



REPUBLIC OF KENYA



**KENYA LAW**  
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**MIA v FGA (Civil Appeal E001 of 2023)  
[2023] KEHC 22658 (KLR) (25 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22658 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CIVIL APPEAL E001 OF 2023  
JN ONYIEGO, J  
SEPTEMBER 25, 2023**

**BETWEEN**

**MIA ..... APPELLANT**

**AND**

**FGA ..... RESPONDENT**

*(Being an appeal from the judgment of Hon.S.Otuke delivered on 10th  
February 2023 in Garissa CM'S court in children's case No. E058 of 2022)*

**JUDGMENT**

1. Vide a plaint dated 15<sup>th</sup> September 2022, the respondent(plaintiff) herein moved to the children's court Garissa CM' s court accusing her husband the appellant herein of child neglect and generally lack of parental responsibility. Consequently, she sought orders as hereunder;
  - a. The defendant to cater for the upkeep of the children
  - b. The defendant to pay kshs 25,000 being the upkeep for the minors
  - c. That costs of the suit be provided for
  - d. Any other reliefs the court may deem necessary.
2. The respondent's cause of action was premised on the fact that together with the appellant, they got married under Islamic law and were subsequently blessed with two children namely; IM & AM aged 3yrs and 6 weeks respectively as at the time the suit was filed. That the appellant has since neglected his parental duties towards the minors and that he had taken away the 3-year-old IM from the respondent. That the appellant thereafter refused to return the child to the respondent and additionally, neglected providing for the new born child.



3. Having been served with the plaint and summons to enter appearance, the defendant entered appearance and filed defence on 16<sup>th</sup> September 2022 thus denying every claim levelled against him. He stated that; the respondent was hell bent to deprive him of the right to be the father to his children; the respondent's aim was to expose him to mental anguish by frustrating him on false allegations; that he has never neglected his children as he was the sole bread winner;
4. When the matter came up for hearing on 17<sup>th</sup> November 2022, the appellant was not present. The matter was then fixed for hearing on 6<sup>th</sup> December 2022 when the respondent sought for entry of interlocutory judgment which the court readily allowed and entered the same day. The matter then proceeded for formal proof wherein the respondent testified, case closed and judgment set for 27<sup>th</sup> December 2022 and later 10<sup>th</sup> February 2023 when it was finally delivered.
5. During the hearing, she adopted the content of her plaint and witness statement dated 2<sup>nd</sup> November 2022 thus seeking custody and maintenance of the children. She stated that the appellant was a man of means working with [Particulars Withheld] company (xxxx) in the computer office.
6. Upon determining the suit, the learned magistrate made the following orders;
  - a. That the plaintiff and defendant are granted joint custody of the minor IM
  - b. That the defendant be paying a monthly maintenance cost of Kshs 25,000 to the plaintiff on behalf of the children on or before the 5<sup>th</sup> date of every month
  - c. The plaintiff to continue providing shelter, clothing and food to the children
  - d. That the orders are subject to review if need be
  - e. The case being a family matter each party to bear own costs.
7. Dissatisfied with the said judgment, the appellant filed the appeal herein in which he has listed five (5) grounds in the undated memorandum of appeal filed on 28<sup>th</sup> February 2023 thus stating that; the trial court condemned him unheard; the trial court failed to consider his statement of defence; the trial court failed to consider his preliminary objection dated 3<sup>rd</sup> November 2022; the appellant will suffer irreparable loss as he will be compelled to pay an amount that the respondent is not entitled to and; that the court applied wrong principles in arriving at the decision it did
8. The appeal proceeded by way of oral submissions wherein the appellant stated that he was opposed to the orders of the trial court as he was taking care of one child. He proposed that the respondent takes care of the other child as they had not divorced. It was his position that the respondent had barred him from seeing the child in her custody and that he had not refused to take care of his child now in the custody of the respondent but simply demanded that he be allowed to see the said child.
9. The respondent on the other hand stated that the appellant had claimed that he was not the father of the child in her custody hence she wanted IM returned to her. She urged the court to give directions on how the parties could take care of their children. It was her case that IM was staying with the appellant's mother while the appellant lives with another wife elsewhere.
10. This being the first appellate court, it is thus bound to reconsider, re-evaluate and re-assess the evidence tendered before the trial court and arrive at an independent determination and or conclusion without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses to be able to assess their demeanor. See *Selle and another vs Associated Motor Boat Co. Ltd and others* (1968) E.A 123 and *Peters Vs Sunday post limited* (1958) E.A 424.



11. I have considered the record of appeal herein, grounds of appeal and oral submissions by both parties. Issues that arise for determination are; whether the appellant was condemned unheard; Whether his defence was considered; Whether he was entitled to the custody of the children or any one of them; whether the amount of maintenance ordered is excessive;
12. The case before the trial court was in relation to custody and maintenance of young children aged below three years. It is trite law and indeed a constitutional imperative under Article 53(2) of *the Constitution* and Section 8 of the *children Act* that in every decision or order made affecting a child, the best interests of the child must be considered. See the case of *KKPM vs SWW (2019)* eKLR where the court held that the best interest of a child is superior to the rights and issues of a parent/s.
13. Before I endeavor to determine this appeal in its entirety, I am inclined to first determine two outstanding grounds which are; the appellant was denied the right to be heard and his defence and preliminary objection were ignored. Did the defendant file any defence? From the record, I am able to find a memorandum of appearance and statement of defence together with exhibits all dated and filed on 16<sup>th</sup> September 2022. Further, there is a preliminary objection dated and filed on 3<sup>rd</sup> November 2022 challenging the court's territorial jurisdiction. A return of service of the said Preliminary objection duly served on the same day by a process server known as Michael William was filed on 23<sup>rd</sup> November 2022.
14. However, the trial court did proceed to enter interlocutory judgment on 6<sup>th</sup> December 2022 after finding that there was no appearance entered nor defence on record and later proceeded with formal proof. In his Judgment at paragraph 4, the hon. Learned magistrate did mention that the defendant did not enter appearance nor file defence. The question which begs for an answer is whether the statement of defence was in the court file or not when interlocutory judgment was entered and subsequently judgment delivered.
15. In the absence of any evidence to the contrary, I am inclined to hold that the defendant had filed his statement of defence and preliminary objection. With that in mind, the entry of interlocutory judgment was improper. Besides, the court was duty bound to dispose of the preliminary objection first before proceeding with the main suit as lack of jurisdiction is a critical component in litigation.
16. It is trite law that in litigation, jurisdiction is everything and without it, a court ought to down its tools and move no further step. These were the wise words from Nyarangi JA (as he then was) in the case of Owners of the Motor Vessel "LillianS" v Caltex Oil(Kenya)Ltd (1989) eKLR. However, jurisdiction is not self-made but a donation from *the constitution* or statute. See Samuel Kamau Macharia vs Kenya commercial Bank Ltd and 2 others (2021) e KLR where the supreme court held that jurisdiction flows from *the constitution* or the statute or both.
17. Although the appellant ought to have first approached the trial court for stay of execution and setting aside the interlocutory judgment, there is already a judgment based on substantive evidence hence this court is not limited in terms of jurisdiction. In any event, children matters are not strictly tied to procedural technicalities. To that extent, I am in agreement with the appellant that the improper entry of interlocutory judgment did deny him an opportunity to defend the suit.
18. As regards being condemned unheard, there is a return of service sworn on 29<sup>th</sup> November 2022 by one Mune indicating that he had served the hearing notice upon the boss to the appellant indicating hearing was scheduled for 6<sup>th</sup> December 2022. He further stated that the said boss refused to sign implying that he declined service.
19. Under order 5 rule 19 of the civil procedure rules, service upon the appellant's boss being his human resource officer was proper and in the absence of any indication or evidence by the said boss denying



service, the same shall be deemed to have been properly effected. That notwithstanding, the hearing process was irregularly conducted after the court ignored the preliminary objection and proceeded with entry of interlocutory judgment and thereafter formal proof yet they were duly filed and in time. In the spirit of Article 50(1) of *the constitution*, the appellant deserved an opportunity to have his Preliminary objection and defence heard on merit.

20. In view of my above finding, I will be hesitant to determine the remaining grounds of appeal touching on the merits of the suit. To do so will jeopardize the likely outcome in case of a successful fresh hearing.
21. For the above stated reasons, I am persuaded by the grounds of appeal herein advanced by the appellant that proceedings herein were unprocedurally held hence inclined to allow the appeal with orders that;
  - a. The appeal herein is allowed
  - b. The interlocutory Judgement entered on 6<sup>th</sup> December 2022 be and is hereby set aside
  - c. The impugned judgment delivered on 10<sup>th</sup> February 2023 and the consequential orders thereof be and is hereby set aside.
  - d. The matter to proceed on merit within Garissa law courts for hearing a fresh before any other magistrate with competent jurisdiction other than Hon. S. Otuke
  - e. The trial court to expedite the hearing process on priority basis for the benefit the subject minors.
  - f. This being a children's matter, I will be reluctant to order for costs. Accordingly, each party to bear own costs.
  - g. The deputy registrar to submit the original lower court file to the trial court.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2023.**

.....

**J.N. ONYIEGO**

**JUDGE**

