



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL APPEAL NO. 73 OF 2020**

**FGC.....APPELLANT**

**-VERSUS-**

**PGN.....RESPONDENT**

*(An appeal from the Ruling of the Senior Principle Magistrate's Court at Ruiru Hon. C.K. Kisiangani, SRM in Ruiru Children's case No. 12 of 2019 dated 27<sup>th</sup> May, 2019)*

**JUDGMENT**

1. **PGN** and **FGC** are husband and wife. They were married in 2010 and were blessed with three girls. Those children are:-

*(a) SWG born 12<sup>th</sup> January, 2011*

*(b) JWG born 26<sup>th</sup> October, 2012*

*(c) ANG born 19<sup>th</sup> February, 2015*

2. The marriage unfortunately floundered on rocks of adversity. **PGN**, hereinafter referred to as, *the father* filed a case before the **Principal Magistrate's Court at Ruiru** seeking full custody, care and control of the children of the marriage. The father also prayed, in that action that, **FGC** thereinafter referred to as, *the mother* be ordered to contribute towards the maintenance of the children of the marriage.

3. That suit was fixed for hearing by consent on 30<sup>th</sup> January, 2020. Both the mother and her advocate failed to attend that hearing and the case proceeded for hearing with only the evidence of the father. The trial court delivered its judgment on 5<sup>th</sup> March, 2020.

4. The mother filed an application by notice of motion dated 17<sup>th</sup> Mach, 2020 seeking the following orders:-

*“(a) THAT there be stay of execution of the judgment herein pending the hearing and determination of this application.*

*(b) THAT the ex parte hearing and resultant judgment dated 5<sup>th</sup> March, 2002 be set aside and the matter be heard de novo on merit.*

*(c) THAT in the alternative, this honourable Court be pleased to recall the plaintiff/Respondent for purposes of being cross examined by the counsel for the defendant/applicant on her evidence that she tendered on 30<sup>th</sup> January, 2020.*

*(d) THAT this honourable Court be pleased to allow the defendant/applicant to tender her evidence and also be cross examined by the counsel for the plaintiff/respondent.”*

5. That application was dismissed by the trial court by its Ruling of 27<sup>th</sup> May, 2020. It is that Ruling that aggrieved the mother and hence this appeal.

6. This Court shall be guided, in the determination of this appeal, by the often quoted decision and principle in the case of **SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS (1968) EA 123** thus:-

***“An appeal to this 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..."***

7. The mother faulted the Ruling of the trial court by raising grounds in this appeal to the effect that:-

- a) *The trial court paid undue regard to technicalities in visiting the mother's advocate's mistakes on the mother.*
- b) *The trial court failed to consider that the mother had raised triable issues in her defence.*
- c) *That the trial court failed to exercise its discretion judiciously and failed to consider the overriding objective of the Civil Procedure Act and the interest of the children.*
- d) *The trial court was biased towards the mother.*

8. The application, the subject of this appeal was supported by the affidavit of the mother. In her deposition the mother brought out the following as the basis of seeking the trial court's exercise of its discretion in her favour:-

1. *That the mother's then advocate mis-diarised the hearing date as 31<sup>st</sup> January, 2020.*
2. *That on 31<sup>st</sup> January, 2020 the mother and her witnesses attended the trial court on the belief the case was to proceed for hearing on that date.*
3. *That on realising the hearing proceeded on 30<sup>th</sup> January, 2020 the mother's advocate wrote a letter of complaint, filed before trial court on 10<sup>th</sup> February, 2020.*
4. *That the suit before the trial court involves three girls of tender age whose interest was comprised by the ex parte hearing.*

9. The application was opposed by the father by a replying affidavit dated 2<sup>nd</sup> April, 2020. The dispositions of that affidavit were that:-

- a) *The application was frivolous.*
- b) *The suit was fixed for hearing on 5<sup>th</sup> December, 2019 and although he and his advocate were ready to proceed with the hearing, the mother and her advocate were not ready and the case was adjourned by consent to 30<sup>th</sup> January, 2020.*
- c) *That the mother was present when the date for hearing on 30<sup>th</sup> January, 2019 was given.*
- d) *The mother's advocate was sent a notice of the date of delivery of the judgment.*
- e) *The mother was frustrating the trial and had not given a good reason for failing to attend the hearing on 30<sup>th</sup> January, 2020.*
- f) *The mother even though she was granted access to the children of the marriage by the judgment of 5<sup>th</sup> March, 2020 had failed to exercise that right.*

10. The trial court by its ruling of the application, which is the subject of this appeal, found that the mother's advocate had failed to set out the reason she did not attend court in her affidavit; and that the prayers sought being discretionary, the mother had failed to convince the trial court that her failure to attend court was not deliberate.

### **ANALYSIS**

11. The case before the trial court related to the custody of young children. The trial court was required to be guided by **Article 53(2)** of the constitution which provides:-

***"(2) A child's best interests are of paramount importance in every matter concerning the child.***

12. Additionally, the trial court needed to consider the provisions of **Section 4(2)(3)** of the Children's act as follows:-

***"(2) In all actions concerning children whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.***

***(3) All judicial and administrative institutions and all persons acting in the name of these institutions, where they are exercising any powers conferred by this act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to –***

- i. ***Safeguard and promote the rights and welfare of the child.***

*ii. Conserve and promote the welfare of the child.”*

13. I have deliberately throughout this judgment referred to the parties as father and mother in order to underscore that the main interest to be considered both by the trial court and this Court is the interest of the three children of the marriage.

14. It is important to note the conduct of either the father or mother will only be considered by this Court if this Court is satisfied that the evidence of that conduct bears directly upon the parent's ability to care properly for the children of the marriage. It is only with those lenses the parties conduct will be considered.

15. The trial court's record shows that on 18<sup>th</sup> October, 2019 the trial court made a finding that the mother had removed the children of the marriage from school which prompted the trial court to order the mother to return the children to school. The trial court was also informed on 23<sup>rd</sup> October, 2019 that the mother who had moved away from the matrimonial home with the children had failed to pick up the children from school. Following that revelation the trial court recorded that parties had consented to the father having the custody of the children. The father continued having the custody of the children up to the date the trial court delivered its judgment on 5<sup>th</sup> March, 2020, whereby the court granted both the father and mother joint legal custody, while the father was granted physical custody. The mother was granted visitation rights of the children.

16. It is important to note that when the trial court considered the mother's application to set aside the *ex parte* hearing, the court received the father's deposition that the mother, up to the date of the father's affidavit, 2<sup>nd</sup> April, 2020, the mother had failed to visit the children even though she obtained an order for such visitation.

17. It would therefore seem that the mother by this appeal seeks the setting aside of the *ex parte* hearing for reconsideration of the custody of the children and there is no evidence she has visited the children as clearly ordered by the trial court's judgment of 5<sup>th</sup> March, 2020.

18. It is worth noting that the mother moved the trial court by her application as provided under Order 12 Rule 7 of the Civil procedure Rules, hereinafter the Rules, which provides:-

***“Where under this Order judgment has been entered or the suit has been dismissed the court on application, may set aside or vary the judgment or Order such terms as may be just.”***

19. That Rule evidently gives the court hearing an application to set aside *ex parte* judgment discretion to determine whether to set aside such a judgment. The trial court was attentive to the provisions of that Rule and made a finding that the mother had failed to move that court to exercise its discretion in her favour.

20. The reason given by the mother for failing to attend the hearing before the trial court was that her then advocate had misapprehended the date to be 31<sup>st</sup> January, 2020 instead of the correct date 30<sup>th</sup> January, 2020.

21. The father by his replying affidavit dated 2<sup>nd</sup> April, 2020 deponed that the mother was in court when the case was fixed for hearing on 30<sup>th</sup> January, 2020 and that she should therefore have attended that hearing. The mother did not deny being in attendance in court and therefore failed to explain why she herself failed to attend the hearing on 30<sup>th</sup> January, 2020, if indeed her advocate misapprehended the date.

22. Further, the father deponed that the mother though given right of visitation of the children she had failed to visit them.

23. The above are factors within the trial court as it considered the application to set aside *ex parte* judgment. And it is no wonder that the trial court in consideration those factors and bearing in mind the best interest of the child, declined to set aside the *ex parte* judgment which would have involved the re-hearing of the case and would probably have the prospect of destabilising the stable environment the children have been in since 23<sup>rd</sup> October, 2019 when the custody of the children was committed to their father.

24. I have considered the grounds of appeal. In my view, the mother erred to submit that the trial court visited the mistake of the advocate on the mother because that advocate failed to file an affidavit to that effect. In this regard, see the case **JULIUS MBAABU VS. TOM AYORA & 3 OTHERS (2018) eKLR**:-

***“9. It is not always that a court will exercise its discretion in favour of a party if the mistake is by its advocates as submitted by the plaintiff. The advocates must demonstrate genuine and acceptable mistakes, not outright negligence as is in the case in this matter.***

***In circumstances as these, a client is not left without a remedy. If professional negligence is proved, the Advocates professional indemnity insurance cushions the advocates against such acts of negligence by compensating the clients by way of damages.”***  
(underlining mine)

25. The mother also erred to argue that in its determination, the trial court failed to apply constitutional provision of Article 159. Article 159 did not do away with Rules of procedures. Not at all. This has clearly been stated by the Supreme Court and the Court of Appeal. In the case **PARLIAMENTARY SERVICE COMMISSION VS. MARTIN NYAGA WAMBORA & OTHERS (2018) eKLR** the Supreme Court had this to say:-

***“[26] On appeal of this decision, the Court of Appeal P (in MBOGO AND ANOTHER V SHAH [1968] EA 93 at 96) affirmed the***

decision of the High Court thus:-

*“We come now to the second matter which arises on this appeal, and that is the circumstances in which this Court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this Court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice.”*

26. In the case LUDWICK MUSINDU VS. NANCY NDUTA (2021) eKLR the Court of Appeal stated thus:-

*“7. The provision permits in exceptional cases for an extension of time to file a reference. In the case of MOSES MWICIGI & 14 OTHERS V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 5 OTHERS [2016] eKLR the Supreme Court stated thus:-*

*‘This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.’*

*Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2)(d) of the constitution, which proclaims that, “...courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities”. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.”*

27. There is a ground of appeal presented to this Court which was not the subject of the hearing before the trial court. This is the ground that the trial court was biased against the mother.

28. My response is that, that ground having not been raised before the trial court, this Court cannot deal with it. Further, having perused the proceedings, there is no evidence of such bias. To the contrary, the trial court more than once granted the mother adjournments in order to file responses to the father’s application and other documents.

29. Having considered the trial court’s proceedings and the Ruling, I conclude there was no error on the part of the trial court. I am of the view that the trial court’s determination was made with a view to the best interest of the children. The children need to be provided with stability and having considered the evidence before the trial court, the father is in a position to provide such a stable environment for the children.

## CONCLUSION

30. On account of the above discussion, I find no merit in this appeal. It is dismissed with no orders as to costs.

**JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 2ND DAY OF DECEMBER, 2021.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant **Maurice**

For the Appellant : Mr. Byamuaana holding brief for Ngugi

For the Respondent : Ms. Gitari holding brief for Mr. Kangethe

**COURT**

Judgment delivered virtually.

**MARY KASANGO**

**JUDGE**