



HKN v LNW (Civil Appeal 1 of 2017) [2022] KEHC 483 (KLR) (Civ) (28 April 2022) (Ruling)

Neutral citation: [2022] KEHC 483 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 1 OF 2017

LA ACHODE, J

APRIL 28, 2022

BETWEEN

HKN APPLICANT

AND

LNW RESPONDENT

RULING

1. Before this court is an application brought by way of a Notice of Motion dated 6th December 2021 pursuant to Order 42 Rule 1 of the Civil Procedure Rules, 2010. The Applicant herein seeks for orders that the Judgment of the Court dated 4th April, 2019 be reviewed and that the Respondent be ordered to take part in parental responsibility.
2. The Application was premised on the grounds set out on the face thereof and the affidavit sworn by the Applicant on the same date. In his affidavit the Applicant deposes that this Court gave judgment on 4th April 2019 which he has earnestly fulfilled. He says that his financial situation since then has drastically changed necessitating review of the stated orders. He states that he has only one source of income, being his salary from the University of Nairobi, which was reduced by kshs.55,000/= making it impossible for him to provide a monthly maintenance fee of kshs.17,500/= in addition to providing for all other needs for the minors. That he caters for school fees and other school related expenses, medical expenses and clothing for all the minors.
3. The Applicant avers that the impugned judgment did not specify the Respondents parental responsibility giving her latitude to not contribute. That the Respondent is of means but feigns poverty to fleece him.
4. It is his case that the responsibility placed upon him is massive considering that his sickly mother also depends on him and his salary is lower now than when the judgment was rendered. That if the impugned judgment is not reviewed, it will render him destitute and unable to cater for the minors'



medical and school related expenses. It is on this basis that he is moving this court to allow him to cater for medical expenses, school fees and related expenses for the minors and for the court to vacate the orders for monthly maintenance of shs.17,500/=.

5. Accompanying the application was an affidavit of means sworn by the Applicant and an uncertified copy of the Applicant's alleged pay slip for November 2021. In it the Applicant broke down his expenditure of the net salary of kshs.119,885/= as follows:

SN	Monthly Expenses	kshs.
1.	Insurance	16,000
2.	CW (fees and other expenses)	10,000
3.	SN (fees and other expenses)	12,000
4.	JN(fees and other expenses)	3,000
5.	Children's home clothes	600
6.	Children's medical services	400
7.	Upkeep (JN)	17,500
8.	Food and other expenses (personal)	6,500
9.	Cooking fuel	1,000
10.	Electricity	4,000
11.	Water	1,000
12.	Fuel and car maintenance	30,000
13.	Car insurance	3,400
14.	Airtime & internet	2,000
15.	Clothes (personal)	500
16.	Medical and other expenses (mother)	5,000
17.	Security	9,500

Monthly total (against a kshs.119,885/= 122,420/=

6. In response, through a replying affidavit sworn on 31st January 2022, the Respondent contends that the orders given on 4th April 2019 were drawn by the consent of the parties and that the Applicant is



in arrears of the maintenance sum. The Respondent urged that a review of the impugned judgment would be prejudicial to her since the minors live with her during school holidays and she is not employed, hence she cannot afford rent.

7. This application was canvassed by way of viva voce evidence. The Applicant testified that he is a lecturer at the University of Nairobi and that beginning January 2021 his remuneration was reduced by Kshs. 55,000/=. That two of the minors are in boarding school and one is in day school; all of whom he caters for, in terms of school fees and other school related expenses and medical expenses. He stated that he also pays for lunch and break needs for the minor day scholar. Her urged that therefore the day scholar eats only breakfast and dinner at home. He told the court that he spends upwards of kshs. 60,000 monthly on the children which is not sustainable based on his income.
8. The Applicant also informed the court that the Respondent is an able bodied graduate who refuses to work so as to frustrate him financially. Further that the Respondent inherited 27 rental units from which she collects money and a parcel of land in Murang'a yet she does not spend anything on the children. He urged the court to order the Respondent to provide for food and accommodation for the minors when they are in her care.
9. The Respondent on the other hand submitted that she has custody of the minors and that the kshs.17,500/= in maintenance from the Applicant is used purely for rent and not food. She contended that the evidence presented by the Applicant is not new and was already heard by the previous courts. She denied that she is financially stable and stated that she sold all her property and invested in a business that failed. Further that the Applicant chased her and the minors out of their home and that is why he was ordered to pay kshs. 17,500/= for maintenance.
10. The Respondent argued that the Applicant has not been remitting the monthly maintenance on time leading to interest on rent arrears. That due to the delay she has accrued rent arrears of kshs.49,000 threatening her and the minors shelter. It was also her case that the minors have a bitter relationship with the Applicant and are opposed to staying with him. Referring to the Applicants affidavit of means, the Respondent stated that the Applicant could easily get rid of some expenses like dog food in the interest of the minors. She urged that the Applicant, as the minors' father, ought to support them until the last-born is 18 years old.
11. The Respondent averred that their lastborn is sickly and the Respondent has been footing for her medication because their medical cover does not cater for it. She conceded that she is a graduate but that she has been looking for a job in vain.
12. In rejoinder, the Applicant conceded that the evidence placed before this court is the same evidence he relied on in the lower court and the appeal. He questioned the truthfulness of the Respondents contention that she sold her inherited property. He denied chasing the Respondent out of their home and stated that the Respondent was evicted by court order due to conflicts between the two of them. The Applicant reiterated that although the orders for maintenance were obtained through consent, the change in his situation warrants a revision of the terms. He further denied being in arrears save for kshs.5,000/= and attributed the delay in sending the monies to lack of money at required times.
13. On the Respondents place of residence, it was the Applicants contention that the Respondent lives in a slum where rent is no more that kshs.4,000 and thus questioned the maintenance sum. He attributed the strained relationship with his children to manipulation by the Respondent and noted that he had straightened issues with his eldest child. He also averred the court that he keeps dogs for security purposes due to remoteness of the area where he lives. Lastly, the Respondent contended that the court that the Applicant has willfully refused to work, and even turned down an offer from her previous employer and is intent on fleeing him.



14. I have considered the Application and the submissions made before me by the parties. The issue for determination is whether the Applicant has made a case to warrant the review of the judgment dated 04/04/2019.

15. To begin with, this is a matter involving children, and this court is guided by Article 53(2) of the Constitution which provides follows:

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

This guiding principle finds expression in the Children’s Act No. 8 of 2001 and in particular Section 4 thereof, which provides that in arriving at a decision on a matter concerning children, the paramount consideration should be the survival and best interest of the child.

16. What amounts to the best interest of the child has not been defined by the law, but it ought to be dependednt on the circumstances at hand. There are however certain minimum requirements that have universally been accepted to constitute the best interest of the child including the right of a child to be provided with shelter, food, clothing, education and medical care...’ (see MA vs R O O (2013) eKLR)

17. Secondly parental responsibility falls on the parents equally as contemplated under Article 53(e) of the Constitution. The father herein provides for the children’s school related needs, medical needs a well as maintenance in the sum of Kshs. 17,500/-. The mother on the other hand provides shelter and maintenance sum of kshs. 17,500/=.

18. It is important also to note that the Applicant in this matter seems to be confused as to what specific law to rely on for this application. The application is premised on Order 42 Rule 1 Civil Procedure Rules, which relates to appeals, while the subject of his application is for review of judgment. The applicable order to rely on in this application is Order 45 Rule 1 of the Civil Procedure Rules. That being said, I must point out that bringing the application under a wrong provision of the law is not fatal to the application and is curable under Article 15(a)(2) of the Constitution. I shall therefore proceed to the main subject matter of the application.

19. Review is a creation of statute pursuant to Order 45 Rule 1 of the Civil Procedure Rules, 2010, it provides as follows:

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.



20. Further, the *Children's Act* in Section 99 gives courts the power to make adjustments to an order for the maintenance of a child as it may deem fit in the circumstances of each case. Section 99 of the Act provides that:

The court shall have power to impose such conditions as it thinks fit to an order made under this section and shall have power to vary, modify or discharge any order made under section 98 with respect to the making of any financial provision, 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.

21. The Applicant testified that his salary has been slashed by Kshs.55,000/- since the judgment dated 16/04/2019 was delivered. It is his case that the change in circumstances renders him unable to provide the monthly maintenance sum of kshs. 17,000/-. In support of his case he produced a copy of a pay slip for Nov 2021, which indicates that he earns Kshs. 119,885/=. The Respondent did not dispute the allegation of reduced salary but noted that although unfortunate, the monthly maintenance was necessary in the interest of the children.
22. The record before the court indicates that in his appeal, the Applicant claimed that his income was approximately kshs. 62,000/=. It was on this basis that the appellate court reduced the amount of maintenance sum ordered by the trial court from kshs. 35,000/= to kshs.17,500 to be contributed by each party respectively. It is curious that the Applicant now claims that his salary has been reduced by kshs 55,000/= to kshs. 119,885/=. Be that as it may this court is guided by the principle of best interest of the child in Article 53(2) of the Court.
23. Maintenance is an aspect of parental care and is the responsibility of both parents of a child. Section 94(1) of the *Children Act* stipulates the considerations by which the Court shall be guided when making an order for financial provision for the maintenance of a child. These considerations include inter alia:
- a) The income or earning capacity, property and other financial resources which the parties or any other person in whose favour the court proposes to make an order, have or are likely to have in the foreseeable future;
 - (b) the financial needs, obligations, or 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 income or earning capacity, if any, property and other financial resources of the child;
 - (e) any physical or mental disabilities, illness or medical condition of the child;
 - (f) the manner in which the child is being or was expected to be educated or trained;
 - (g) the circumstances of any of the child's siblings;
 - (h) the customs, practices and religion of the parties and the child;



24. The requirement for modification/review of orders of parental responsibility as noted above was contemplated in *MKN v. JC & Children Court Kericho* (2019) eKLR, I am in agreement with the finding of the court that:

“More importantly, however, the application for review can only be made in the court which determined the matter, not in another court..... The parental responsibility is equal between the two parents. The parent responsibly does not cease because of separation or divorce. However, circumstances and means of parents change, and the best course of action is either for the two parents to agree or go to the Children’s court and report any charged circumstances for decisions. Each of the parents has to be reasonable because one cannot pay or bear that he or she has no ability to.”

25. The children in this matter are school going minors who are entitled to parental love and care. This parental responsibility should be borne by both parents. Onger J. in the impugned judgment noted as much and gave specific orders that both parents contribute kshs. 17,500/= for the maintenance of the children. In my view, and based on the records before the court and circumstances of this case, I no justification for reducing the maintenance sum. The sum was arrived at based on the assumption that the Applicant at the time earned a net salary of Kshs. 62,000/= which is much lower than the amount he has told the court he earns now.

26. In any case, the Applicant in his own testimony noted that despite his contribution on maintenance the Respondent and the children are living in deplorable conditions in the slum. To my mind therefore, to reduce or vacate the order for maintenance would put the minors in a much worse situation than they are in already. It is reprehensible when parents decide to use their own children as pawns on a chase board to score against each other. Whatever the case between the parents, the children should not be poisoned against either parent. They should have an independent relationship with each parent.

27. The upshot of the above analysis is that I find no justifiable reason to warrant review of the judgment dated 4th April 2019. The Application is found to be devoid of merit and to allow it would not be in the best interest of the minors but would be prejudicial to their welfare. Consequently, the Notice of Motion dated 6/12/2021 be and is hereby dismissed.

28. Each party will bear their respective costs of this application.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 28TH DAY OF APRIL 2022.

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L. A. ACHODE

HIGH COURT JUDGE

