



**MNN v JMM (Miscellaneous Application E024 of 2021)
[2022] KEHC 12488 (KLR) (Family) (27 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 12488 (KLR)

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

FAMILY

MISCELLANEOUS APPLICATION E024 OF 2021

MA ODERO, J

MAY 27, 2022

IN THE MATTER OF MM (MINOR)

BETWEEN

MNN APPLICANT

AND

JMM RESPONDENT

RULING

1. Before this Court for determination is the Notice of Motion dated 15th February 2021 by which the MNN (the Applicant) seeks the following orders:-

- “ 1. Spent.
- 2. That this Honourable court be pleased to exercise its supervisory jurisdiction over subordinate court as stipulated in Article 165(6) and (7) of the Constitution of Kenya and proceed to call for the record of proceedings and/ or court file of children’s Case No. 126 of 2019 MNN V JMM registered at the children’s court at Milimani and proceed to set aside the order of the Honourable Magistrate issued on 5th February 2021 to the effect that the proceedings are stayed pending the hearing and determination of an intended appeal by the Plaintiff therein MNN and direct the Honourable magistrate to immediately expedite the adjudication and determination of the Children’s Case No. 126 of 2019 MNN V JMM in the best interest of the minor.



3. That this Honorable court be pleased to issue a declaration that the orders issued on 11th November 2019 are self-executing and only subject to the terms therein and consequently incapable of lapsing or being stayed.
 4. Any other orders that mean the ends of justice.
 5. The costs of this Application be in the cause”.
2. The application was premised upon Articles 53, 159, 165 (b) & (7) of the Constitution of Kenya, Section 1A, 3A, 63 of the Civil Procedure Act, Cap 21, Laws of Kenya, sections 4,6,7,9,22, 76(2) of the Children’s Act 2001, Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law and was supported by the Affidavit of even date sworn by the Applicant.
 3. The Respondent JMM opposed the application through his Replying Affidavit dated 26th February 2021. The application was canvassed by way of written submissions. The applicant filed the written submissions dated 15th March 2021 whilst the Respondent relied upon his written submissions dated 19th April 2021.

Background

4. This application arises from Nairobi Children Case No. 126 of 2019 MNN v JMM in which the Applicant herein had sued the Respondent seeking various orders relating to the education and maintenance of the minor.
5. In the lower court, the Respondent was on 29th October 2019 ordered to pay a sum of Kshs 75,000 within fourteen (14) days failing which he would be imprisoned for a period of twenty (20) days. This order was extracted on 11th November 2019.
6. A notice to show cause was issued against the Respondent on 10th June 2019 and Warrant of Arrest were issued on 27th November 2019. The Applicant avers that in blatant disregard of the order that payment be made within 14 days the Respondent made the final payment on 13th November 2020, whilst the Applicant was in the process of procuring assistance to execute a Warrant of Arrest issued against the Respondent. On 11th November 2019 when the parties appeared before the trial court the court directed that the Warrant of Arrest had lapsed since the full Kshs 75,000 had been paid by the Respondent.
7. The Applicant is aggrieved that despite the delay of over one (1) year in complying with the courts directive, the court still lifted the warrants against the Respondent and her Advocate sought leave to appeal the trial court’s decision which leave was granted.
8. In addition to granting said leave to appeal the learned trial magistrate of her own volition stayed the proceedings in the Children’s Court pending the outcome of the Appeal. A copy of this order appears as Annexure ‘MNN-9’ to the supporting Affidavit.
9. The Applicant contends that the stay of proceedings was unnecessary and is in any event prejudicial to the minors welfare as it will only further delayed the determination of the suit to the detriment of the minor. She prays that the order of stay be revised by the High Court and that the suit be heard to its logical conclusion.
10. As stated earlier the application was opposed by the Respondent who urges that the application is un-procedural, misconceived, bad in law, vexatious and amounts to an abuse of court process. That the Applicant, through her Advocate made it a condition that they were not ready to proceed with the



main suit unless the Respondent served the twenty (20) days jail term even despite his having paid the full Kshs 75,000 as directed by the court.

11. The Respondent submits that this application is filed in pursuance of the personal vendetta, which the Applicant has against him. That instead of filing and pursuing the appeal for which leave had been granted, the Applicant instead filed the instant application. He urges the court to dismiss the application with costs.

Analysis and Determination

12. I have carefully considered the application before this court, the Affidavit filed in reply as well as the written submissions filed by both parties.
13. Article 165(6) of the *Constitution* of Kenya 2010 grants to the High Court supervisory jurisdiction over subordinate courts as well as over any person, body or authority exercising or judicial or quasi-judicial function. Article 165(7) provides as follows:-
 - (7) For the purposes of clause(6) the High Court may call for the record of any proceeding before any subordinate court or person, body or authority referred to in clause (b), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”
14. The power of supervision imposes a duty on the High Court to ensure that subordinate courts and tribunals remain within the boundaries of their jurisdictional and procedural authority. It is to prevent any irregular un-procedural and/or illegal acts by subordinate courts.
15. However, it must be remembered that all courts including the subordinate courts have independence in the manner in which they conduct their duties. In *Dalmia Jain Airways v Sukumar Mukberjee* AIR 1951 Cal 193, it was pointed out that the power of superintendence held by the High Court must be exercised ‘most sparingly’ and only in appropriate cases. In the *Dalmia Jain Airways* case, the court cited the case of *Manmathanath v Emporer* where it was held that –

“The power of superintendence is not a power given to this court to correct errors otherwise it would be tantamount to a right to entertain appeal on law and fact. The right should be exercised only in cases where the courts have clearly done something which they were not entitled to do. The power must be used to keep the courts below within the bounds prescribed by law for such courts.....” (own emphasis)

16. Similarly the High Court should avoid using its supervisory jurisdiction to micro manage trials in the lower court. In the case of *National Social Security Funds v Sokomania Ltd and Another* [2021] eKLR Hon Justice Samson Okong’o held as follows:-

“Where, or if, it is intended to exercise Supervisory Jurisdiction under the *Constitution*, I think the following safeguards should be observed:

- i. A balance has to be struck in the exercise of constitutional Supervisory Jurisdiction to ensure there is no appearance that its object is to micro-manage the trial court’s independence in the conduct and management of its proceedings;
- ii. Ideally, constitutional Supervisory Jurisdiction should be exercised only after the parties are heard on the subject matter in question;



- iii. Supervisory Jurisdiction should not be used where the option of revision is appropriate or applicable;
 - iv. Supervisory Jurisdiction should not be used as a shortcut for an appeal where circumstances for appeal clearly pertain and are more appropriate;
 - v. Supervisory Jurisdiction should be exercised to achieve the promotion of the public interest and public confidence in the administration of justice.” (own emphasis)
17. Therefore the mandate of the High Court in exercising its supervisory jurisdiction is to correct grave dereliction of duty and flagrant abuse of fundamental principles of law by subordinate courts which would lead to grave injustice unless the High Court intervenes.
 18. The Applicant sought leave to file an appeal against the trial courts decision to lift the Warrants of Arrest issued against the Respondent. Apparently, that appeal has not been filed. Instead, the Applicant came up with the present application challenging the decision of the learned trial magistrate to stay the proceedings pending hearing and determination of the intended appeal.
 19. In my view the proper course of action would have been for the Applicant to file an application in the lower court asking the trial magistrate to revise the orders of stay. The trial court is vested under the law with discretion to stay proceedings. In making those orders, the trial magistrate acted well within her jurisdiction and did not breach any law or procedure. I am mindful that this court needs to guard against falling into the trap of micro-managing proceedings in the subordinate court.
 20. The Applicant claims that the magistrates orders of stay mitigate against the best interests of the child as the trial will be delayed. I note that interim orders were made in the lower court to cater for the child’s education and upkeep pending hearing of the main suit. It is the Applicant herself who sought leave to appeal. Moreover, it is clear that the Applicants move was a petty one given that the Kshs 75,000 had already been paid. In my view, the Applicant herself is allowing her hatred for the Respondent to cloud the overriding issue being the welfare of the child. Seeking to have a person jailed when the debt has already been paid is not a *bona fide* action. The Applicant seems more determined to have the Respondent jailed than to conclude a case which she herself filed.
 21. I find that by filing this application instead of seeking a review in the lower court and/or pursuing her extended appeal, the applicant is herself prolonging the case.
 22. Finally, I find no merit in this application. The same is dismissed in its entirety. Each party to bear its own costs.

DATED IN NAIROBI THIS 27TH DAY OF MAY 2022.

MAUREEN A. ODERO

JUDGE

