Gachago v Wainaina (Civil Appeal 45 of 2023)
[2024] KEHC 12318 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 12318 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 45 OF 2023

MA OTIENO, J

SEPTEMBER 26, 2024

BETWEEN

JAMES MURAGURI GACHAGO ..... APPELLANT

AND

SERAH WANGUI WAINAINA ..... RESPONDENT

(Being an Appeal from the Ruling and Order of the Principal Magistrate, Honorable J.A Agonda delivered on 11th April 2022)

JUDGMENT

Introduction

1. This is a children's matter where JMG, the Appellant herein is aggrieved by the Ruling delivered on 11th April 2022 in Ruiru CMCC No. Exx of 2021 by which the trial court dismissed the Appellant's application dated 28th February 2022 for variation and/or modification of the orders issued in the trial court's judgment of 27th January 2022.

2. This appeal was initially filed in Kiambu under Kiambu HCCA No. Exx of 2022 but was later transferred to this court pursuant to Gazette Notice No. 1180 dated 25th August 2023 which established a High Court at Thika.

3. The background of the matter is that by a plaint dated 13th May 2021, the Respondent herein (then a Plaintiff suing as a mother and next friend of TMG, a minor) instituted a claim against the Appellant (then a Defendant) seeking among others, maintenance, medical insurance cover and school fees for the child. The Respondent also sought in the suit, to have full custody, care and control of the child.

4. The Appellant entered appearance on 4th June 2021 and filed a statement defence on the same date denying the Respondent's allegations that he had never provided for the child. While admitting the paternity of the child and having cohabited with the Respondent as man and wife, the Appellant

averred that it is the Respondent who failed to honour the then existing agreement between the parties to have custody of the child given to the Appellant upon the child attaining the age of 10 year. The Appellant, while praying that the suit be dismissed, asserted that he can only take care of the child's needs to the extent permitted by his financial ability and his similar obligation to his other three children.

5. While the main suit was pending hearing, the Respondent vide an application dated 8th July 2021 sought interim orders to have the Appellant provide a monthly sum of Kshs. 41,000/= towards the maintenance and upkeep of the child as well as the child's educational and related expenses pending hearing and determination of the main suit.

6. In response to the Respondent's application for interim orders, the Appellant vide his replying affidavit of 29th July 2021 stated that he was agreeable to paying the child's school fees and that he had already enrolled the child in a medical scheme. The Appellant however maintained in his affidavit that the monthly maintenance sum of Kshs. 41,000/= sought by the Respondent in the application was excessive, taking into account his monthly net income of Kshs. 23,000/= and the fact that he has other children for whom he also provides.

7. In its Ruling of 1st October 2021, the trial court ordered the Appellant to pay the child's school fees and related expenses, to provide a medical cover for the child and to pay a monthly sum of Kshs. 10,000/= as his contribution towards the needs of the minor. The Respondent, the minor's mother was on the other hand, in the Ruling, directed to provide rent, food, clothing, good grooming and other miscellaneous expenses for the child.

8. In the meantime, the main suit proceeded for full hearing on 30th November 2021 and the parties gave their respective testimonies before the trial court. Upon conclusion of the trial, the trial court rendered its judgment on 27th January 2022 and ordered as follows; -

    a. Legal custody of the child granted to both parties with the Plaintiff (now Respondent) having actual and physical custody.

    b. The Defendant (now Appellant) to have supervised reasonable right of access every weekend from Saturdays 9.00 am to 5.00 am and half of the school holidays. That picking and dropping point will be on a neutral place to be decided by the Parties and the Plaintiff's Advocate.

    c. The Defendant to pay the child's school fees and meet school related expenses for the child. The school fees be paid directly to the school where the child is currently enrolled in until the Parties secure an affordable private school near the Plaintiff's residence.

    d. The Defendant to continue to cover the child's medical needs as and when they arise.

    e. The Plaintiff to provide shelter, nanny, utilities, clothing, food and shopping towards the child's welfare.

    f. The Defendant to remit Kshs. 8,000.00 every month payable to the Defendant (sic) on or before the 5th of every month to cater for this (sic) child's upkeep and maintenance.

    g. The Defendant to pay the monthly maintenance arrears as per the Court Order dated 1st October 2021

9. Following the delivery of the judgment, the Appellant on 28th February 2022 filed an application for variation and modification of the trial court's orders of 27th January 2022 in the following terms; -

a. Allow the Defendant to pay a monthly sum of Kshs. 5,000.00 for the child's maintenance upkeep and education.

b. To allow the transfer of the child in this case to a public school mutually agreed by the parties, just like the other children of the Defendant.

c. The NHIF provided by the Defendant to his other family be deemed as sufficient medical cover for the child in this case.

d. The Court do suspend the upkeep and maintenance arrears pursuant to the Court Order dated 1st October 2021 and revive it once the Appellant's income improves or after a period that the Court will define.

e. Any other review of the Judgment and Decree as the Court may deem fit.

10. Vide her Replying Affidavit of 16th March 2022, the Respondent opposed the Appellant's application for review/modification of the trial court's judgment, terming the application as an appeal disguised as a review application. According to the Respondent, the application sought the same prayers which had been disallowed at the hearing of the main suit.

11. On 11th April 2022, the trial court rendered its ruling on the Appellant's application and dismissed the same for lack of merit since the grounds raised in the application did not warrant the issuance of the orders sought.

The Appeal

12. Aggrieved by the trial court's ruling of 11th April 2022, the Appellant lodged this appeal, raising the seven grounds of appeal in his memorandum of appeal dated 11th May 2022. The main grounds of appeal were that; -

i. The magistrate erred in law and in fact in dwelling on whether or not to grant stay of execution pending appeal when the substance of the Appellant's application dated 28th February 2022 was for review of the court's decree and judgment of 27th January 2022.

ii. The court erred in law and in fact in considering the wrong provisions of the law on suspension of maintenance orders.

iii. The court erred in law and in fact in holding that it had made final determination on the matter and it was therefore functus officio when it in fact had jurisdiction to determine the application for review even after judgment;

iv. The court erred in law and in fact in holding that where there is quantum of maintenance, the aggrieved party should appeal the Order instead of applying for review irrespective of the grounds raised;

v. The magistrate erred in law and in fact in declining to review its Decree and judgement of 27th January 2022 considering several material errors in the Judgement that mis-characterised the Plaintiff's (the Respondent herein) case against the appellant;

vi. The magistrate erred in law and fact declining to review its Decree and judgement of 27th January 2022 on the basis of [in]sufficient grounds for review given by the Appellant;

vii. The court erred in law and fact in not granting the Appellant's Application for Review considering the law on review and grounds raised by the Appellant which warranted the Orders sought;

Submissions

13. On 20th May, 2024, directions were given by this court for the matter to proceed by way of written submissions. That parties were to file and exchange written submissions within twenty (20) days from that date. The appellant filed his submissions on 30th May 2024 whilst the Respondent filed hers on 10th June 2024.

14. The first issue taken up by the Appellant in his submissions was that the magistrate misconstrued the Appellant's application dated 28th February 2022 to be one for stay of execution pending appeal as opposed to what was its true nature, that is, one for review/variation of the court's judgment of 27th January 2022. That due to this misconception by the magistrate of the nature of the Appellant's application, the court applied the wrong principles in determining the application. The Appellant submitted that instead of applying Section 99 of the Children's Act 2001 (then applicable) under which the application was made, the court in deciding the application, incorrectly, resorted to Order 42 Rule 6(2) of the Civil Procedure Rules and the principles applicable thereunder, thereby reaching a wrong conclusion.

15. On the finding by the magistrate that the court was functus officio and could not therefore deal with the Appellant's Application dated 28th February 2022, the Appellant submitted that that finding by the court was erroneous. Citing the decision in Industrial Court at Nairobi, Cause No. 1201/2013, John Waminge Kamau vs Phoenix Aviation (2015) e KLR, the Appellant asserted that power of the court to review its judgment is an exception to the functus officio rule. Accordingly, it was the Appellant's position that the magistrate still had the power as donated under Section 98 and 99 of the Children's Act 2001 (then applicable) to deal with the Appellant's application for variation of the court's judgment of 27th January 2022.

16. It was further the Appellant's submissions that the court committed an error in law and in fact in its finding that quantum on maintenance ought to be subjected to an appeal as opposed to an application for review.

17. Regarding the substantive prayers in the application for review, the Appellant submitted that contrary to the magistrate's findings, the lower court is empowered under Section 99 of the Children's Act, 2001 (then applicable) to vary, modify or discharge any order made pursuant to section 98 of the Act.

18. It was therefore the Appellant's case that his application dated 28th February 2022 for variation of the lower court's judgment of 27th January 2022 had sought the four (4) specific prayers, that is, the judgment be varied to; -

    i. Allow the Appellant to pay a monthly sum of Kshs. 5,000/= for the child's upkeep and education;

    ii. Allow the transfer of the child in issue to a public school. Mutually agreed by parties, like the other children of the Appellant;

    iii. That the National Hospital Insurance Fund (NHIF) cover provided by the Appellant to his family including his three children and the child in this case, be deemed as a sufficient medical cover for the child in question, provided the parties agree on a mutually acceptable outpatient facility and the Appellant to facilitate its use;

iv. That the court suspend the upkeep and maintenance arrears pursuant to the Court Order of 1st October 2021 and revive it once the Appellant's income improve or after a period that the court would define.

19. The Appellant submitted that the application for variation was supported by the fact that he was financially constrained. That his net monthly salary was only Kshs. 23,492/- and that it is from this amount that he was expected to provide for education and upkeep of the child in question as well his three other children, not to mention his other family's needs such as rent, food and his travel to work.

20. On the prayer to have the child moved to a public school, the Appellant submitted that this was based on his inability to afford the child's current school which translated to about a further monthly sum of Kshs. 6,000/=. It was the Appellant's case that having the child in question attend a private school will make his other two children who attend a public school feel discriminated against. In support of his position, the Appellant cited the decision in Nyeri HC Civil Appeal No. 41 of 2017 SMW vs EWM (2019) eKLR as well as the case of Marsabit, Civil Appeal No. 2 of 2017, W S I vs M A D, (2017) eKLR.

21. On the prayer to have the NHIF card suffice for medical cover for the child, the Appellant submitted that child in question, just like his other three children are already enrolled in a NHIF medical cover and that considering his precarious financial circumstances, the court should give an Order facilitating provision of details and documents for the NHIF whenever the child in this matter was sick instead of giving an order for a new cover. The decision in Nyeri HC Civil Appeal No. 41 of 2017 SMW vs EWM (2019) eKLR was again relied on by the Appellant in support of his argument.

22. Regarding the prayer to have the upkeep and maintenance arrears suspended, the Appellant stated that since the Order was made on 1st October 2021, he has been unable to meet its conditions. It was the Appellant's case that the failure to meet the terms of the court order was due to his extremely low salary as well as his parental obligations, both to the child in question as well as his other three children.

23. It was therefore the Appellant's case before the lower court that payment of the accumulated amount was likely to take away his means and ability to provide for his other three children and family, including compromising his ability to meet personal expenses which includes the cost of travelling to work.

24. Finally, the Appellant submitted that the trial court's judgment of 27th January 2022 had so many glaring errors and mistakes and that the trial court's refusal to allow his application for review of the judgment on account of the mistakes was therefore erroneous. According to the Appellant, the errors and mistakes in the trial court's judgment essentially recharacterized the Appellant's case, leading to a wrong conclusion.

25. The Appellant therefore urged this court to all the appeal and issue the following Orders; -

a. Allow the appeal and that the Ruling and Orders of the lower court dated 11th April 2022 be varied or set aside (except the Order on costs).

b. The prayers in the appellant's Application dated 28th February 2022 be granted in terms of the orders sought therein or in terms that this court may deem fit

c. Costs of the appeal be granted to the Appellant.

26. On her part, the Respondent supported the lower court's Ruling of 11th April 2022 and urged this court to uphold the same. The Respondent submitted that the trial court was right in not granting the Appellant's prayer for suspension and/or variation of the orders. Citing Article 53(2) of *the Constitution*, the Appellant submitted that in granting any order relating to a child, the best interest

of the child is paramount. It was the Respondent's position that an order suspending payment of the Kshs. 10,000/= monthly maintenance arrears would not be in the best interest of the child.

27. The Respondent informed court that since the Order was issued by the court way back on 1st October 2021, the Appellant deliberately failed to comply. According to the Appellant, suspending the payment of the arrears would render useless the court order of 1st October 2021 contrary the principle espoused in the decision in Republic vs County Government of Kitui Ex Parte Fairplan Systems Limited [2022] eKLR that court orders are not to be issued in vain and that court orders must to be obeyed.

28. On the prayer to have school fees and related expenses as well as the Kshs. 8,000/- monthly maintenance payment reviewed to a monthly sum of Kshs. 5,000/=, the Respondent submitted that the issue had been substantively dealt with at trial and that there was no new evidence or argument advanced by the Appellant to warrant the review or variation. According to the Respondent, if the Appellant was dissatisfied with the order of the court, the proper procedure would have been for the Appellant herein to appeal the decision but not an application for review as is the case herein.

29. Citing the decision in Mkupuo Network Awareness vs CS Ministry of Lands and Physical Planning and others [2022] eKLR, the Respondent asserted that a review application is not a panacea to open the case or application for fresh argument.

30. Regarding the Appellant's request to have the child transferred to a public school, the Respondent submitted that the Appellant's application for review or variation of the same was insincere since the Appellant had in his Replying Affidavit dated 29th July 2021 admitted that he was willing to cater for the child's school fees directly with school provided that the child is not transferred to another school without his consent. Citing the case of ZMO vs EIM [2013] eKLR, the Respondent submitted that stay of execution of maintenance orders in children's cases are only to be made in very rare cases and that the instant case is not one such case.

31. Finally, the Respondent submitted that the errors in the trial court's judgment of 27th January 2022 were not so material as to re-characterize the Appellant's case as was alleged. The Respondent therefore urged this court to dismiss with costs the instant appeal.

Analysis and determination

32. This being a first appeal, I am enjoined to reconsider evidence tendered before the trial court, reevaluate the same and draw my own conclusions. In doing so, I am required to bear in mind that I did not have the advantage of seeing and hearing the witnesses testify. This is the principle as laid down in the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA where the court stated that:

> " ...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..."

33. I have considered this appeal and the submissions made by the parties in support of their respective positions. As indicated above, this appeal relates to a children's matter where the primary consideration is to be given to the best interest of the child as instructed under Article 53 (2) of *the Constitution*. It is not in dispute that the Appellant is the biological father of the minor in question. The dispute in these proceedings is the trial court's decision of declining the Appellant's application dated 28th

February 2022 seeking a review of its judgment of 27th January 2022 in which the court had among others directed the Appellant to; -

i. Pay school fees and other related expenses directly to the school where the minor was then enrolled, until parties secure affordable private school near where the mother lived.

ii. Continue to cover the child's medical needs as and when they arise.

iii. Remit Kshs. 8,000.00 every month to the Respondent on or before the 5th of every month to cater for the child's upkeep and maintenance.

iv. Pay the monthly maintenance arrears as per the Court Order dated 1st October 2021

34. Having carefully reviewed the lower court's ruling of 11th April 2022 which is the subject of this appeal, I agree with the Appellant's submissions that the trial magistrate misconstrued the nature of the Appellant's application. A cursory perusal of the Appellant's application dated 28th February 2022 reveals that the Application was brought under among others, Section 98 and 99 of the Children's Act, 2001 (which was the applicable statute then). The aforesaid provisions of the law provided as follows; -

> "The court shall have the power to impose such conditions as it thinks fit to an order made under this section and shall have the power to vary, modify or discharge any order made under Section 98 concerning the making of any financial provisions, by altering the times of payments or by increasing or diminishing the amount payable or may temporarily suspend the order as to the whole or any part of the money paid and subsequently revive it wholly or in part as the court thinks fit."

35. It therefore follows that the order for stay that was sought by the Appellant in his application dated 28th February 2022 was not one pending appeal, but was ostensibly to allow parties and the court time to deal with the Appellant's application for review or variation of the terms of the judgment of the court dated 27th January 2022. In deciding the application, the trial court, in framing the issues for determination, made no reference to Section 99 of the *Children Act* under which the application was made, but instead erroneously proceed with the application as it if was one brought under Order 42 of the Civil Procedure Rules, 2010.

36. The next issue for this court's determination is whether the trial court having delivered its judgment in the matter was funtus officio and could not therefore deal with the Appellant's application for review and or variation of the subject judgment. Again, on this, I agree with the Appellant. The application for variation or review of a judgment in children's matter is by law permitted under section 99 of the Children's Act (currently section 119 of the Children's Act, 2022). Where the best interest of the child demands, there is nothing that prevents an applicant from moving back to the trial court for variation or review of orders. In LAO versus OK Arap M [2019] eKLR where the court had been moved to vary a maintenance order, the court stated as follows; -

> "The court in the exercise of its power may impose conditions, vary modify or even discharge a maintenance order for the making of a financial provision. The Court may also increase or decrease or change the times of payments of the amount payable under a maintenance order. Additionally, the court has the power and discretion to temporarily suspend the whole or any part of the maintenance amount and subsequently revive it wholly or in part as it deems fit. For a party to be deserving of an order of variation of a maintenance order, it must be demonstrated that such variation is in the best interest of the child."[Emphasis added].

37. From the above, it is clear that for a party to succeed in an application for variation of a maintenance order under Section 99 of the *Children Act* (section 119 of the current version of the Act), it must be demonstrated to the satisfaction of the court that such variation is in the best interest of the child.

38. Having established that the trial court had jurisdiction to deal with the Appellant's Notice of Motion application dated 28th February 2022 for variation of the maintenance orders, I will now turn to the substantive payers in the application to establish whether the orders sought are in the best interest of the child and therefore ought to have been granted.

39. The first substantive prayer sought in the Appellant's subject application is that the trial court's order directing the Appellant to pay school fees and related expenses as well as that requiring the Appellant to pay a monthly sum of Kshs. 8,000 towards the child's upkeep be varied and that instead the Appellant be allowed to pay a monthly sum of Kshs. 5,000/- towards the child's upkeep and education. According to the Appellant, this prayer is due to the fact that he is financially constrained, his net monthly salary being Kshs. 23,492/- only. It is therefore his case that he is unable to provide for the subject child without infringing on his parental obligation to his other three children, as well his ability to take care of his personal needs, including his expenses relating to his transport to work.

40. Section 94(1) of the Children's Act 2001 (then applicable) provides guidelines on factors to considered by a court before making an order for financial provisions. The section specifies that some of the issues to be considered ought to be; -

    a) "The income or earning capacity, property, and other financial resources which the parties or any other person in whose favor the court proposes to amend an order, have, or are likely to have in the foreseeable future.

    b) The financial needs, obligations, responsibilities which each party has or is likely to have in the foreseeable future.

    c) The financial needs of the child and the child's current circumstances;

    d) The financial needs of the child and the child's current circumstances;

    e) The income or earning capacity, if any, property and other financial resources of the child;

    f) Any physical or mental disabilities, illness, or medical condition of the child;

    g) How the child is being or was expected to be educated or trained;

    h) The circumstances of any of the child's siblings;

    i) The customs, practices, and religion of the parties and the child.

    j) Whether the Respondent has assumed responsibility for the maintenance of the child and if so, the extent to which and the basis on which he has assumed that responsibility and the length of the period which he has met that responsibility;

    k) Whether the Respondent assumed responsibility for the maintenance of the child knowing the child was not his child, or knowing that he was not legally married to the mother of the child;

    l) The liability of any other person to maintain the child.

m) The liability of that person to maintain other children.

41. I have carefully reviewed the evidence on record including the Appellants affidavit of means dated 30th November 2021 in which he deponed that from a gross monthly salary of Kshs. 148,800/=, his net pay was a monthly sum of Kshs.23,492/= only. From the affidavit of means, it is apparent that the bulk of the Appellant's income (a sum of Kshs. 69,230) goes towards servicing a loan, which as at May 2021 stood at Kshs. 5,716,051.60. I however note that the Appellant did not disclose in the application the use to which the loan was put. The money from the loan may have been used to purchase a non-income generating asset such as a residential house or may have been very well put in an income generating business. It was for the Appellant to bring this evidence to court but he chose not to.

42. From the judgment of the trial court, I note that the magistrate did not take into account the fact that the Appellant has another family with three other children to take care of. The trial court in its judgment found, and rightly so, that the Appellant did not adduce any evidence at trial in support of his testimony that he had other three children. However, noting that the birth certificates were subsequently attached to the Appellant's application dated 28th February 2022 in which he sought variation of the terms of the judgment, the same ought to have been considered and or taken into account by the court in dealing with the application for variation of the terms of the judgment under section 99 of the Children's Act, 2001.

43. I have perused the court's ruling of 11th April 2022 which is the subject of appeal and I note that the lower court did not address its mind to the issue. In the circumstances, it is the view of this court that the trial court failed to take into consideration matter which it should have taken into consideration and is therefore a decision which is amenable to review by this court. In Mbogo v Shah (1968) 93 in which De Lestang VP (as he then was) observed at page 94 that; -

> "I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion..."

44. In the circumstances and taking into account the guidelines under section 94(1) of the Children's Act [2001], I believe that quantum of maintenance should be within the limits of the parents' means and that it should reflect the income level and economic realities of the parents. Consequently, I hereby vary the terms of the trial court's judgement of 27th January 2022 and substitute the monthly sum of Kshs. 8,000/= on account of the child's upkeep with a monthly sum of Kshs. 5,000/=. The due date for payment remains as directed by the lower court, that is, before 5th day of every month.

45. I however decline to vary the terms regarding the payment of school fees and related expenses since the doing so would in my view not serve the best interest of the child and would also be contrary to the Appellant's position as contained in his affidavit of 29th July 2021 where had expressed his willingness to cater for the child's school fees directly to the child's then school, provided that the child was not transferred to another school without his consent.

46. On the prayer to have the child moved to a public school, I agree with the Respondent's submissions that the prayer is contrary to the position the Appellant had all along taken in the proceedings. It is noteworthy that vide his affidavit of 29th July 2021, the Appellant had deponed that he was willing to cater for the child's school fees directly to the child's then school, provided that the child was not transferred to another school without his consent. In any event, I note that the trial court had ordered

that parties were at liberty to discuss and have the child moved to a more affordable private school. I therefore maintain this position by the trial court.

47. On the prayer to have the NHIF card suffice for medical cover for the child, I note that both parties are in agreement on the matter. The only issue, as I gather from the proceedings is that the details of the cover had not been communicated to the Respondents. Indeed, in her submissions in this appeal, the Respondent stated that; -

> " In opposition of the suit, the Appellant filed the Statement of Defence dated 4th June 2021 (Page 28- 30). In Paragraph 7, he confirmed his willingness to have the minor enrolled in his medical cover. This settled the issue of medical needs of the child".

48. I have carefully perused the judgment and the decree extracted therefrom and do not see any basis of interfering with the trial court's finding on the issue. In its judgment, the lower court ordered that "[T]he defendant shall continue medical cover for the child to take care of the medical needs of the child as and when they arise". There was no order by the court for an additional medical cover to be provided by the Appellant. In the circumstances, I find this prayer by the Appellant unmerited and dismiss the same. I maintain the trial court's judgment and order on the matter.

49. Finally, the Appellant also prayed for an order suspending the interim order of 1st October 2021 in which the Appellant had been ordered by the trial court to pay a monthly sum of Kshs. 10,000/- as upkeep of the minor pending the hearing and final determination of the matter at the lower court. I have carefully reviewed the proceedings and note that since the order was made way back in October 2021, the Appellant has not made any effort to comply with the court order.

50. In view of the Appellant's failure or refusal to comply with the interim maintenance order to his own child, it is my humble opinion that it would not be in the best interest of the child to have the order reviewed. The child in this case is obviously in need of maintenance from both the mother and the father. It is evident that the child's right to maintenance is being compromised by the appellant's refusal to pay the amount ordered by the court. A litigant who refuses to obey a valid court order is not deserving of the exercise of the court's discretion in his favour.

51. In my view it would have been different had the appellant offered to deposit the amount sought, or even a reasonable part of it, into the court pending the hearing and determination of the appeal. Better still, he should have paid the amount, or part of it, towards the upkeep of the child, particularly in view of the fact that he is not contesting paternity. In AKK v SMM [2020] eKLR, Muchelule J (as he then was) stated as follows a similar matter; -

> " 13. The child in this case is in need of maintenance from the father and the mother. The mother is the respondent who has custody and is doing her part to maintain the child. She said that the appellant is the father, which he denied. He was asked to undergo DNA to confirm paternity which he has not done, since 2018. He was asked to pay Kshs.20,000/= per month towards child's maintenance. He did not appeal the decision. The application for review and the application for judicial review were declined. He has since not paid a cent. The amount is over Kshs.640,000/=. It is evident that the child's right to maintenance is being compromised by the appellant's refusal to pay the ordered amount. A litigant who refuses to obey a valid court order is not deserving of the exercise of the court's discretion in his favour. It would have been different had the appellant offered to deposit the amount sought, or even a reasonable part of it, into the court pending the hearing and determination

of the appeal. Better still, he should have paid the amount, or part of it, towards the upkeep of the child, now that he is not seriously contesting paternity.

14. In Z.M.O. –v- E.I.M [2013] eKLR, Justice W. Musyoka indicated as follows: -

> "As a matter of principle, grant of stay of execution of maintenance orders in children's cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute. ....."

15. Given all the facts that his application has presented, I am not persuaded that it is in the best interests of the child herein to allow the application to stay either the proceedings or the application for execution before the trial court. I dismiss the application with costs.

52. Before I pen off, it is important that I mention something about the errors in the trial court judgment and their effect on the Appellant's case before the trial court.

53. In his appeal to this court, the appellant highlighted a number of errors in the trial court's judgment of 27th January 2022 arguing that the errors had the effect of re-characterizing the Appellant's case before the trial court and therefore needed to be reviewed.

54. I have carefully perused the trial court's said judgment and I agree with the Appellant's submissions that the lower court judgment indeed had errors and mistakes. However, I do not think that those errors were so material as to warrant variation of the terms of the judgment under section 99 of the *Children Act*, 2001 as prayed by the Appellant. In my view, the trial court was right when it stated the following in its ruling (the subject if this appeal) regarding the errors; -

> " On the issue of Review, the age of the child herein was stated as 5 years instead of 11 years. I find this does not touch on the pertinent issues that the Court had already determined..."

55. Accordingly, I find this appeal partly merited.

56. The judgement of the lower court is therefore varied but only to the extent that the monthly upkeep sum of Kshs. 8,000/- is hereby substituted with a monthly sum of Kshs. 5,000/= payable to the Respondent on or before the 5th day of every month.

57. The rest of the trial court's judgment and decree remains undisturbed.

58. This being a matter concerning the welfare of children, I am of the view that each party should bear their own costs.

59. It so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 26TH DAY OF SEPTEMBER 2024

ADO MOSES

JUDGE

In the presence of

Moses – Court Assistant

Adongo h/b for Mituga..... for the Appellant.

Murimi Waweru.....for the Respondent.