PNK v RG (Appeal E025 of 2023) [2025] KEHC 18639 (KLR) (Family) (18 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18639 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

APPEAL E025 OF 2023

H NAMISI, J

DECEMBER 18, 2025

BETWEEN

PNK ..... APPELLANT

AND

RG ..... RESPONDENT

JUDGMENT

1. The Appellant and the Respondent were involved in a relationship that they describe as a marriage under Kikuyu customary law. From this union, one issue was born: a male child. The date of birth is undisputed as 20 July 2017. However, the identity of the child became a subject of bitter contestation in the pleadings, a fact that is relevant to the issue of the restraining order.

2. The Appellant identifies the child as D.K. The Respondent, in his Defence and Counterclaim filed in the trial court, vehemently asserted that the child's legally registered name is G.G.K. This discrepancy is not merely administrative; it signals the deep-seated identity conflict between the parents.

3. The marriage, as is often the tragedy in such matters, took a turn for the worse. The parties separated permanently in or around 2017/2018. The Appellant avers that she left with the minor, who was approximately 3 months old at the time, and has been the primary caregiver since.

4. The uneasy truce between the separated parents shattered in late 2022. The Appellant's pleadings paint a picture of escalating hostility. In her Plaint dated 10 January 2023, she particularized instances of cruelty that are disturbing. The most critical incident alleged by the Appellant occurred on or about 17 August 2022. The Appellant deposed that the Respondent abducted the minor for a period of one week. This was not a mere overstaying of access; it was characterized by the Appellant as a criminal act. She reported the matter to Riruta Police Station, and the occurrence was booked vide OB No. 44/17/08/2022.

5. The Appellant averred that this abduction had severe medical consequences. She deposed that the minor has a health condition requiring constant medication. During the week of the alleged abduction, the Respondent reportedly denied the child access to this medication, causing his health to deteriorate. This specific allegation—withholding medical care—strikes at the heart of the best interests principle.

6. Further to the abduction, the Appellant's written submissions describe an incident where the Respondent allegedly attempted to pull the child through the window of his mother's house which has grills, an act described as having the potential to injure the minor extensively. Perhaps the most chilling piece of evidence annexed to the Appellant's pleadings was a text message attributed to the Respondent, which read as follows:

> " The day I decide you'll never see him again be assured it will take me a minute and nobody will stop it. Always Keep that in mind."

7. This was not a vague threat of seeking custody; it was a specific threat of unlawful removal and permanent concealment of the child.

8. Faced with these threats, the Appellant moved the Children's Court at Nairobi on 10 January 2023. Her Plaint sought three specific prayers:

   (a) An order granting her actual and sole custody of the minor.

   (b) An order restraining the Defendant from any contact and/or access to the minor.

   (c) Costs of the suit.

9. Upon being served, the Respondent initially filed a Defence and Counterclaim dated 29 January 2023. In this document, he denied the cruelty and abduction. He mounted a counter-narrative. The Respondent claimed that the Appellant had forged the child's Birth Certificate to remove his name, changing the child's name from G.G.K to D.K. He alleged this was criminal conduct for which she was being sought by Kikuyu Police Station (OB 55/18/01/2023). The Respondent described the Appellant as a drunkard who changes house-helps weekly and sleeps with the minor while intoxicated.

10. In the Counterclaim, the Respondent sought actual and joint custody and visitation rights.

11. The litigation appeared set for a protracted and bitter trial. However, on 9 February 2023, the Respondent executed a volte-face. He authored a letter addressed to the Executive Director of Milimani Law Courts, which is part of the Record of Appeal. The contents of this letter are pivotal to this appeal. The Respondent wrote:

> " REF: MCCHCC/E026 OF 2023 (Penina Njeri -vs- Robert Githire) After deep soul-searching, I feel I am not ready to subject my son to this back and forth which has existed for 5 years now and it is based on malice, vengeance and outright lies. I therefore request this Honourable court to grant the orders as requested by the Plaintiff save for the costs and interests as I have also incurred such costs and do not wish to claim for the same. She can have full custody, maintenance and responsibility of the Minor."

12. This letter was copied to the Appellant's Advocates and served via email. It constituted an unequivocal withdrawal of his Defence and Counterclaim and a consent to judgment on the Plaintiff's terms, with the sole exception of costs.

13. On 7 March 2023, the trial court delivered judgment. The record of the proceedings captures the brevity of the court's engagement with the matter:

> " Perused the letter dated 9th February, 2023 addressed to court by the Defendant. He is not opposed to the suit. Perused the Plaint dated 10th January, 2023. I allow it on terms that the Plaintiff is granted the sole custody, care and control of the minor. Each party to bear own costs. File ordered as closed."

14. The Decree issued pursuant to this judgment reflected only two orders: Grant of Sole Custody to the Plaintiff. No orders as to costs. Crucially, the Decree was silent on Prayer (b) of the Plaint—the restraining order.

15. Aggrieved by these finding, the Appellant lodged this appeal on the following grounds:

    i. That the trial Magistrate erred in law and in fact by dismissing prayer 2 in the Plaint that states: the Defendant be restrained from any contact to the minor herein, JOHN DYLAN KARONGO;

    ii. That the trial Magistrate erred in law and in fact by dismissing prayer 2 of the Plaint whereas the Respondent had stated in court and also through a letter duly filed in court that the Plaintiff be awarded the prayers as stated in the Plaint and further stating that he does not seek any access to the child;

    iii. That the trial Magistrate erred in law and in fact by dismissing prayer 2 as stated in the Plaint, ignoring documentary evidence before it as to the behaviour of the Respondent;

    iv. That the trial Magistrate erred in law and fact in giving the Respondent unfettered access to the child, thus rendering health management of the child fruitless in the circumstances;

    v. That the trial Magistrate erred in law and fact by allowing the Respondent uncontrolled access to the child as the same is not in the best interest of the child as this will destabilize him emotionally;

    vi. That the trial Magistrate erred in law and fact by issuing the order of 7 March 2023 without considering the pleadings, Affidavits and documents filed in favour of the Appellant which if duly considered would have caused him to arrive at a different conclusion and / or order;

    vii. That the trial Magistrate erred in law and fact by considering and applying wrong principles in reaching his decision thus allowing the Respondent access to the minor without putting requisite measures to govern the same;

    viii. That the trial Magistrate erred in law and fact by failing to appreciate the best interest of the child in delivering his decision.

16. The appeal was canvassed by way of submissions. The Respondent did not participate in the appeal, despite being served and being granted opportunity to do so.

17. In her written submissions, the Appellant argues that the Children's Court is a court of protection. Relying on Section 134 and 135(c) of the *Children Act*, she submits that the court had the power and the duty to issue an exclusion order given the history of abduction (OB 44/17/08/2022). She argues that the silence of the court effectively gives the Respondent license to terrorize the minor, contrary to the very peace the Respondent claimed he wanted to grant

Analysis & Determination

18. As a first appellate court, the mandate of this Court is well-settled. It is the duty of this Court to revisit the evidence tendered before the trial court, evaluate it afresh, and arrive at its own independent conclusion. However, this Court must always bear in mind that it did not have the distinct advantage of seeing or hearing the witnesses as they testified, and thus should be slow to overturn findings of fact unless they are based on no evidence or are based on a misapprehension of the evidence. This principle was famously enunciated in the locus classicus case of Selle & Another vs. Associated Motor Boat Company Ltd & Others EA 123, where the Court of Appeal for East Africa held:

> " 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."

19. This position was reaffirmed by the Court of Appeal in Abok James Odera & Associates vs. John Patrick Machira & Another eKLR. Furthermore, in matters concerning children, this appellate jurisdiction is exercised with a specific lens: the best interests of the child principle enshrined in Article 53(2) of *The Constitution* and Section 8 of the *Children Act*. However, in family litigation, and particularly in children's matters, this duty is augmented by the principle of parens patriae. This Court acts as the ultimate parent of the nation's children. Where a subordinate court's procedural omission potentially endangers a child, this Court must not only correct the error of law but must also actively fashion a remedy that secures the child's safety. The strict rigors of adversarial litigation must often yield to the inquisitorial nature of child protection proceedings.

20. Having keenly read the record of appeal and the submissions, the following issues lend themselves for determination:

    i. Whether the trial court erred in failing to enter judgment on all conceded prayers;

    ii. The legal threshold for Restraining/Exclusion Orders under the *Children Act*, 2022;

    iii. Whether the failure to grant the restraining order violates the "Best Interests of the Child."

    iv. The appropriate orders to be issued by this court.

21. The procedural keystone of this case is the Respondent's letter. In civil litigation, the doctrine of admissions is governed by Order 13, Rule 2 of the Civil Procedure Rules. It states that where admissions of fact are made, either on the pleading or otherwise, the court may make such order or give such judgment as it may think just.

22. While strict Civil Procedure Rules are applied with some flexibility in Children's Court to accommodate the welfare principle, the fundamental rules of natural justice and party autonomy, where not harmful to the child, apply. The Respondent's letter was clear: "I therefore request this Honourable court to grant the orders as requested by the Plaintiff."

23. The term "orders as requested" refers specifically to the prayers in the Plaint. These were (a) Custody, (b) Restraint, and (c) Costs. The Respondent expressly excluded costs. By logical deduction, he expressly included the Restraint.

24. The learned Magistrate correctly noted that the Respondent was not opposed to the suit. However, judicial logic faltered at the remedy stage. If a defendant is not opposed to the suit, judgment should be entered in terms of the plaint unless a specific prayer is illegal, impossible, or manifestly contrary to public policy, or in this case, the child's best interest.

25. The Magistrate granted prayer (a) but remained silent on prayer (b). In law, silence on a specific prayer when final judgment is delivered acts as a dismissal of that prayer. A court must pronounce itself on all reliefs sought; failure to do so leaves the dispute indeterminate.

26. By failing to grant prayer (b) despite the concession, and without offering a single sentence of reasoning as to why the restraint was denied, the trial court committed a reversible error. It substituted the parties' agreement, that the father would stay away, with its own unarticulated preference for non-intervention. In the case of Sawe & another v Sawe [2025] KECA 1677 (KLR) the Court of Appeal reiterated that parties are bound by their pleadings. Here, the Respondent bound himself by his admission. The court ought to have perfected that admission into a Decree.

27. The Appellant's counsel cited Section 134 and 135(c) of the *Children Act*. Section 134 grants the court broad powers to make orders for the protection of a child. Section 135 deals specifically with Exclusion Orders. Section 135(c) provides that the court may make an exclusion order requiring a person who has inflicted or threatened to inflict violence on a child to leave the home or be restrained from contact.

28. The courts have traditionally been cautious about issuing "No Contact" orders against biological parents. The prevailing philosophy, anchored in Article 53(1)(e) of *The Constitution*, is that a child has a right to parental care from both parents. Parental disputes should not be used to deny a child the benefit of a father figure.

29. However, this right is not absolute. It is qualified by the best interests principle. Where access becomes the vehicle for trauma, abuse or abduction, the right to access is extinguished by the superior right to safety. In RK v AN [2022] KEHC 10970 (KLR), the Court observed as follows:

> " It is in the best interests of the minors to have regular access to both parents. No parent has superior rights over the other and both ought to be allowed interaction with the minors. The only exception is if there exists a real threat that the children will be exposed to imminent harm."

30. The evidence before the trial court—which stood uncontroverted once the Defence was withdrawn—included a police report of abduction. In the eyes of the law, the unauthorized removal of a child by a parent, especially when accompanied by concealment as alleged, constitutes a grave risk. There was the text message "The day I decide you'll never see him again be assured it will take me a minute and nobody will stop it".

31. This Court takes judicial notice of the dynamics of domestic control. A threat to make a child disappear is a severe form of psychological violence against the mother and the child. It creates a climate of fear where the child cannot live a normal life. Where there is a history of hostility and an inability to co-parent, the court must prioritize the peace of the child.

32. The Appellant did not seek to terminate the father's parental status, but to restrain his physical access. Given the threat of abduction, an order merely granting custody to the mother is insufficient. Without

a restraining order, the father can approach the child at school or on the street, and the mother has no police-enforceable document to prevent him. The restraining order provides the teeth to the custody order.

33. Therefore, the silence of the trial court was not merely a procedural lapse; it was a substantive failure to protect. It left the Appellant with a custody order that could not stop the Respondent from fulfilling his threat to take the child in a minute.

34. It is in the best interest of the minor to have a stable, predictable environment free from the fear of being snatched or pulled through a window. Where one parent is fearful and the other is willing to stay away, the law should facilitate that separation. The best interest here dictates a protective shield, not an open door.

35. However, this Court must clarify the scope. A restraining order in family law is not necessarily permanent in the sense of "forever." It stands until further order of the court. If, in five years, the Respondent undergoes counselling, creates a rapport with the child, and seeks to re-enter the child's life constructively, he can apply to the Children's Court for a variation. But as of today, the order must be absolute to neutralize the existing threats.

36. In view of the foregoing, the appeal is meritorious and the same is allowed. The judgment and decree by Hon. F. Terer, SRM in Nairobi Children's Court Cause No. E026 of 2023 are hereby set aside and substituted with the following judgment:

    i. Custody: Actual and legal custody of the minor, D. K. (also referred to in the proceedings as G.G.K), is granted solely to the Appellant.

    ii. A prohibitory order is hereby issued restraining the Respondent, by himself, his servants, family members, or agents, from accessing, contacting, harassing, intimidating, stalking, or in any way interfering with the minor, or the Appellant.

    iii. The Respondent is restrained from entering the Appellant's place of residence, the minor's school, or any other place where the minor may reasonably be expected to be, for the purpose of contact.

    iv. The Officer Commanding Station (OCS) Riruta Police Station, or any other police station within whose jurisdiction the Appellant and minor reside, is hereby directed to ensure strict compliance with Order No. (ii) and (iii) above.

    v. Each party shall bear their own costs of this Appeal.

DATED AND DELIVERED AT NAIROBI THIS 18 DAY OF DECEMBER 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For Appellant: Ms Kadenge

For Respondent: No appearance

Court Assistant Lucy Mwangi