



REPUBLIC OF KENYA



**FW v LLO (Civil Appeal E094 of 2022) [2024] KEHC 11680 (KLR)  
(Family) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11680 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPEAL E094 OF 2022  
PM NYAUNDI, J  
SEPTEMBER 20, 2024**

**BETWEEN**

**FW ..... APPELLANT**

**AND**

**LLO ..... RESPONDENT**

*(Being an appeal of Part of the Judgment and Decree of Hon M.W. Kibe , Resident Magistrate at Nairobi Children’s Case No. E633 of 2021 delivered on 1st September 2022)*

**JUDGMENT**

1. This Appeal arises from a judgment delivered in Milimani Children’s Case No. E633 of 2021. The Appellant is aggrieved by the decision of the Honourable M.W. Kibe , and has preferred this Appeal. Vide Memorandum of Appeal dated 27<sup>th</sup> September 2022, the Appellant challenges the Judgment of the trial court on the following grounds-
  - a. That the learned Magistrate erred in law and in fact by failing to consider that the figure of Kshs. 5000/- per month is excessive, exorbitant and oppressive.
  - b. That the learned Magistrate erred in law and in fact by failing to consider the appellant’s earning capacity
  - c. That the learned Magistrate erred in law and fact by failing to take key consideration into account in arriving at her judgment.
2. This appeal was canvassed by way of written submissions. The Appellant’s submissions are dated 4<sup>th</sup> March 2024 and the Respondent’s submissions are dated 8<sup>th</sup> May 2024.



### **Appellant's Submissions.**

3. The Appellant challenges the trial court decision to share the responsibility equally and relies on the decision in *E. M. M v. O.O* [2016] and *JWM v CKK* [2021] eKLR arguing that the Court is obligated to consider the financial capability of each parent.
4. The Appellant further submits that the Court does not only consider the interests of the child but should be careful not to burden the parent's with heavy maintenance expenses. He relies on the decision in *AAJ v AA suing through MM* [2018] eKLR and in *Crispus Maghanga Mzae v Mary Mukhwana Kwanus* Mombasa HCDC No. 58 of 2004.
5. He reiterates that he is prepared to provide for the minor but his other responsibilities must be considered.

### **Respondent's Submissions**

6. The Appellant frames the following as the issues for determination
  - a. Whether this appeal is competent
  - b. Whether the order for payment of Kshs 5000/= being food for the minor ought to be set aside
7. On the 1<sup>st</sup> ground the Respondent submits that the Appeal is incompetent as it does not comply with Order 42 rule 2 of the *Civil Procedure Rules, 2010*. Reliance is placed on the decision in *Lucas Otieno Masaye v Lucia Olewe Kidi* [2022] eKLR and *Paul Karenyi Leshuei v Ephantus Kariithi Mwangi & Anor* [2015] eKLR; *Bwana Mohammed Bwana v Silvano Buko Bonaya & 2 Others* [2015] eKLR and *Rachel Wambui Nganga & Anor v Rahab Wairimu Kamau* [2020] eKLR.
8. Further the Respondent submits that the Appellant has not complied with the orders since judgment was entered. The Affidavit of means submitted is challenged on the basis that the Appellant has not demonstrated the term of the loan and when it was taken and reference made to the decision in *SWM v LNB* [2019] eKLR and *JNN v WMM* [20200] eKLR

### **Analysis and Determination**

9. I remind myself that this court is sitting on a first appeal and as such I am under a duty to subject the evidence presented before the trial court to scrutiny in order to arrive at my own conclusions bearing in mind always that this court did not have the opportunity to observe the witnesses first hand. In *Selle & another -v- Associated Motor Boat Co. Ltd. & others* (1968) EA 123, the Court had the following to say in respect of the duty of a court sitting on first appeal:

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 demeanour of a witness is inconsistent with the evidence in the case generally.



10. Both the Plaintiff and the Defendant testified as sole witness in their respective cases. It is not disputed that the parties are the biological parents of the minor. It was the Respondent's case that the Appellant was not providing for the minor. In his defence the defendant said he was prepared to provide for the minor but was opposed to the Kshs 5000 maintenance. He has other commitments, he has other children whom he supports.
11. Having analysed the pleadings herein and the submissions; I discern that the only issue for determination is whether the appeal has merit.
12. The Respondent contends that the Appeal as presented is incompetent for failure to include the Decree in the Record of Appeal. This issue was considered by the Court of Appeal in the case of [Emmanuel Ngade Nyoka v Kitbeka Mutisya Ngata](#) [2017] eKLR, where it stated-

starting with the first issue, it is true that the record of appeal before the first appellate court at the time of filing did not contain the decree appealed from. This omission brought into focus the provisions of Order 42 rule 2 of the [Civil Procedure Rules](#) which provides inter alia:

“Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the act until such certified copy is filed.”

However, the respondent did not take advantage of this provision to subsequently file a certified copy of the decree so that the appeal proceeded to hearing in the absence of the decree appealed from. Was this omission fatal to the appeal? The appellant thinks so as according to him the requirement is couched in mandatory terms. The Judge did not agree with him reasoning that: “The word “Decree” has been defined by the [Civil Procedure Act](#), Cap 21 to include judgment. In fact, the [Civil Procedure Act](#) has provided at section 2 that the judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of a judgment may not have been drawn up or may not be capable of being drawn up”. This is the essence of the proviso to the definition of the term “decree.” According to the Judge, the record of appeal before him had a certified copy of the judgment of the trial court. Consequently, he reasoned, the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record.

We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon courts to go for substantive justice as opposed to technicalities. Further holding otherwise would have run counter to the overriding objective as captured in sections 1A and 1B of the [Civil Procedure Act](#). Finally, one would ask what prejudice did the appellant suffer with the omission of the certified copy of the decree in the record of appeal. We do not discern any.

13. In the instant case a certified copy of the judgment is found at pages 264 to 270 of the record. In the circumstances I confirm that the Appeal is competent.
14. On the substantive Appeal, whether or not the Court should interfere with the order requiring the Appellant to contribute Kshs 5000 towards buying food for the minor? I am guided by the decision



in *Mbogo & Another v Shab*, [1968] EA, on general principles upon which an appellate court may interfere with a discretionary power of a trial Court, which were set out as follows: -

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

15. At the close of the proceedings the court delivered the impugned judgment. I note that at page 265 the Court considered the evidence of the defendant and at page 269 stated as follows

Food

On 8<sup>th</sup> March 2022, this Court ordered both parties to cater for the minor’s food. Their total contribution towards food was set at Kshs 10,000 per month. The Defendant was ordered to pay half of the amount being Kshs 5000 per month payable by the 10<sup>th</sup> day of the month with the plaintiff meeting the shortfall.

The Plaintiff indicated in her Replying Affidavit sworn on the 17<sup>th</sup> June, 2022 that the Defendant has blatantly refused to comply with the orders of the court requiring him to pay kshs 5000 per month. The plaintiff is the one who has been meeting the minor’s food. I will disallow the Defendant’s application for review of the order that he pays kshs 5000 per month towards food as he has not demonstrated that he has complied with the orders of the Court made on 8<sup>th</sup> March, 2022 requiring him to remit Kshs 5000 per month for food. Orders of the Court are not made in vain and must be complied with.

The defendant shall cater for the minor’s food as earlier ordered on 8<sup>th</sup> March, 2022 by sending a sum of Kshs 5000 per month for the minor’s food.

16. The guiding principle when considering matters concerning children’s welfare are found in the *Constitution* that requires that the best interests of the child be of paramount importance. Article 53(2) provides:

“A child’s best interests are of paramount importance in any matter concerning the child.”

17. The same principles are echoed in Section 4(2) and 3(b) of the *Children’s Act* that provides that:

- (2) 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.
- (3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration... to the extent that this is consistent with adopting a course of action calculated to—
  - (a) safeguard and promote the rights and welfare of the child;
  - (b) conserve and promote the welfare of the child;



(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

18. The import of the above provision is that even as the Court weighs the different considerations in arriving at an order of maintenance, the best interests of the Child will be the primary consideration. I find therefore that the Court correctly exercised its discretion in the matter and like the trial court this court takes a serious view of litigants who fail to comply with orders of the Court.

19. For the foregoing reasons, the Appeal is dismissed and the judgment of the trial Court upheld in its entirety. The Appellant shall meet costs of the Appeal.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**P M NYAUNDI**

**JUDGE**

In the Presence of

Fardosa Court Assistant

No appearance for the Appellant

No appearance for the Respondent

