PCL v JCA (Suing as Next Friend of HcCL ICL, ZSL & NAL, all Minors) (Family Appeal E007 of 2024) [2025] KEHC 14244 (KLR) (9 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14244 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

FAMILY APPEAL E007 OF 2024

HI ONG'UDI, J

OCTOBER 9, 2025

BETWEEN

PCL ..... APPELLANT

AND

JCA ..... RESPONDENT

SUING AS NEXT FRIEND OF HCCL ICL, ZSL & NAL, ALL MINORS

(Being an appeal from the ruling and orders of Hon. R. Ombata (SRM) in Nakuru CM's Children's Case No. E077 of 2022, delivered on 21st March 2024)

JUDGMENT

1. This appeal arises from the ruling and order entered by the lower court on 21st March 2024. In the said suit, the respondent (who was the plaintiff and sued on behalf of four (4) minors vide the plaint dated 2th July, 2020 prayed for judgment against the appellant (who was the defendant) for;

    i. An Order that the defendant do pay all school fees and school related expenses until all the children attains the age of 18 years.

    ii. An Order that the defendant do pay the plaintiff a sum of Kenya Shillings Ninety Paw Thousand Shillings (95,000/=) for food, shelter and school related emoluments every month until all the minors attains the age of 18 years.

    iii. Any other Order that this court may deem fit to grant in the circumstances.

    iv. Cost of the suit.

2. Thereafter the respondent filed an application dated 3rd April 2023 seeking several orders and the trial court delivered the impugned ruling on 21st March 2024 allowing the said application.

3. Being aggrieved with that ruling the appellant lodged the appeal dated 26th March, 2024 on the following grounds:

   i. That the learned trial magistrate erred in law and principle by allowing an Application that was fatally defective in substance in that the application referred to and sought to set aside non-existent orders.

   ii. That the learned trial magistrate erred in law by reopening a suit to be determined on its merits whereas the court was functus officio having made a final determination on the issue of custody and-40) maintenance of the minors.

   iii. That the learned trial magistrate erred in law by issuing orders whose net effect is to make the same court sit on an appeal of its own decision.

   iv. That the learned trial magistrate erred in principle by failing to consider all grounds of opposition dated 17th May, 2023.

   v. That the learned trial magistrate erred in law and fact by failing to appreciate the applicable law as provided under Order 12 Rules 6 (1) and (2) of the Civil Procedure Rules.

   vi. That the learned magistrate erred in law and fact by wrongly applying provisions of Order 12 Rule 7 of the Civil Procedure Rules.

   vii. That the learned trial magistrate failed to appreciate the well settled principle of law that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

   viii. That the learned trial magistrate failed to appreciate the law governing proceedings by overturning a substantive decision without taking into consideration all the factors surrounding the case and more so, the prejudice to be suffered by the minors.

   ix. That the learned magistrate erred in law and in fact by failing to appreciate the evidence placed before her, which evidence did not support the decision to set aside judgement and reopen the case for re-hearing.

   x. That the learned magistrate erred in law and in fact by making a finding whose import is to burden the trial court with matters of custody that were not pleaded by the plaintiff (now respondent).

   xi. That the learned magistrate erred in law and in fact admitting into evidence an exhibit that was not sealed by the Seal of Commissioner for Oaths.

   xii. That the learned magistrate erred in law and fact by admitting as properly filed a reply to defense and defense to counter claim filed out of time and without leave of court and without affording the defendant (now appellant) an opportunity to oppose its admission into record.

   xiii. That the learned magistrate failed to appreciate the law vis-a-vis the material placed before her, all of which did not support the ruling made.

4. The appellant prayed that the appeal be allowed and the trial's court ruling be set aside in its entirety. Further that each party bear its own costs of the appeal.

5. The Appeal was canvassed through oral and written submissions.

Appellant's submissions

6. He submitted orally stating that he is the father of all the four (4) minors and all he was asking for is justice. He stated that the respondent had refused to give a report on the house accommodating the children. He further stated that he had filed a counterclaim in the lower court but the same was not dealt with. He added that the respondent left their house in 2015 and he has been living with the 3 children. The lower court granted him sole custody because of the respondent's condition and she has nothing to offer the children.

7. He further submitted that they have four children and the two older children were in boarding school while he lived with the two younger ones in Baringo. He asserted that the respondent has clinical depression and her actions would affect the children. He added that they were not enemies with the respondent. He urged the court to uphold the orders granting him custody, set aside the ruling by the lower court and that he be awarded costs.

Respondent's submissions

8. The respondent submitted orally and placed reliance on her written submissions dated 23rd May 2025. In her oral submissions she stated that the appellant left them and that she had never been separated from her children. She stated that her desire was to have the children with her and that both of them ought to do their bit. She further stated that she had no mental issues, had settled and lived in a small house and was also running a small business. She added that there was no enmity between her and the appellant.

9. In her written submissions, she stated that the lower court had jurisdiction to set aside the default judgment and re-open the suit for hearing based on the application filed by the appellant. She placed reliance on Article 159 (2) of *the Constitution*, section 3A of the *Civil Procedure Act*, order 12 rule 17 of the Civil Procedure Rules and the decision in Shah Vs, Mbogo (1967) E.A 116 where the court laid the following criteria:

> " The court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought whether by evasion or otherwise) to obstruct or delay the cause of Justice".

10. See also Philip Chemwolo & Another v Augustine Kubebe (1982-88) KLR at 104, Morris & Company Limited v Victoria Minerals & Chemicals Limited & Another [2007] eKLR, Esther Wamaitha Njihia & others v Safaricom Limited [2014] eKLR and Jacqueline Njeri Njuguna & Another v Bishop Mbugua Karanja & 4 others [2022] eKLR.

11. She further submitted that custody should be enjoyed by all parents as long as it is in the best interest of the child. She placed reliance on Article 53 (2) of *the Constitution*, section 8 of the Children's Act, 2022 and the decision in J v C (1970) AC 668 where the court held as follows;

> " When all relevant facts, relationship, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighted, the course to be followed will be that which is most in the interest of the child..."

12. See also; In re CJ & WK (Children Miscellaneous Application E016 of 2023).

13. In conclusion, she urged the court to dismiss the appeal and allow the lower court case to proceed in the best interest of the children.

Analysis and determination

14. This being a first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act* to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion considering the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of Selle v Associated Motor Boat Co. Ltd (1968) 123 where Sir Clement De Lestang (V.P) stated that:

> " An appeal to this Court from a trial by the High 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. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally".

15. Having carefully perused the proceedings, the ruling and the record of appeal as a whole including both parties' submissions, I find the issue arising for determination to be whether the trial court exercised its discretion judiciously in arriving at the decision to set aside the exparte proceedings together with the judgment and reinstating the respondent's suit.

16. The appellant has listed thirteen grounds of appeal and the same generally faults the learned trial magistrate for allowing the respondent's application dated 3rd April 2023. He contends among other things that the said application was fatally defective in substance as it sought to set aside non-existent orders. Thus, the learned magistrate erred in law and principle in allowing it. The respondent on her part argued that the lower court was right and acted within its powers to set aside the judgment and re-open the suit for hearing and determination.

17. The learned trial magistrate in her ruling noted that she had looked at the court record and proceedings leading up to the said exparte judgment and she realized that indeed counsel for the respondent was absent on the date when the matter was slated for hearing despite him being aware of the hearing date. It was her finding that the explanation by the respondent was reasonable, without prejudice. She further noted that this being a matter where children are involved and the best interests as envisaged under Article 53(2) of *the Constitution* and Section 4(2) (3) of the Children's Act so it must be given paramountcy.

18. In Mbogo & Another V. Shah [1968] EA 98 it was held 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 misjustice."

19. Further, in Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KECA 175 (KLR) the Court of Appeal held that –

> "And as is always the case, judicial discretion has to be exercised on the basis of the law and evidence. And as was stated by this Court in the case of Carl Ronning v Societe Navale Chargeurs Delmas Vieljeux (The Francois Vieljeux) [1984] KLR 1 an appellate court may only interfere with the exercise of judicial discretion if satisfied either;(a)The judge misdirected himself on law, or(b)That he misapprehended the facts, or(c)That he took account of considerations of which he should not have taken an account, or(d)That he failed to take account of consideration of which he should have taken account, or (e)That his decision, albeit discretionary one, was plainly wrong."

20. Having carefully perused the ruling by the trial court's dated 21st March 2024 plus the record, I note that guided by the decision in Mwala v Kenya Bureau of Standards EA LR [2001] 1 EA 148, the trial magistrate made her determination and invoked her discretion to find that the application by the respondent had merit. In the above decision, the court made a distinction between a regularly entered default judgment and an irregularly entered one.

21. In the instant case the of service of summons is not contested. Thus, the default judgement entered therefore was a regular one which in turn gave the trail court the discretion to set it aside or not. Further, the trial court found that the defence was valid and reasonable and upon perusal of the same defence I note that the same raises triable issues.

22. I find, as stated in Mrao Ltd v First American Bank of Kenya Ltd & 2 others (supra) that it has not been demonstrated that the trial magistrate misdirected herself in law; that she misapprehended the facts; that she took account of considerations of which she should not have taken account; that she failed to take account of considerations of which she should have taken account, and that her decision, though a discretionary one, was plainly wrong.

23. Consequently, I find no merit in this appeal and the same is hereby dismissed.

24. The matter to be mentioned before the Chief Magistrate for re-allocation of the case since Hon. Ombata Senior Resident Magistrate is no longer serving in this station. The matter ought to be heard on priority basis

25. Each party to bear his/her own costs.

26. Orders accordingly.

Delivered, dated and signed this 9th day of October, 2025 in open court at Nakuru.

H. I. ONG'UDI

JUDGE