



REPUBLIC OF KENYA



KENYA LAW

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**JGM v MW (Civil Appeal 20 of 2017) [2022] KEHC 13304 (KLR)
(Family) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13304 (KLR)

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

**FAMILY
CIVIL APPEAL 20 OF 2017**

**AO MUCHELULE, J
SEPTEMBER 29, 2022**

BETWEEN

JGM APPELLANT

AND

MW RESPONDENT

(Being an Appeal from the Judgment and Decree of the Children Court, Nairobi delivered by Hon. Otindo (SRM) dated 2nd March 2017 in Children Cause No. 1396 of 2015)

RULING

1. The appellant JGM and the respondent MW got married in 2011 and got two children, AKM and JKG, who were the subject of the Children Court at Nairobi Cause No 1396 of 2015.
2. In the cause the appellant sued the respondent for the joint legal custody, care and control of the minors. Along with the cause was a chamber application for joint legal custody, care and control of the minors and unlimited access of them. The respondent filed a defence and counterclaim seeking the sole custody of the minors and the payment of their maintenance and school fees by the appellant.
3. On March 2, 2017 the trial court delivered a judgment in the following terms:-
 - 1) that the plaintiff shall provide for school fees and school related expenses for both minors at a school both parties shall agree on;
 2. that the plaintiff shall also provide for medical care for the minor and the clothing needs of the minors;
 3. that the plaintiff shall provide for shelter and the related expenses plus the caregiver expenses;



4. that the food expenses of Kshs 36,000/= shall be shared as follows; the plaintiff shall contribute Kshs 20,000/= per month while the defendant shall contribute Kshs 16,000/= per month;
5. that the entertainment expenses shall be catered by each party at their own pleasure;
6. that the diaper expenses considering the age of the child, is allowed at a reasonable sum of Kshs 3,500/= per month which shall be equally shared at Kshs 1,750/= per month for the next one year only; and
7. that each party shall bear own costs of the suit and be at liberty to apply.'

The appellant was aggrieved and filed an appeal to this court whose grounds were as follows:-

- ' (1) That the learned magistrate erred in fact and in law in awarding maintenance of a larger proportion against the appellant without considering that the child maintenance is an equal parental responsibility of both parents;
- (2) That the learned magistrate erred in fact and in law in failing to consider the appellant's and respondent's financial means considering that both parties are in formal employment before making a determination on the minors' maintenance;
- (3) That the learned magistrate erred in fact and in law in making a finding that the appellant conceded to provide shelter and other related expenses and caregiver expenses which was not in evidence adduced at the trial;
- (4) That the learned magistrate erred in fact and in law by erroneously disregarding evidence on record thus failing to consider the appellant's evidence on basic requirements he was willing to offer and thereby erroneously making a determination without considering the appellant's evidence and submissions;
- (5) That the learned magistrate erred in fact and in law by alluding to evidence which the appellant is purported to have testified and thus occasioning the appellant to be prejudiced by the trial magistrate's judgment.'

4. The respondent filed a notice of preliminary objection dated March 3, 2021 whose grounds were as follows:-

- ' 1) The issues canvassed in this suit are sub-judice and should be rendered void for duplicity as the same being directly and substantially in issue in Nairobi Children Court Case No 1396 of 2015 where the appellant/plaintiff has filed a review application dated February 17, 2021 between the same parties litigating under the same title and pending before the children's court having jurisdiction to grant the relief's sought.
- 2) The appellant continues to be in contempt of orders issued by the Nairobi Children Court Case No 1396 of 2015 for maintenance of the minors herein and there is a pending order for salary attachment dated December 4, 2020 against him and served to his employer-[Particulars Withheld].
- 3) That the appellant has not complied with the judgment of the children's court dated March 2, 2017;
- 4) The suit is defective as it is bad in law;
- 5) That the suit is frivolous, vexatious and an abuse of court process.'



It is this notice that is the subject of this ruling. Mr Aboge for the appellant and Ms Mundia for the respondent addressed the objection through written submissions.

5. For a preliminary objection to succeed, the courts have set down the principles to be considered. First the objection should raise a crucial point of law; secondly, the point is argued on the assumption that all the facts pleaded by the other side are correct; thirdly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion; and, finally a valid preliminary objection should, if successful, dispose of the suit. The celebrated decision in *Mukisa Biscuits Manufacturing Co. Ltd – v- West End Distributors Ltd [1969] EA 696* is clear on this.
6. The first ground was that this appeal is subjudice as the same issues are the ones in the children court in the application dated February 17, 2021 before that court. I have checked the application. The court had on December 4, 2020 ordered the attachment of the appellant's monthly salary to recover Kshs 2,286,700/= which he had not paid over a time in regard to the judgment that had been delivered. The application sought to stay the order and to vary and/or set aside the orders issued on December 4, 2020. The orders issued on December 4, 2020 followed a notice to show cause dated June 26, 2020 why the appellant's 1/3 of his monthly salary should not be attached to recover Kshs 2,385,000/= that was required. There was a response filed. The application was heard and a ruling delivered on December 1, 2020 allowing it. On December 4, 2020 a formal order was issued to attach the salary. It is this attachment that sought to be stayed. It was also sought that the orders of December 4, 2020 be varied and/or set aside.
7. It is evident that this appeal challenges the judgment that was delivered on March 2, 2017, when the application dated February 17, 2021 in the trial court seeks the variation and or setting aside of the execution orders of December 4, 2020. The appeal and the application are quite different. They relate to two different issues. The issue of subjudice does not arise. The ground fails.
8. In ground two, there was a claim that the appellant was in contempt of the orders of the children court that followed the judgment. The issue of contempt is before the trial court, which under section 94 of the *Children Act* has powers to enforce its orders. The appeal is not over the execution orders. It is not over the question whether or not the appellant was found to be in contempt. The two matters are not the same. This court cannot stop what is going on in the children court. It must wait for either party to invoke its appellate powers. The same goes for ground three of the objection. Compliance of the orders in the judgment belongs to the trial court.
9. In regards to grounds 4 and 5 of the objection, it is clear that the questions cannot be answered until the merits of the appeal have been heard and determined. The appeal cannot be prejudged. The respondent cannot anticipate what the court will find on the appeal.
10. In conclusion, the preliminary objection is not sustained. It is dismissed with costs.
11. So that the appeal is heard and determined, and considering that it relates to children, I give the following directions:-
 - a. the appeal is admitted to hearing by this court;
 - b. the appeal shall be heard through written submissions;
 - c. the appellant shall file and serve written submissions within 21 days;
 - d. on service, the respondent shall file and serve submissions within 21 days; and
 - e. this matter shall be mentioned on November 24, 2022 to give the judgment date.



12. In the meantime, the children court file is released to that court.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2022.

A.O. MUCHELULE

JUDGE

