SNN v WW (Civil Appeal E050 of 2022)
[2022] KEHC 13232 (KLR) (Family) (29 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13232 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL E050 OF 2022

AO MUCHELULE, J

SEPTEMBER 29, 2022

BETWEEN

SNN ..... APPLICANT

AND

WW ..... RESPONDENT

(Being an appeal from the ruling and orders of Resident Magistrate, Hon. R.O. Mbogo delivered at Nairobi on 22nd April 2022)

RULING

1. The applicant SNN is the father of the respondent WW In a judgment delivered on November 1, 2019 in the Children Court at Milimani there was an order extending the applicant's parental responsibility beyond the age of 18 to have him pay her college fees. It is evident that the fees was not paid, which led to the respondent taking out a notice to show cause why a third of the applicant's monthly salary should not be attached to settle the Kshs 720,920/= that was outstanding. The applicant opposed the notice to show cause and at the same time applied to have the *exparte* proceedings and judgment set aside, saying that he had been condemned unheard as he was all the time not aware of the proceedings. The trial court allowed the notice to show cause and dismissed the application to set aside.

2. The applicant was aggrieved by the orders and filed the appeal that is contained in the amended memorandum of appeal dated May 30, 2022 whose grounds were as follows:-

    (1) That the learned trial magistrate erred in law, in principle and in fact and failed to uphold the rule of natural justice hence denying the appellant an opportunity to defend the suit filed against him by the respondent and tried *exparte* on the October 22, 2019.

(2) That the learned trial magistrate erred in law, in principle and in fact by holding that the appellant had not demonstrated sufficient grounds to warrant the court to set aside the *exparte* judgment dated November 1, 2019.

(3) That the learned trial magistrate erred in law, in principle and in fact by holding that the appellant had not adduced sufficient reasons to show cause why his salary should not be attached to satisfy the decretal amount of Kshs 720,920/= for the *exparte* judgment dated November 1, 2019.

(4) That the learned trial magistrate erred in law, principle and in fact in proceeding to issue orders for execution for an erroneous exparte judgment intended to give effect to orders issued in a previous suit Nairobi CMCHC Civil Case No 599 of 2013 the suit of which had been dismissed for want of prosecution (and not revived) thus the lapse of the orders.

(5) That the learned trial magistrate erred in law, in principle and in fact in holding that the notice to show cause was unopposed and the figures of the decretal sum were unopposed yet the appellant had indeed replied to the same and sought indulgence of the court for an opportunity to defend the suit albeit out of time.

(6) That the learned trial magistrate erred in law in principle and in fact in noting a disconnect between the appellant and his previous advocate in the previous matter in CMCHC Civil Case No 599 of 2013 hence an issue that casts doubts on whether this appellant was served or not, thus revisiting an advocates mistake on an innocent client.

(7) That the learned trial magistrate erred in fact, in law and in principle in ordering that funds drawn from the appellants attached salary be paid up to a personal account to the respondent yet the same was meant to cover the alleged school fees arrears."

3. It is notable that the judgment sought to be executed was delivered on November 1, 2019. It was not appealed against. The application to set it aside was dismissed and the request in the notice to show cause why the monthly salary should not be attached was allowed.

4. The applicant stated that the appeal that he has filed has merits. The respondent thought otherwise. It is not for this court to deal with the merits of the appeal. However, it was indicated by the respondent, without demur, that the applicant was defended during the lower court proceedings and that his advocates were served with pleadings, including the notice of delivery of the judgment; but that he chose not to defend or to participate. Therefore, that the application was brought to delay her getting school fees.

5. The question whether the applicant stood to suffer substantial loss was addressed by the parties in the written submissions. This is a money decree. The money is for college fees of the applicant's daughter, the respondent. The respondent annexed a consent signed between them and adopted by the court on February 11, 2014 in Children Court Case No 599 of 2013 in which, among other things, the applicant agreed to provide college fees for the respondent in any public university and school related expenses. Is this the reason why the suit herein was not defended? Has the applicant been paying the agreed university fees? This is a special case why the applicant cannot be saying that, if the application is not allowed, he may lose his money. This is because he agreed to pay his daughter's school fees. Such fees is not refundable. It follows that the argument that he will suffer substantial loss if stay is not granted would not make sense.

6. The result is that the application has no merits and is dismissed with costs.

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

A.O. MUCHELULE

JUDGE