



**DN v CM & 2 others (Family Appeal 23 of 2018)
[2022] KEHC 12759 (KLR) (24 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12759 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL 23 OF 2018**

**JO NYARANGI, J
AUGUST 24, 2022**

BETWEEN

DM APPLICANT

AND

CM 1ST RESPONDENT

LAND REGISTRAR THIKA 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

*(Arising from the decree of Hon Sindani made in Tononoka
Children’s Case No 2965 of 2016 delivered on May 30, 2018.)*

RULING

1. Vide its judgment dated June 30, 2018, the Tononoka Children’s Court entered judgment in favour of the applicant (mother to the minors) thus directing that the plaintiff and the defendant have equal parental responsibility to the issues herein; actual/physical custody to vest in the plaintiff with unlimited access to the defendant on alternate weekends and during half of the school holiday; legal custody to vest in both parents; the plaintiff to provide shelter for the children; the plaintiff to provide school fees directly to the children’s school and meet all school related expenses directly to the school from time to time in the current school or in a mutually agreed on school from time to time; the children to remain under both party’s medical cover and the defendant to meet any extra medical expenses as and when it may arise from time to time; parties to share monthly maintenance of food and upkeep at a ratio of 70:30 as against the defendant and the plaintiff respectively thus the defendant to contribute Kshs 45,000 per month payable to the plaintiff on or before the 5th day of every month; each party to provide entertainment while with the children; clothing to be provided by both the plaintiff and the defendant at 50:50 in any event not less than twice in a year.



2. Aggrieved by the said decision, the appellant/respondent lodged an appeal. On July 17, 2020, the lower court's orders were confirmed save for substitution of the contribution for maintenance which was reduced from Kshs 45,500 to Kshs 30,000 every month. However, the appellant did not comply thus attracting attachment of his salary which order was made on October 24, 2020 but could not be realized as the respondent stopped working. He was later cited for contempt whereby he was found guilty and sentenced to Kshs 100,000 in default serve 30 days imprisonment. That order was never implemented as the appellant/respondent was not arrested nor was the fine paid.
3. Subsequently, the respondent/ applicant filed an application dated December 22, 2021 seeking sale of immovable property LR Thika Municipality Block 17/4XX to realize the execution process. The application was however dismissed as the ownership documents were not attached.
4. Determined to execute the court judgment, the applicant filed a notice of motion dated April 19, 2022 seeking that;
 - a. This application be certified as urgent and service be dispensed with in the first instance;
 - b. This honorable court finds the 1st respondent in arrears of Kshs 1,359,450
 - c. This honorable court be pleased to issue orders of attachment of all that property known as Thika/Municipality Block 17/4XX belonging to the 1st respondent in execution of a decree emanating from the judgment of Hon LK Sindani in Tononoka Children's Case No 296 of 2016 delivered on May 30, 2018.
 - d. The honorable court allows the sale of all the property known as Thika Municipality Block /17/4XX in execution of the decree
 - e. The honorable court to issue a date for notice to show cause (NTSC) why the execution of immovable property namely Thika /Municipality /Block 17/4XX belonging to the 1st respondent should not proceed;
 - f. The costs of this application be on the cause; and
 - g. The honorable court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.
5. The application is anchored on the grounds set out on the face of it and averments contained in the affidavit in support sworn by the applicant on April 19, 2022 in which she averred that the respondent was in arrears of Kshs 1,359,450 arising from the decree of Hon Sindani made in Children's Case No 2965 of 2016 delivered on May 30, 2018. That the said amount is accumulation of payments of school fees and related expenses, monthly upkeep, extra medical expense and investment for future medical expenses including, education for the benefit of the minors, clothing and food.
6. The applicant attached a valuation report and a search for the said property amounting to kshs 1,200,000. Despite service of the application upon the respondent, no response was ever filed. The application was therefore argued exparte. There is no dispute there is a court judgment and a decree thereof. There is also no dispute that the appellant's/respondent's salary was by an order of the court dated October 19, 2020 attached but the appellant/respondent opted to resign. Equally, the appellant/respondent was fined Kshs 100,000 in default serve 30 days after being cited for contempt.
7. Before me is an application to execute the decree by way of attachment of immovable property. The decree arose from the judgment issued by Hon Sindani of Tononoka Children's Court which was



upheld by the High Court save for the maintenance expenses which was adjusted from Kshs 45,000 to kshs 30,000.

8. It is clear from the history of this case that the applicant has deliberately ignored and or disobeyed various court orders. He cannot be left to choose whether to obey and not to obey.
9. However, from the wording of the substantive prayer, the decree sought to be executed was issued by the Honorable Sindani *vide* Children Case No 296 of 2016 Tononoka children's court. It then follows that it is the court that issued the order whose decree that is sought to be executed that should issue orders for implementation of the same.
10. Although the High Court had previously handled notice to show cause and attached the salary of the respondent as a form of execution that was in relation to realization of the maintenance expenses which was also ordered by the High Court on appeal. In this application, the applicant is seeking execution of the entire judgment entered by the lower court. Accordingly, the lower court should be moved for execution of its orders by way of attachment of the respondent's assets. To that extent, the application is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF AUGUST, 2022

JN ONYIEGO

JUDGE

