



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 60 OF 2017

R W.....1ST APPELLANT

M N.....2ND APPELLANT

A W.....3RD APPELLANT

VERSUS

L K.....RESPONDENT

JUDGMENT

1. The respondent is the biological father of two minors B G. (turned 18 years on 22nd May 2018) and I W (6 years old). The mother of the minors died on 1st January 2017. The appellants are their maternal aunts (sisters to the mother). There is an ongoing dispute before the Children's Court in **Children's Case No. 254 of 2017** between the appellants and the respondent regarding custody of the minors.

2. On 28th August 2017 the Senior Resident Magistrate Court (G.M. Gitonga) delivered a ruling directing that the respondent to have interim custody for purposes of the younger child completing his 3rd term at its current school. The appellants were ordered to access the minors on one Sunday every month with effect from 23rd April 2017 at the Chief's camp in Kawangware.

3. The appellants were aggrieved by the said orders. They filed the present appeal on the following grounds:

- a) that the learned magistrate erred in law and fact in ordering that the appellants do grant actual care and custody of the minors to the respondent;
- b) that the learned magistrate erred in law and fact in ordering that the younger minor be given to the respondent for purposes of going to school for third term;
- c) that the learned magistrate erred in failing to be correctly guided by the best interest of a child principle in arriving at a decision that affects the welfare of the children herein;
- d) that the learned magistrate erred in law and fact in ordering the DNA which was not even prayed by the respondent;
- e) that the learned magistrate erred in law and fact by delivering a ruling in favour of the respondent; and
- f) that the learned magistrate erred in law and fact by failing to appreciate and or abandoning the current old maxim of equity that he who comes to equity must come with clean hands.

They prayed that the appeal be allowed and the entire decision of the Senior Resident Magistrate delivered on 28th August 2017 be set aside. The appeal is pending determination.

4. Since the filing of the notice of appeal on 1st September 2017, the appellants have never filed the record of appeal. On 17th July 2018, I directed the parties to simultaneously and within 14 days, file submissions on the appeal and appear before the court on 27th October 2018

for highlighting. No submissions were filed by the appellants. Neither did they appear before the court on the said date. Absence of the appellants during the hearing of the appeal is enough ground for dismissal of the appeal (**Benina Gachui Mirio and another vs Julius Kamanda Mirio Civil Appeal No. 160 of 1993**, [1993] LLR 4894 (CAK)).

5. It is through the record of appeal that the court will be able to review the trial record to be able to make a decision whether or not the appeal has merits. No record was filed in this case. Secondly, the appellants did not list (under **Order 42 rule 11** of the **Civil Procedure Rules** and **Section 79B** of the **Civil Procedure Act**) the appeal before the judge for directions.

6. The decree and orders appealed from under **section 79G** of the **Act** were not filed. The requirement for decree and order to be filed is a mandatory ritual without which no legitimate appeal can be said to have been lodged against a decision of a subordinate court (**Ndegwa Kamau t/a Sideview Garage –v- Fredrick Isika Kalumbo [2016]eKLR**).

7. In short, the appeal before the court is not competent. The appellants did not even attend to prosecute the same. I dismiss it with costs and discharge the orders that were issued herein.

DATED and DELIVERED at Nairobi this 15TH day of NOVEMBER 2018

A.O. MUCHELULE

JUDGE