ARM v NWS (Family Appeal E015 of 2022)
[2023] KEHC 4096 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 4096 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

FAMILY APPEAL E015 OF 2022

G MUTAI, J

APRIL 28, 2023

BETWEEN

ARM ..... APPELLANT

AND

NWS ..... RESPONDENT

(Being an Appeal from the Ruling of the Hon. L.L. Sindani, SRM in Children Case No. TCC No. E055 of 2020 delivered on 4th May, 2022; ARM versus NWS)

JUDGMENT

Introduction

1. The appellant and the respondent were married under the customary laws of the Taita people. Their union was blessed with three issues, twins SFK and SRK and PWMK, born on June 13, 2013 and September 21, 2016, respectively. From the pleadings filed in the subordinate court it would appear that their union was initially happy. The marriage however broke down in the course of time, as a result of which the appellant left their joint home.

2. The appellant works for the [Particulars Withheld] and earns what most Kenyans would describe as a good salary. The respondent, it would appear, is unemployed and has no source of income, save for what she describes as menial jobs, whose proceeds, she asserts, are insufficient for her to take care of the said children.

3. On October 14, 2020, the appellant filed a suit before the subordinate court. In the said suit he alleged that the respondent had been cruel to him and the children. He averred that she had threatened to kill them. He further averred that the cruelty inflicted upon by the respondent made him leave the matrimonial home. Having left the said home, the appellant stated that he was apprehensive about the

security of the children. He therefore filed the suit before the subordinate court for their protection. In the said suit the appellant sought the following orders: -

> "a. Declaration that both parties have equal parental responsibility for the issues of the relationship herein;
>
> b. Legal custody, care and control of the children do vest in the plaintiff; and
>
> c. The defendant to have unlimited access to the minor children."

4. The respondent opposed the suit. She filed a written statement of defence on October 26, 2020. She averred therein that the appellant had wanted to take the children to his home so that they could undergo female genital mutilation, something she was opposed to. She denied that she had been cruel to the appellant and their children. She stated that she loves the children and had always protected them as evidenced by the fact that the said children were in her custody at the time the suit before the subordinate court was heard and concluded. She accused the appellant of attempting avoid his parental responsibilities by citing issues which to her were either nonexistent, or if existent, capable of resolution.

5. The respondent filed a counterclaim *vide* which she sought Kshs 50,000.00 for maintenance of the children which sum she broke down as follows: -

   a. Kshs 12,000.00 for rent;

   b. Kshs 15,000.00 for food;

   c. Kshs 9,000.00 for food consumed by a child (identity not declared) on special diet;

   d. Kshs 7,000.00 for household consumables; and

   e. Kshs 7,000.00 for other expenses including clothing, hair dressing, electricity tokens, fresh water etc.

6. The court was also asked to give any other relief it deemed fit in the circumstances of the case. The respondent attached to her list of documents birth certificates of the children, a letter from the Chief of Mbololo location, a copy of the appellant's payslip and house rent receipt.

7. The matter went to a full trial before the subordinate court. Upon considering the evidence and the law the learned magistrate made the following orders in the judgment she delivered on June 2, 2021.

   a. Joint parental responsibility;

   b. Joint legal custody;

   c. Actual custody to vest with the mother with unlimited access to the appellant on alternate weekends and half of the school holidays;

   d. The appellant to pay school fees;

   e. Maintenance of Kshs 18,000.00 to be paid by the appellant to cater for rent, food and daily upkeep of the minors;

   f. The respondent was asked to move to a cheaper house with rent not exceeding Kshs 5,000.00; and

   g. The respondent was given 6 months to look for a gainful venture "so that she can pay for her own rent and also participate financially in bringing up of the children".

8. No appeal against the said judgment was made by either party. From the record of appeal, it would appear that the appellant complied in part with the resultant decree by making periodic payments to the respondent. He appears to have changed his mind for on December 6, 2021 he filed an application vide which he sought to have the judgment reviewed. The review he sought before the subordinate was for the amount payable as maintenance to be set aside and terminated completely. He averred in the said application that he was required to pay Kshs 18,000.00 to the respondent despite being the children's sole provider. He was also aggrieved by the fact that the deductions left him with income which was insufficient, in his view, to meet his obligations to his other family. He stated that the respondent too had a duty to provide for the children something the subordinate court had excused her from doing.

9. The respondent did not file a response to the said application. She instead filed an application dated December 14, 2021 *vide* which she sought to have the appellant committed to civil jail, for payment of what she said were maintenance arrears, for attachment of the salary of the appellant so that the decree of the court could be satisfied and finally for the court to find that she had not been able to get any gainful employment.

10. The court considered both application and delivered a consolidated ruling. In the said ruling the learned senior resident magistrate found no merit in the appellant's review application and dismissed it. She however found merit in the application by the respondent and found the appellant to have been in contempt of court. Consequently, she ordered as follows: -

    a. The applicant to make payments in compliance with the judgment decree within 60 days failing which 1/3 of his salary would be attached;

    b. The appellant's application dated December 6, 2021 be dismissed; and

    c. Made no orders as to costs.

11. It is this decision that the appellant aggrieved with. Vide a memorandum of appeal filed on May 18, 2022 the appellant raised 7 grounds to the effect that: -

    1. The trial court erred in both law and fact in making a finding that the appellant was in contempt of court orders, despite the glaring evidence of M-pesa statements which proved that appellant had monthly and religiously contributed for the upkeep of the children as decreed by the court, thus illegally ordering a third of the appellant's salary by attached;

    2. The trial court erred both law and fact by shifting the burden of proof against the appellant on whether the respondent had secured gainful venture in order contribute and support the children despite the lapse of six months' grace period as decreed by the court;

    3. The trial court erred in both law and fact in failing to consider both factual and legal considerations by dismissing the appellant's application for review when in actual fact the appellant had demonstrated sufficient reasons to warrant orders sought;

    4. The trial court erred in both law and fact by capriciously and unilaterally reviewing its own judgment issued on June 2, 2021 to the extent that parental duty on provision is not tied to the respondent who is not gainfully employed;

    5. The trial court erred both in law and fact by decreeing that all the parental responsibility be borne by the appellant thus turning the appellant into a beast of burden for provision;

6. The trial court erred both in law and fact by unilaterally and lackadaisically extending the time period of one year for the respondent to get a financial venture thus rendering the appellant the sole responsibility of catering for the minor; and

7. The trial court erred in both law and fact in that its said determination was against the weight of law, evidence and justice.

12. The matter came up before Onyiego, J on January 17, 2023. On the said date the applications before this court which were then outstanding were abandoned in favour of hearing the appeal on merit. The appellant was given 10 days to file his written submissions while the respondent was also given 10 days to do so upon being served by the appellant. Hearing of the appeal was stated for February 16, 2023.

13. On February 16, 2023 and also on the February 27, 2023 the matter came up before me. Upon confirming that the parties had filed their written submissions I reserved my judgment for March 31, 2023.

14. I was not able to deliver my judgment on the said. My sincere apologies to the parties for the delay.

15. I have read the submissions of the parties in support of their respective cases. I must consider their submissions in view of the facts and the applicable law and make my determination accordingly.

The Law

16. Article 53(1) of the *Constitution* of Kenya, 2010 provides that: -

> " Every child has right
>
> (e) to parental care and protection, which includes equal responsibility of the mother and the father to provide for the child, whether they are married to each other or not".

17. Section 90(a) of the *Children Act*, 2001 (repealed) provided that "unless the court otherwise directs, and subject to any financial contribution ordered to be made by any other person, the following presumptions shall apply with regard to the maintenance of a child: -

> a. Where the parent of a child were married to each other at the time of the birth of the child and are both living, the duty to maintain a child shall be their joint responsibility."

18. The *Constitution* edict above is reflected in sections 4(2) and (3) of the repealed Act which provided thus: -

> (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."

19. My duty as the appellate is to re-evaluate the evidence tendered in the subordinate court, both on points of law and fair and to come up with findings and conclusions therein (see *JWN v MN* [2019] eKLR (per Wendo J).

20. I must thus look at the judgment and the ruling of the subordinate court, while cautioning myself that unlike the learned Senior Resident Magistrate I did not have the benefit of hearing the testimonies of the witnesses or observing their demeanor. I must also give due regard to decisions made in exercise of discretion and be most reluctant to interfere with them, even if I would have made a different decision unless the decision so made was clearly and blatantly wrong.

21. In my opinion the appeal raises 3 issues to wit: -

1. Had the appellant disobeyed court orders? If so did the court have jurisdiction to hear and determine the contempt application?

2. What test is applicable in review application? Was that test met in the appellant's application dated December 6, 2021? And

3. Does an indigent parent have a duty to provide for children? What is the meaning of the word "equally" as used in article 53(1)(d) of the *Constitution* of Kenya, 2010?

I will look at each of these issues in turn.

22. In her ruling dated May 4, 2022 the learned Senior Resident Magistrate referred to section 10(3) of the *Magistrates Court* Act, No 26 of 2015. Section 10 of the said Act provides that

"

" 10. Contempt of court

1. Subject to the provisions or any other law the court shall have power to punish for contempt...

(3) In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court"

My understanding of the said provision, buttressed by case law which I shall refer to below, is that a magistrate's court has the powers to punish for contempt committed in the face of the court. Contempt of court that cannot be said to be "in the face of the court" may only be punished pursuant to the provisions of section 5(1) of the *Judicature Act* which provides that "(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts."

23. The *Contempt of Court Act*, No 46 of 2016 gave Magistrate's Court the jurisdiction to punish for contempt. The said legislation was however declared unconstitutional by Mwita, J in *Kenya Human Right Commission v Attorney General & another* [2018] eKLR.

24. In *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others* [2014] eKLR the Court of Appeal held that: -

> "jurisdiction belongs to the High Court or Court of Appeal. It is instructive that the High Court or Court of Appeal exercise that jurisdiction, it extends to the contempt committed in the subordinate court. The only jurisdiction the Magistrate's Court could exercise when dealing with contempt of court is if it is committed in the face of the court."

25. In her application before the court below the respondent argued that the appellant had failed to pay the maintenance sums ordered by the court. There was severe contestation on what amount had been paid and when that was done. What was not in doubt was that the default, if any, on the part of the appellant hadn't taken place in the face of the court. That being the case the proper procedure would have been to invoke the of jurisdiction the High Court to uphold the authority and dignity of the subordinate courts. That wasn't done in this case. In purporting to exercise jurisdiction to punish for contempt of court that she does not have the learned Senior Resident Magistrate clearly erred.

26. Had the appellant faithfully paid the amounts ordered by the court? I have perused the record of appeal and the supplementary record of appeal. I am unable to confirm that the appellant made timely, consistent, and full payments of the decretal amount. I note that after filing his application for review he stopped making payments, probably in the mistaken belief that the filing the said application excused him from the obligation to make further payments. His conduct was unfortunate, to say the least. The foregoing notwithstanding having found that the learned senior resident had no jurisdiction to punish the appellant for contempt of court the court below erred when it purported to punish him. in my opinion what the court should have done instead was to permit the execution of its decree.

What test is applicable in review application? Was the test met in respect of the review application before the Subordinate Court?

27. Orders 45 of the *Civil Procedure Rules, 2010* provides that review application may be made upon discovery of new and important matter or evidence, which after the exercise of due diligence was not within the knowledge of or could not be produced by a party at the time the decree was made or the order made or on account of some mistake or error apparent o the face of record or for any sufficient reason.

28. In their submissions the advocates for the appellant have emphasized the "any sufficient reason" part of the test. My understanding of the rule is that when construing "sufficient reason" one must use the "ejusdem generis". In this case the general words "for any sufficient reasons" must be construed so that "sufficient reason" is confined to matters related to discovery or new facts or mistakes or error apparent on the face of the record. In other words, "sufficient reason" is not a carte blanche to litigants to subject all matters to review.

29. The question then is this; was a case for revision made before the lower court? In her judgment, the learned Senior Resident Magistrate placed the burden of bringing up the children on the appellant. Her reasons for doing so were understandable. The appellant is in gainful employment with a gross salary of Kshs 190,000.00. in his own pleadings he, in prayer (d) of his plaint specifically sought an order directing him to solely maintain the children. The respondent on the other through seeking to have custody of the children denied that she was in gainful employment. The court agreed with her and ordered that she be excused from contributing towards the upkeep of the children firstly for 6 months and subsequently for 12 months.

30. The duty to maintain children is shared equally by the parents. In so saying I am not holding that child upkeep should be like double entry bookkeeper's ledge where debits and credits must balance. Contributions to be made by each parent may vary depending on their respective abilities, incomes, needs, and obligations. Our founding compact, the *Constitution*, starts with the premise that parents of any given child have equal life chances. This is obviously a rebuttable presumption. In this case, the court below, wrongly in the view, failed interrogate the respondent's claim that she was not in gainful employment. In so doing the learned Senior Resident Magistrate delivered a judgment that was heavily skewed against the appellant.

31. Section 109 of the *Evidence Act* provides that "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person".

    By shifting the burden of proof to the appellant to show that the respondent was not indigent the court below erred. The said error, is in my view apparent from the face of the record and could therefore be subject of a review application.

Is an indigent person required to contribute towards maintenance?

32. As I have stated above the *Constitution* presumes that a male and a female parent of any given child are equally able to provide for him/her. Where that is not the case the court must strive, as near as is justly and fairly possible, to procure equitable contribution. The duty of proving inability lies on the party alleging.

33. In this case the court accepted the averments of the respondent without question. In so doing it may have given her a disincentive not to seek employment or engage in remunerative self-employment. One wonders what would happen should the appellant lose his employment.

34. My opinion is that the best interest of the children calls for both parents to be active participants in their upbringing. This is what the court below found as a matter of fact. The respondent was given time to put her house in order so that she can also contribute. She has had almost 2 years to get her act together. Having her contribute half of the maintenance sums is not unreasonable given that the larger financial burden still falls on the appellant. I do not think that there is a reason to think that the respondent will be unable to raise Kshs 9,000.00 per month.

35. The upshot of the foregoing is that the appeal succeeds in part. I therefore order as follows: -

    1. I find and hold that the learned Senior Resident Magistrate did not have jurisdiction to find the appellant to have been in contempt of court;

    2. I find and hold that the appellant and the respondent have equal responsibility pursuant to article 53 of the *Constitution* to provide for the children. As the respondent has had almost 2 years to look for gainful employment or occupation I order that she contributes to the maintenance of the children. Consequently I order that the amount payable by the appellant be reduced to Kshs 9,000.00 per month with effect from the date of this judgment;

    3. The appellant shall pay for the education and provide medical care for the children in accordance with the judgment delivered on June 2, 2021. In default thereof, the respondent shall be at liberty to move the court below for appropriate orders, including by way of periodic attachment of his salary; and

    4. Each party shall bear own costs of the appeal.

36. Orders accordingly.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF APRIL 2023 VIA MICROSOFT TEAMS

GREGORY MUTAI

JUDGE

In the presence of

Winnie Migot - Court Assistant

Mr. Ondeng for the Appellant

The Respondent (in person)