



**In re AFK (Minor) (Civil Appeal E026 of 2023)  
[2025] KEHC 11650 (KLR) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11650 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E026 OF 2023  
HM NYAGA, J  
JULY 29, 2025  
IN THE MATTER OF AFK (MINOR)**

**BETWEEN**

**JMM ..... APPELLANT  
SUING AS THE GRANDFATHER AND NEXT FRIEND OF AFK (MINOR)**

**AND**

**PKK ..... RESPONDENT**

*(Being an appeal from the Ruling of Hon. E.K.Chesoni RM delivered on  
26th January, 2023 in Maua CM'S Children's Case No. E022 of 2022)*

**JUDGMENT**

1. The appeal arises out of the order issued on 26.1.2023 in the Maua Children's case number E022 of 2022 whereby the trial court dismissed the Plaintiff's/Appellant's suit for the reason that based on the Children officers' reports from Thika and Igembe South, the Defendant/Respondent was better suited to have custody and care of the minor.
2. In the aforementioned suit, the Plaintiff now the Appellant herein was mainly seeking for actual and legal custody of the minor and for an order of permanent injunction restraining the Defendant/Respondent herein whether by himself or his servants/ legal representatives from taking away, divesting custody and/or interfering with the wellbeing of the minor herein.
3. The Respondent did not file a response to the Plaintiff's/Appellant's suit.
4. On 3<sup>rd</sup> November,2022, the trial court directed the Children officers from Igembe South and Thika to carry out a social inquiry then prepare a report in respect of the Appellant and Respondent.



5. The said reports were duly prepared and filed in court on 26<sup>th</sup> January,2023. The trial court upon perusing the said reports dismissed the Plaintiff's/Appellant's suit on the aforesaid ground.
6. The appellant was dissatisfied with the entire ruling/order of the trial magistrate and filed this appeal. The appeal is based on the following grounds:
  - a. That the Learned Resident Magistrate erred in law and in fact in failing to hear the said case on merits and/or hear the evidence of the parties therein.
  - b. That the Learned Resident Magistrate erred in law and in fact in dismissing the entire case on the basis of a report from the Children's officers and failed to consider the evidence on record.
  - c. That the Learned Resident Magistrate erred in law and in fact in denying the Plaintiff the right to be heard as required under Article 50(1) of *the Constitution* of Kenya.
  - d. That the Learned Resident Magistrate erred in law and in fact in failing to consider the child's best interest as enshrined in Article 53(2) of *the Constitution* and Section 8 of the Children's Act,2022.
  - e. That the decision of the Learned Resident Magistrate is against the weight of evidence on record.
7. The Appellant seeks orders that the order issued on 26<sup>th</sup> January,2023 in the primary suit be set aside, that this Honourable Court be pleased to direct that the primary suit be heard on merits, that costs of this appeal and those of the lower court be provided for and that this Honourable Court be pleased to issue any order it deems fit and just to meet the ends of justice.
8. When this matter came up for directions, the parties agreed to argue the appeal by way of written submissions. For the Appellant submissions were filed by Frank Gitonga and Associates Advocates, while those of the respondent were filed by Kennedy Koome & Company Advocates.

### **Appellant's Submissions**

9. The Appellant submitted that he is the grandfather of the minor whereas the Respondent is the minor's father. He asserted that the Respondent had been cohabiting with the minor's mother, one CKM, in Thika, and that upon her demise on 23<sup>rd</sup> February, 2022 he took custody of the minor and catered for all his needs as a guardian, since the Respondent had at the time abdicated his parental responsibilities and denied knowing the child.
10. He submitted that the respondent secretly took custody of the minor and has since denied the deceased's family who are attached to the minor herein a chance to access or visit him.
11. The Appellant contended that the trial magistrate violated his right to be heard by dismissing his case.
12. Citing Articles 47(1) and 50(1) of *the Constitution*, he submitted that he was not granted an opportunity to testify or call witnesses in support of his case.
13. The Appellant argued that the trial court occasioned injustice to both the minor and the family of the deceased by dismissing his case without granting them visitation rights or access to the minor.
14. Citing the provisions of Section 27(a) of the Children's Act and the case of Ramadhan Ali Athman V Peter Mwingo Chirima [2020] eKLR, the Appellant urged this court to consider him as the guardian of the minor to act jointly with the respondent in providing care to the said minor since he is equally willing and ready to take care and be present in his life.



## Respondent's Submissions

15. On whether the trial magistrate erred by dismissing the suit, the Respondent referring to Section 95(4) of the Children's Act, submitted that the court rightly considered children reports on record and duly stopped attempt to drag the minor into unnecessary litigation in a bid to preserve the child's best interests.
16. Regarding whether the trial magistrate focused on the best interest of the minor, the respondent argued that the trial court did not contravene any of the provisions of the Children's Act, 2022.
17. He asserted that the Appellant had neither provided a home nor any minor's basic needs prior to the filing of the primary suit.
18. He contended that the Appellant had not been appointed as a guardian to the minor and that his claims seemed to have been pegged on the fact that the respondent had not formally married the minor's mother at the time of her demise. He argued that this position neither reflected the best interests of the minor nor granted the Appellant the locus standi in the Children's Court.
19. Referring to the case of JM v MN & another (Civil Appeal E022 of 2021) [2023] KEHC 23832 (KLR) (12 October 2023) (Judgment), the Respondent submitted that the trial court's decision was proper and focused on the minor's best interest.
20. In conclusion, the Respondent submitted that he is the only surviving parent of the minor, that he has been exercising full parental responsibility of the minor since birth in November 2021 to date, that the minor is well taken care of, surrounded by multiple loving family members and caregivers and has not suffered any harm, that the Appellant has never had custody of the minor nor has he ever been appointed as the minor's guardian, that the Appellant has never provided a home to the minor nor any of her basic needs and that no harm has befallen the minor as a result of the trial's court's decision.
21. The Respondent therefore urged this court to uphold the trial court's ruling and to grant him the costs of this Appeal.

## Analysis & Determination

22. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. (See: *Selle & Another v Associated Motor Boat Co. Ltd & Another* (1968) (E.A. 123).
23. Equally, the duty of the first appellate was stated in *Peters v Sunday Post Limited* (1958) EA 424 where Sir Kenneth O'Connor stated as follows:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”
24. In light of the above precedents, I will now determine this Appeal.
25. Having considered the appeal and the submissions, I opine that the Issues which crystalize for determination are;



- a. Whether the order dismissing the Appellant's suit should be set aside so that the matter may be heard and determined on its merits.
- b. If the answer to the above is in the negative, Whether the Appellant should be appointed as a guardian of the Minor.
- c. Whether the Appellant and deceased's family should be granted/ allowed the visitation rights.

### **Issue No.1**

26. It is trite that parties have a constitutional right under Article 50(1) of *the constitution* to be fairly heard. A fair hearing means granting parties a chance or opportunity to present evidence and call witnesses if any in support their respective cases.
27. In Richard Ncharpi Leiyagu –v- IEBC & 2 Others, Civil Appeal No. 18 of 2013, the Court of Appeal stated as follows: -

“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”
28. In the instant case, it is not in dispute that the Appellant was not granted an opportunity to tender his evidence in support of his case prior its dismissal by the trial court. The trial court did entirely rely on the children officers' reports filed and proceeded to dismiss the Appellant's suit.
29. A Children Officer's social inquiry reports indeed assist the court in assessing welfare and parental suitability, but the court ought to still evaluate the totality of evidence, including testimony from parties and any perceived conflicts.
30. The Appellant herein is the maternal grandparent of the minor. He submitted that upon the demise of the minor's mother, the minor has been living with him and he had played the role of a guardian by taking care of all the minor's needs.
31. The Respondent vehemently disputed the Appellant's position asserting that the minor had neither lived with the Appellant nor had the Appellant taken care of his needs.
32. In the primary suit, the appellant pleaded that he had been reliably informed that the minor herein was in bad health, sickly and neglected by the Respondent who is a habitual drunkard and had abandoned the minor with a house help. He contended that he had repeatedly sought access to the minor and reported the matter to the police and Children's Office, but no action was taken.
33. In his statement, the Appellant expressed apprehension that the minor is in great danger due to the Respondent's alleged affiliation with a cult that does not believe in seeking medical treatment.
34. The Respondent submitted that he was not served with the pleadings. However, the record contains an affidavit of service confirming that service was affected.
35. I have perused the children officers' reports from Thika Sub County children office dated 19<sup>th</sup> December,2022 and from Igembe South Sub- County office dated 26<sup>th</sup> January,2023 in relation to the minor. The children officers recommended that the respondent was best suited to have custody.



36. The said reports however do not address the aforementioned issues raised by the Appellant in his pleading.
37. The veracity of the parties' respective assertions is a matter that ought to be determined upon a full hearing on the merits, where evidence can be adduced and tested through cross-examination.
38. Courts are obliged to give priority to the best interests of a child. Article 53(2) of *the Constitution* of Kenya 2010 provides that: -
- “A child's best interests are of paramount importance in every matter concerning the child”.
39. Similarly, Section 8 (1) (a) of the *Children Act* 2022 provides: -
- “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 the primary consideration.”
40. Article 53 (e) of *the Constitution* recognizes a child's right to parental care and protection.
41. Section 11 of the *Children Act* provides: -
1. Every child has the right to parental care and protection.
  2. Except as is otherwise provided under this Act, every child has the right to live with his or her parents.
42. Article 19 of the African Charter on Rights and Welfare of the Child provides that –
- “Every child is entitled to parental care and protection and shall whenever possible reside with his or her parents.”
43. In the case of LAC & another v MJC (Civil Appeal E119 of 2021) [2022] KECA 68 (KLR) (4 February 2022) (Judgment), where the Court of Appeal asserted that parental rights are unassailable except in instances where it is demonstrated that the parent is unfit.
44. It is thus clear that the minor herein has a right in law to live with and be raised by their biological parents. In the absence of the mother, then the respondent who is the biological father would rank in priority over any other person unless good reason be given that he is not capable of exercising parental care and responsibility as the law requires of him. The Appellant's suit was not heard on its merits, and as such, it cannot be ascertained whether such evidence would be available without conducting a hearing.
45. It is imperative to note that the issues of appointment as guardian and access to the minor/visitation of the minor were not prayed for by the Appellant before the trial court. It is a cardinal principle of the court that it will only grant reliefs sought by a party. Nonetheless, given that this is a children's matter where the best interests of the child are paramount the Court may, in appropriate circumstances, depart from that general rule to ensure the child's welfare is safeguarded.
46. Section 122 of the Children's *Act No. 29 of 2022* provides for guardianship as –
- (1) Guardianship means a person appointed by will or deed by a parent of a child or by an order of court to assume parental responsibility over a child on the death of the parent either alone or jointly with the surviving parent of the child in accordance with the provisions of the Act.



47. Section 123(2) of the same Act provides that: -

On the death of the mother of a child, the father, if surviving, shall be the guardian of the child either alone or jointly with the guardian, if any, appointed by the mother, or if such guardian is dead or refuses to act, the Court may appoint a guardian to act jointly with the father.

48. In light of the above legal provisions, and bearing in mind the best interests of the child, the court will be better placed to ascertain upon determining the matter on its merits whether the Respondent is fit, willing, and capable of independently caring for the minor or whether there is a need to appoint the Appellant as a guardian to act jointly with the Respondent.

49. In determining the best interests of the child, the court is required to consider all the circumstances of the case. In this instance, the trial court failed to do so.

50. Section 78 of the *Civil Procedure Act* sets out the powers of an appellate court and these are:

“To determine a case finally; or remand the case or frame the issues and refer them for trial; or take additional evidence or require such additional evidence to be taken; or order a new trial.”

51. In view of the foregoing, I believe the interests of justice will be best served by referring the matter back to the Magistrate’s Court for expeditious hearing and determination of the main suit on its merits.

52. Having found the above in relation to first issue, the other issues are moot.

53. In sum, this court makes the following orders: -

- a. The Appeal herein has merit and is hereby allowed.
- b. The trial court’s order issued on 26<sup>th</sup> January, 2023 be and is hereby set aside.
- c. This matter be referred back to the Maua Magistrate’s Court for hearing of the main suit by a magistrate other than Hon. E.K. Chesoni.
- d. Each party will bear their own costs.

54. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 29<sup>TH</sup> DAY OF JULY, 2025.**

**H. M. NYAGA,**

**JUDGE.**

