**Atinda v Nyamunda (Civil Appeal E017 & E018 of 2024 (Consolidated)) [2025] KEHC 4950 (KLR) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4950 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUSIA**

**CIVIL APPEAL E017 & E018 OF 2024 (CONSOLIDATED)**

**WM MUSYOKA, J**

**APRIL 25, 2025**

**BETWEEN**

**JOHN FELIX ATINDA ..... APPELLANT**

**AND**

**JOSPHINE NYAMUNDA ..... RESPONDENT**

## JUDGMENT

1. The suit, at the primary court, was initiated against John Felix Atinda, who is the appellant, for the purposes of this judgement, by Josephine Nyamunda, who is the respondent for the purposes of this judgement. The 2 had cohabited for 3 years, and were the parents of 2 children, on whose behalf and for whose benefit the suit was commenced. The respondent sought a sole order against the appellant, for payment of school fees for the minors and an insurance health cover for them.

2. The suit was filed contemporaneously with a Motion for a mandatory order to compel the appellant to pay school fees and provide an insurance health cover for the 2 children. It was claimed that the appellant had abandoned his responsibility over the 2 children. Certificates of birth were annexed as evidence of paternity, and so were documents to demonstrate that the 2 minors were in school.

3. The appellant filed a defence, admitting the cohabitation, and the parentage of the 2 children. He averred that he had the initial sole custody of the children, after the respondent had absconded. He lost custody after the respondent initiated a children suit at the Siaya law courts, being Siaya CMC Children Case No. E005 of 2018. He indicated willingness to cater for the school needs of the children, if they were not taken to a private school. He averred that his resources were meagre, being a net salary of Kshs. 18,000.00. He complained of being denied access to the children, and a chance to provide for them. He also disclosed that the 2 minors were listed under the National Health Insurance Fund as his dependants.

4. That application and suit were canvassed simultaneously by way of written submissions, following directions that were given on 24th January 2024. judgement was delivered on 20th March 2024. The appellant was ordered to ensure that the children were provided with medical cover. It was also directed that 1/6 of his basic monthly salary was to be deducted to meet the educational needs of the minors, to be remitted to the respondent. The school fees were calculated at Kshs. 54,000.00 per term, and Kshs. 162,000.00 per year.

5. The appellant was aggrieved, hence the appeal in Busia HCCA No. E017 of 2024. The grounds of appeal, in the memorandum of appeal, dated 27th March 2024, are that the court did not appreciate that there was another children case at the Siaya law courts; the court failed to assess his income or earning capacity, financial needs, obligations or responsibilities, as well as the needs of the 2 children, and 2 others not subject to the suit; the court disregarded the oral and documentary evidence adduced as his contribution to the care and maintenance; the court failed to consider his right of access to the minors; and the court ignored or disregarded the material evidence adduced and the written submissions. He sought a finding that the order for deduction of 1/6 of his salary was excessive.

6. In her appeal, in Busia HCCA No. E018 of 2024, the respondent raises only 1 ground, in the memorandum of appeal, dated 27th March 2024, that the contribution of 1/6 from the salary of the appellant was not adequate.

7. Directions were given on 29th July 2024, consolidating the 2 appeals, and making Busia HCCA No. E017 of 2024 the lead file, and directing disposal of the appeal by way of written submissions. Only the appellant filed written submissions.

8. The appellant has identified 2 issues for determination, whether the award regarding the educational needs of the minors was excessive, and on the costs of the appeal. He argues that the trial court did not consider the resources of the parties when it made the order. He submits that the deduction of 1/6 of his salary was a mistake, considering that he had another family. He avers that he was also servicing a loan. He submits that the order would depress his income. He cites EM vs. AM [2020] eKLR (Odunga, J) and Joachim Ndaire Macharia vs. Mary Wangare Ndaire & another [2008] eKLR (Makhandia, J).

9. The point of convergence, of the 2 appeals, is the 1/6 contribution from the salary of the appellant. The appellant argues that it would be oppressive, given that he has other children to take care of and a bank loan to service; while the respondent argues that it would not be enough to meet the educational needs of the children.

10. Is the amount oppressive? The appellant has not sought to demonstrate that it is. He merely claims that he has another family to take care of, but he has not sought to demonstrate the financial burden that he carries regarding that other family. The only documents that he provided, regarding that, were the certificates of birth for the other 2 children, but none on the financial responsibility that he bore towards them. There were none completely on how much he spent regarding them. On the obligation to the bank, I note that the trial court took that into account, but emphasized that the needs of the children ought to take priority, and, therefore, the appellant needed to re-arrange his financial obligations to accommodate for the needs of his children. I cannot fault the trial court for that. The best interests of the child and the paramountcy principle are underwritten by *the Constitution*, and there is no walking away from it.

11. I note that the trial court has only burdened the appellant with the health and educational needs of the subject minors. He was not burdened with providing accommodation, food and clothing, which it would appear were left to the respondent. He cannot, therefore, be seen to complain much. I do not find the order of the court oppressive on the appellant.

12. Was the same order too little, as averred by the respondent? I do not think so. The trial court had to balance the known resources of the appellant with his financial obligations, not only with respect to the subject minors, but also to the other family and the bank. The court did that, and made an award that would not have been too oppressive on the appellant. The objective of the proceedings under the *Children Act*, Cap 141, Laws of Kenya, is not to punish or penalise a party, but to provide a solution for the children, upon considering all the resources of their parents.

13. The appellant has not argued the other grounds of appeal, and they should, ideally, be deemed as abandoned. However, I shall still consider them.

14. On the Siaya court children matter, none of the parties exhibited the pleadings filed in that cause. What I have seen are the proceedings. They appear to have only dealt with custody, and not maintenance. It was open to the appellant to apply for transfer of the Siaya suit to the Busia court for consolidation purposes. He did not avail himself of that option. The pendency of that cause was not litigated before the trial court, as no attempt was made to demonstrate that parallel orders had been made by the 2 courts, or were likely to be so made, hence the matter is not before me.

15. On the income or earning capacity of the appellant and his financial obligations not being considered, I have very closely perused the judgement of the trial court, and noted that those issues were considered and addressed. Paragraph 10, of that judgement, deals comprehensively with the educational needs of both the subject children and the other children. It also addresses the matter of the income of the appellant, considers his payslip, and the fact that he has taken a loan with a bank, which he is servicing. Paragraph *11* analyses the school fees burden, with respect to the children the subject of the suit, in monthly and annual terms, to assist in the assessment of how much the appellant could and should shoulder, without being oppressed. There cannot be any truth, therefore, in the submission that the court did not consider the income or earning capacity of the appellant, and his financial obligations.

16. On the disregard of his oral and documentary evidence, adduced to demonstrate his contribution to the care and maintenance of the 2 subject children, I will start by stating that the suit at the primary court was canvassed by way of written submissions. The issue of oral evidence not being considered should not arise, as no oral evidence was taken. On the documentary evidence, the filings, at the trial court, displayed certificates of birth for all 4 children, a payslip, and documents from NHIF and M-Minet. The said documents were considered in the judgement. Paragraph 10 of the judgement acknowledges the fact that the appellant is catering for 4 children in total. The payslip is also considered in that paragraph, where both the net and gross pay are discussed, as well as the commitment of Kshs. 35,082.00 to the bank. Paragraph *12* acknowledges the health insurance covers for the children. There is no basis, therefore, for the submission that the evidence placed on record was not considered.

17. On the court not addressing his right of access to the children, I do not, from the pleadings that that was not an issue before the trial court. The respondent did not raise it in her plaint, and the appellant did not counter-claim for it. Parties are bound by their pleadings, and the court determines matters purely based on what has been pleaded. That issue, therefore, cannot be placed before me for consideration on appeal. In any event, it is an issue that was before the Siaya court, and the parties should have litigated it in that suit.

18. On the material evidence and submissions not being considered, I would begin with the evidence. The appellant is being repetitive. I have addressed that issue in the foregoing paragraphs. On written submissions, I hold the view that written submissions are overrated. A decision of a court cannot be vitiated on grounds that written submissions were not considered. The primary material, upon which a decision of a court should be premised, are the pleadings and the evidence on record. Written submissions are largely summaries of the pleadings and evidence, by way of analyses and legal

arguments. Whether or not submissions are considered is not fatal, but non-consideration of and adherence to the pleadings and the evidence would, most certainly, be fatal to the determination. The pleadings, and the evidence adduced to establish them, are the bedrock of the suit, submissions are not.

19. In this case, the judgment of the trial court recites the pleadings, both the plaint and the defence, at paragraphs *1*, *2*, *3* and *4*. Paragraph *5* acknowledges the filing of written submissions by both parties, and indicates that the same were considered. The analysis and determination, in paragraphs *6*, *7*, *8*, *9*, *10*, *11* and *12* are evidently founded on the pleadings, the evidence and the written submissions. There is no merit, therefore, to the argument that the evidence and written submissions were not considered. I have very closely perused and considered the written submissions by the appellant, in support of this appeal, and I have not found demonstration that there was no consideration, by the trial court, of his evidence and written submissions.

20. Overall, I find no merit in both appeals, and I hereby dismiss them. On costs, I note that this is a family matter. Both sides appealed and have lost. Each party shall, as a result, bear their own costs. The original trial court records shall be returned to the relevant registry, while the instant appeal files shall be closed. Orders accordingly.

**DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 25TH DAY OF APRIL 2025.**

**W MUSYOKA**

**JUDGE**