PPRK (Suing as Next Friend to JK & FAK - Minor) v AK (Civil Appeal E086 of 2024) [2025] KEHC 14048 (KLR) (8 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14048 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E086 OF 2024

RM MWONGO, J

OCTOBER 8, 2025

BETWEEN

PPRK (SUING AS NEXT FRIEND TO JK & FAK - MINOR) ..... APPELLANT

AND

AK ..... RESPONDENT

JUDGMENT

The Memorandum of Appeal

1. By a memorandum of appeal dated 26th September 2024, the appellant seeks the following orders:
    a. That this appeal be allowed;
    b. The ruling dated 23rd September 2023 of the trial court be quashed;
    c. The court to issue an Order that the Respondent is liable to contribute in upbringing the two children by paying a monthly maintenance of Kshs.6,000/= and school fees towards the upbringing of the two children JK and FAK.
    d. The court issues Orders that custody of the two children be vested upon the appellant.
2. The appeal is premised on the grounds:
    1. That the Honourable magistrate erred in law and fact by reviewing her judgment without any application for review from the appellant and/or Respondent thus defeating the principle of best interest of children;
    2. That the Honourable magistrate erred in law and fact by failing to follow the right procedure in reviewing her orders and considered the Respondent's pleas that he has left employment and thus he cannot be able to meet his burden of the shared parental responsibility;

3. That the Honourable Magistrate erred in law and fact by failing to recuse herself from further proceedings with hearing the suit despite the appellant's plea and insistence that Respondent had Intimated to the Appellant that the Learned magistrate and the Respondent were in communication outside of court in regard to the suit when the matter was subsisting;

4. That the learned trial magistrate erred in law by denying the appellant the right to a fair trial because the court failed to address the appellant's application for execution which was lawfully and legally filed before the applicant tactfully and maliciously and filed the application dated 27th April 2024 in order to defeat justice;

5. That the trial court erred in law and fact by failing to find that the court was functus officio and that the court was barred by law from further issuing orders that amended the decree issued on 30th May 2023;

6. The learned trial magistrate failed to appreciate the fact that the Respondent did not produce any tangible evidence to prove that he was not employed and thus it was necessary to review the Orders issued vide the decree dated 30th May 2023;

7. The learned trial magistrate erred in law and fact by leaving more confusion and contradictions that has left the Appellant confused on the exact contribution the Respondent is supposed to make in maintenance of the minor FAK; and

8. That the learned Magistrate erred in fact by failing to take into account that the other child of their marriage JK is still in college and the Appellant has been left with the onus task of caring for him without the input of the father the Respondent who has proved uncooperative, uncaring and usually exhibits a don't care attitude in regard to maintenance of the two children.

3. The Impugned ruling emanates from an application dated 27/04/2024 in which the applicant sought an order that the parties contribute at a ratio of 60:40 by the applicant and respondent, respectively, to maintenance of their child FAK as detailed later.

Background: The Plaint and Defense

4. The appellant sued the respondent seeking judgment against him for an order that the respondent pays school fees for the 2 children and further maintenance of Kshs.41,000/= every month. Through the plaint, the appellant stated that she was the respondent's spouse until they differed. Since then, he has abdicated his parental responsibility and refused to pay school fees and other costs for the children yet he can afford to do so.

5. The respondent filed a statement of defense in which he stated that the appellant was demanding exorbitant amounts of money from him without basis. He stated that he has incorporated all the children in his medical cover and so he does not expect that there will be medical expenses. He also stated that since they parted ways, the appellant has continuously denied him access to the children.

The Proceedings in the trial court

6. The case was heard viva voce. PW1 was the appellant who stated that FKK is in primary school while JK is now an adult seeking further education but so far, he had not joined any institution yet. She said that she is unable to meet the costs of the children's education and medical and she had been providing for the children since their father, the respondent, left. On cross-examination, she stated that the respondent tried to sell their land but the appellant declined and he beat her up.

7. DW1 was the respondent who stated that he works with KCB Bank and he has been paying for his children's education. He stated that the appellant should pay Kshs.41,000/= for the household utilities since he purchased the house through mortgage and he pays Kshs.71,000/= per month for it. He said that the children are his dependants on his medical cover and he pays their school fees. He said that the appellant looks for expensive schools for the children and he cannot afford those schools.

8. The trial court delivered its judgment on 30th May 2023 in which the court ordered thus:

    a. The defendant shall pay the school fees and all school related expenses for FAK. Both parents shall agree on the school that the minor shall be taken to at any given time.

    b. The Defendant shall provide shelter whereas the Plaintiff caters for water and electricity bills.

    c. The Defendant shall cater for medical expense.

    d. The Plaintiff shall cater for food and clothing.

    e. The Plaintiff will have physical custody of the child. Both parties are however granted the legal custody, care and control of the minor.

    f. Defendant shall pay a maintenance of Kshs.6,000/= to the Plaintiff on or before the 5th of every calendar month.

    g. There is no order as to costs.

3Application Dated 27th April 2024

9. Shortly before issuance of this final judgment, the respondent had filed the chamber summons dated 27th April 2024 through which he sought for an order that the applicant and respondent contribute at a ratio 60:40 in respect of FKK's school fees and other needs. In the application, the respondent acknowledged that the trial court had already delivered its judgment but the appellant had refused to comply with some of the orders given by the court in that judgment. It was on that basis that he sought apportionment of the minor's school fees in the manner prayed.

10. To this application, the appellant responded by filing a preliminary objection challenging the jurisdiction of the trial court which, she argued, had since been exhausted. She stated that the court had become functus officio and had no power to review its own judgment. She also filed a replying affidavit.

11. The trial court delivered a ruling on 23rd September 2024 in which it found that no point of law had been disclosed and it dismissed the preliminary objection. It relied on Part XI of the *Children Act* and stated that the court had power to vary or suspend any order depending on the circumstances. The application was allowed and the respondent ordered to pay Kshs.70,000/= per year towards the minor's school fees and school related expenses. It was also ordered that the appellant finds a school which can accept fees in the specified amount and if there is a shortfall, she should meet it.

Application Dated 07th October 2024

12. The respondent filed another application dated 07th October 2024 through which he sought review of the judgment delivered on 30th May 2023. He asked the trial court to review, rectify or vary its order compelling him to pay Kshs.6,000/= maintenance to the appellant.

13. This application was not heard because the High Court issued an order of stay of proceedings through its ruling delivered on 19th December 2024.

Submissions on the appeal

14. The appeal was canvassed by way of written submissions.

15. The appellant submitted that through its ruling, the trial court reviewed its judgment without being moved. She relied on section 53 of the *Children Act* and the cases of JOO v AJM (2017) eKLR and CIN v JNN (2014) eKLR and argued that a party seeking the intervention of a court regarding child support must demonstrate their own contribution towards the same. She stated that the trial court erred in reviewing its judgment without being moved in the manner prescribed under Order 45 Rule 1 of the *Civil Procedure Act*.

16. She relied on the cases of Parliamentary Service Commission v Wambora & 36 others [2018] KESC 74 (KLR), Mukisa Biscuits v West End Distributors Limited 1969 [EA] 696 and John Mundia Njoroge & 9 others v Cecilia Muthoni Njoroge & another [2016] KEHC 6254 (KLR). She stated that the trial court proceeded to make the decision despite the fact that the she had asked the trial magistrate to recuse herself severally.

17. The respondent submitted that the trial court considered the best interest of the child FKK in its ruling and order that he should pay Kshs.70,000/=.

Issue for Determination

18. The issue for determination is whether the appeal has merit.

Analysis and Determination

19. The jurisdiction of this Court as an appellate court is to make its decision based on the record of the trial court by re-examining the evidence. This was held in the case of Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123, where the court stated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. 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..."

20. The respondent moved the court under sections 4,6,82,88 and 114 of the *Children Act* and prayed that the ratio of maintenance ought to be determined at 60:40 between the parties since he could no longer afford the school selected by the appellant for the child FKK. He stated that he was under financial distress at the time and during hearing of the application, he told the court that he had lost his job. This application was filed, heard and determined after the judgment had already been delivered but it was not a review application. In fact, the application seeking to review the judgment of the court was filed after the application herein had already been determined and the impugned ruling delivered. The review proceedings were stayed by the High Court and are still pending.

21. In the impugned ruling, the trial court indicated that the preliminary objection failed because the application could be determined under Part XI of the *Children Act* where in section 134 is contained and states:

> " 134. Power of Court to make orders in certain proceedings

(1) The Court may make any order under this Act or any other written law for the protection of a child in any proceedings concerning the welfare and upbringing of the child.

(2) The persons qualified to apply for an order under this Part for the protection of a child include—

(a) the child;

(b) the parent, guardian or custodian of the child;

(c) a relative of the child;

(d) the Secretary;

(e) an authorised officer: and

(f) a person acting on behalf and in the best interest of child;

Provided that a qualified person may apply for more than one order at the same time, but the Court shall not make more than one order in determination of the application—

(i) if to do so would be detrimental to the interest of the child; or

(ii) if the desired effect of the orders sought by the applicant may be achieved by making only one order.

(3) The Court may make an order under this Part—

(a) giving directions on how the order shall be carried out;

(b) imposing the conditions to be complied with in carrying out the Order;

(c) specifying the duration for which the order shall remain in force; and

(d) attaching such supplementary or consequential provisions as the Court may think fit.

(4) An application for an order under this Part may be made either orally or in writing whether separately or as part of any proceedings under this Act."

22. Section 141 of the *Children Act* provides for review of orders made under Part XI as follows:

> " 141. Review, etc., of order
>
> The Court may—
>
> (a) from time-to-time review, vary, suspend or discharge any order made under this Part; or
>
> (b) revive an order after the order has been suspended or discharged."

23. Noting that the impugned ruling was not a review application, it is understandable that the appellant raised a preliminary objection to the application, stating that the trial court has since become functus officio, thus lacking jurisdiction to determine the application. However, Section 134 of the *Children Act* empowered the trial court to hear and determine that application even though the judgment had already been delivered. That provision does not specify a strict time when the order may be sought but it anticipates that an applicant may seek more than one order and at different times whether separately or as part of any proceedings under the Act. The mandatory requirement is that whatever order(s) are made have to be in the best interest of the child. In essence, therefore, an order could be issued and a subsequent order is made to guide execution of the previous order as anticipated under section 134(3) of *Children Act*.

24. In other words, it is clear that the trial court was at liberty to hear and determine the application on condition that in so doing, the best interest of the child remained its paramount focus as demanded under Article 53 of the *Constitution*.

25. When determining the application, it was necessary that the court orders that the minor be retained at her current school or she be sent to a school where school fees does not exceed Kshs.70,000/= per year, which money will be provided by the respondent. It was in the best interest of the child that the orders made in the impugned ruling be made as such.

26. There was no basis for the preliminary objection to succeed at that point because the *Children Act* makes provision for an application such as the one dated 27th April 2024 to be determined, whether brought orally or in writing at whatever stage of proceedings. In that respect, the trial court did not err as alleged.

27. As to the appellant's allegations that the trial court was partial, that is a matter to be raised with the Judicial Service Commission through the available complaints channels. There are no legal issues arising therefrom that can be addressed through this appeal. It is also to be noted that the court in which the issue of recusal was raised by the appellant was that of the trial magistrate, and that the trial magistrate did not think she should recuse herself. The grounds for recusal have to be serious and tested, before being boldly raised.

28. This position was discussed in Rawal v Judicial Service Commission & another; Okoiti (Interested Party); International Commission of Jurists & another (Amicus Curiae) [2016] KECA 717 (KLR), where the Court of Appeal held:

> " An application for recusal of a judge is a necessary evil. On the one hand it calls into question the fairness of a judge who has sworn to do justice impartially, in accordance with the *Constitution* without any fear, favour, bias, affection, ill-will, prejudice, political, religious, or other influence. In such applications, the impartiality of the judge is called into question and his independence is impugned. On the other hand, the oath of office notwithstanding, the

judge is all too human and above all the *Constitution* does guarantee all litigants the right to a fair hearing by an independent and impartial judge. When reasonable basis for requesting a judge to recuse himself or herself exists, the application has to be made, unpleasant as it may be. That is the lesser of two evils."

29. Further, in The President of the Republic of South Africa v. The South African Rugby Football Union & Others, Case CCT16/98 it was held:

> " At the very outset we wish to acknowledge that a litigant and her or his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is counsel's duty to advance the grounds without fear. On the part of the judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his [or her] recusal as a personal affront."

Disposition

30. In light of all the foregoing, I am of the considered opinion that the appeal has no merit and it must fail.

31. Since review proceedings were stayed before the trial court through a ruling of this court delivered on 19th December 2024, that order is hereby vacated to allow the trial court to hear and determine the pending review application dated 07th October 2024.

32. It is prudent that the hearing of the review application be held before a different Magistrate other than Hon. D. Endoo who was the trial Magistrate herein.

33. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 8TH DAY OF OCTOBER, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

1. Polly Purity – Appellant

2. Authority Kigen - Present online

3. Francis Munyao - Court Assistant