock her ship safely by plucking some of the weeds. The wife of the other man knew about the secret affair and as a result the drama unfolded. The case is in reality a divorce case rather than the dispute over children. The wife of the man testified in court.

Analysis

10. The witnesses for the appellatant were narrating interests that related to the Respondent’s unfaithfulness and nothing really about children. The issues of leaving the children under the care of another



neighbour while she went to on her romantic escapades is neither here or there as it has nothing to do with the children.

11. The appellant admitted that she used to be a good mother till she suddenly changed. The change is admitted. The respondent admitted that while the appellant had failed on his conjugal duties, she called and received help from one Mr N.
12. The decision from the Magistrate on custody is that of discretion. The Court of Appeal in that version in the case of *Mbogo and Another vs. Shah* [1968] EA 93 where 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.”

13. I note that all the 7 grounds do not emanate from the record. I cannot see where any of them were shown to arise. For example, there was no electronic evidence that was not admitted. On any case, the text messages related to an already admitted fact, which Section 4 of the *Evidence Act*, states that no one can be called upon to prove admitted facts or presumed facts. It states as hereunder;

- (1) Whenever it is provided by law that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.
- (2) Whenever it is directed by law that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

14. I find the evidence on record, supports the finding by court. The issues raised in the Memorandum of Appeal do not pass the test in the circumstance. There is no single issue of fact or law capable of being dealt with. A finding whether the Plaintiff is a good father does not determine any legal issue in court.

15. Secondly the evidence that the children’s mother is even a prostitute or a loose woman has no bearing on the custody of the children, nor is Mr N existence. In *M A A v A B S* [2018] eKLR, the court, justice: M Thande, stated as follows, while referring to the *Children’s Act 2001*: -

“What is stated in Section 4 (3)(b) of the Act is the paramountcy principle which is vital in all matters concerning children and must be given prominence. While considering this matter, this Court was alert to the welfare of the child herein who is of tender years. The matter is not about the Appellant and the Respondent and their interests are secondary to those of the child. The foregoing provisions require this Court to treat the interests of the child as the first and paramount consideration and must do everything to inter alia safeguard, conserve and promote the rights and welfare of the child herein. Acting in the best interest of the child, I am of the view that his welfare will best be served if he remains with his mother the Respondent.”

16. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. In this case, I exercise this discretion and award the costs to the respondent.

Determination

17. Following the foregone discourse, the upshot is that the following orders do hereby issue:



- a. The appeal is bereft of merit and is as such dismissed
- b. The Respondent shall have costs of this appeal
- c. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF JULY, 2023.

.....

F. WANGARI

JUDGE

In the presence of;

Musyoki Advocate for Applicant

Ngugi Advocate for Respondent

Barile, Court Assistant

