



**KCS v DJS (Miscellaneous Civil Application E029 of 2022)  
[2022] KEHC 14249 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14249 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS CIVIL APPLICATION E029 OF 2022  
RN NYAKUNDI, J  
OCTOBER 21, 2022  
IN THE MATTER OF THE CHILDREN ACT NO. 8 OF 2001  
IN THE MATTER OF EJ, OJ, SJ, IJ AND JJ.....MINORS**

**BETWEEN**

**KCS ..... APPLICANT**

**AND**

**DJS ..... RESPONDENT**

**RULING**

1. Before me for determination is the applicant’s application dated February 24, 2022 in which the applicant seek orders that: -
  1. Spent.
  2. The warrants of arrest issued against the applicant on February 22, 2022 before Hon Menya (SRM) in Eldoret Chief Magistrates Court Children Case No 85 of 2019 be stayed and or set-aside pending the hearing of this application.
  3. That there be stay of execution of the orders given on the July 26, 2019 Hon Menya (SRM) in Eldoret Chief Magistrates Court Children Case No 85 of 2019 compelling the defendant/ applicant to pay the plaintiff/respondent an upkeep or maintenance of Kshs 10,000/= per month and all consequential orders pending the hearing and determination of this application inter-partes.
  4. That there be stay of execution of the orders given on the July 26, 2019 Hon Menya (SRM) in Eldoret Chief Magistrates Court Children Case No 85 of 2019 compelling the defendant/ applicant to pay the plaintiff/respondent an upkeep or maintenance of Kshs 10,000/= per



month and all consequential orders pending the hearing and determination of the intended appeal.

5. Leave be and is hereby granted to the applicant to appeal against the ruling of the court delivered on January 24, 2020 by Hon Menya (SRM) in Eldoret Chief Magistrates Court Children Case No 85 of 2019 out of time.
  6. The time for lodging the appeal against the ruling of court delivered on January 24, 2020 by Hon. Menya (SRM) in Eldoret Chief Magistrates Court Children Case No 85 of 2019 be extended.
  7. Upon grant of leave to appeal out of time, the memorandum of appeal lodged herein be deemed as duly filed.
  8. Costs of this application be in the cause.
2. The application is premised on the grounds on the face thereof and is further supported by the affidavit sworn on February 24, 2022 by Kipkemboi Cheruiyot Sum.

### **Applicant's Case**

3. The applicant's case is that on July 26, 2019 the court in Eldoret Chief Magistrate's Court Children Case No 85 of 2019 delivered a ruling in respect of the respondent's application dated April 23, 2019. That the ruling directed that the applicant caters for all the school fees for the minors and further that the applicant pay Kshs 10,000/= per month for maintenance of the minors.
4. The applicant was aggrieved by the section of the ruling requiring him to pay Kshs10,000/= as monthly upkeep for the minors. The applicant contends that; all the minors are in boarding schools and tertiary institutions where he pays school fees, the minors only spend minimal time home during school holidays, the respondent is employed and is capable of providing for the upkeep of the minors during school holidays, that he also stays with some of the minors during school holidays, that the ruling appeared to be contradictory since the court had ordered the respondent to take care of food and shelter for the minors which to the applicant's understanding implies upkeep, that he is also takes care of the minors medical issues and that the main suit is yet to be heard and the orders are akin to final orders at a preliminary stage.
5. The applicant deposed that being aggrieved with said ruling he instructed his advocated then on record to apply for review of the said orders *vide* the application dated August 27, 2019. The applicant further deposed that the said application was prosecuted and what was pending was a ruling. The applicant however contends that his advocate then on record never informed him of the outcome of the said ruling. That after several attempts to find information regarding the said ruling proved to futile, the applicant then decided to change advocates and procured the services of M/s Chepkonga & Company Advocates currently on record.
6. The applicant deposed that upon perusal of the court file by his new advocates on record, he learnt that a ruling had since been rendered on January 24, 2020 dismissing his application for review. The applicant also learnt that the respondent had taken out notice to show cause against him which notice he maintains was never served upon him. The applicant also learnt that warrants of arrest had been subsequently issued against him and their execution was imminent.
7. In view of the aforementioned the applicant then his current advocates on record to file an application at the trial court seeking stay of execution and leave o file appeal out of time against the ruling that was delivered on January 24, 2020. That the application was heard *ex-parte* in the first instance and



the warrants of arrests stayed pending the hearing and determination of the application *inter-partes*. The applicant contends that efforts to set down the said application for hearing have been rendered futile as a further application filed by the respondent was given pre-eminence his despite having filed first in time.

8. The applicants contends that subsequently arrest warrants were issued against him on September 28, 2021 without his or his advocates knowledge as there no proper service of the mention notice. The applicant deposed that further arrest warrants were issued against him by the court on February 21, 2022. The applicant further contends that unless stay orders are granted, he may be arrested at any time and yet he has been dutifully paying fees for all the minors as well as taking care of their upkeep.
9. The applicant contends that article 53 (e) of the Constitution of Kenya provides that parental responsibility of a child should be shared equally between the mother and father to a child whether married to each other or not.
10. The applicant deposed that time within which to file an appeal has since lapsed due reasons beyond his control. The applicant further deposed that the appeal has high chances of success.
11. The applicant is apprehensive that the respondent has set in motion the execution process and that unless stay of execution is granted the respondent will proceed with execution to his detriment.
12. The applicant urged court to grant him leave to file the appeal out time.
13. The application is opposed by Dorcas Jeptekeyn Somboi, the respondent herein *vide* the replying affidavit sworn on March 8, 2021.
14. The respondent urged court not to grant the applicant the orders sought until he complies with the orders issued by the trial court on July 26, 2019.
15. The respondent contends that the applicant being dissatisfied with the orders of July 26, 2019, applied for review and a ruling was rendered on January 24, 2020.
16. The respondent contends that all the said period she has been taking care of the minor needs and that in August, 2020 due to the pressure of taking care of the minors and Covid-19 related issues she approached her advocate who in turn wrote a letter to the applicant's advocate seeking a way forward but there was no response prompting her to seek the intervention of the court.
17. The respondent deposed that the matter was then fixed for mention to confirm compliance on the part of the applicant but his advocate did not have any positive report regrading the issue prompting the respondent's advocate to seek notice to show cause. The respondent maintains that the notice to show cause was served upon the applicant who failed to appear before court hence issuance of the warrant of arrest.
18. The respondent further deposed that upon executing the said warrants, the applicant through his advocate filed an application seeking leave to appeal against the ruling of January 24, 2020 and the court granted the applicant temporary stay of execution.
19. The respondent then filed another application seeking to compel the applicant to comply with the court orders of July 26, 2019 before he be could heard which application was allowed and parties directed to negotiate and agree on the way forward. The respondents deposed that unfortunately there was effort on the part of the applicant and on February 22, 2022 her advocate advised that since the warrant of arrest was still in place they should proceed and enforce them.



20. The respondent further contends that the applicant should first cater for the school fees of the minors and all school related items including shopping for the children before seeking for review of the orders of July 26, 2019.
21. Parties did not file any written submissions.

### **Determination**

22. Article 53 1(e) Constitution 2010 and section 23 & 24 of the Children Act 2001 provides for the parents of the children to have equal responsibilities for their children. It is in deed true that appellant and respondent have equal responsibilities to their (5) children. However, the responsibilities are allotted based on the specific circumstances of each case. In the present case, the trial court noted that both the applicant and respondent are working before directing the responsibilities that they will each bear.
23. The trial court in its own wisdom directed that the applicant caters for the minors' school fees whereas the respondent pays for all other school related items. The court further directed that the respondent shall take of clothing, food and shelter as the applicant was already catering for their medical cover under his insurance scheme. The trial then directed the applicant to remit Kshs10,000/= as maintenance for the minors before every 5<sup>th</sup> day of the month.
24. This is a matter that touches on the interests of the children. The children have to go to school and their maintenance and upkeep catered for. These are not matters that can be postponed, or delayed. The court has an obligation to safeguard and promote the rights and welfare of the children.
25. From the record the applicant has attached receipts to prove that he has been paying school fees for the minors. He however, has not adduced any document to show that he has been paying upkeep of Kshs 10,000/= per month as directed which also forms the basis of his intended appeal. It is worth noting that although stay of execution is a discretionary matter. It cannot be granted to a party who has not met his part of the bargain. The order that the applicant pays for the upkeep and education of his children still stands. He is in arrears and that will substantially affect the rights of the children.
26. In Solomon Muriithi Gitandu & Another v Jared Maingi Mburu [2017] eKLR the court held that: -

‘In the case of Braeburn Limited v Gachoka and another (2007); it was held *inter alia*;

“A person is not liable to be committed to civil jail for inability to pay a debt but a dishonest and fraudulent debtor is liable to be punished by way of arrest and committal.”

The court further observed that: -

“section 38 of the Civil Procedure Act however, provides a limitation of the courts' power to order execution of a decree by way of detention in prison. The section prohibits the court from making an order of execution of any decree for the payment of money unless the judgment-debtor has first been given an opportunity of showing cause why he should not be committed to prison and even where the judgment debtor has been given such notice to show cause, the court must itself be satisfied and give reasons in writing for that.”

These limitations are further re-stated under order 22 rule 31 (1) Civil Procedure Rules. A notice to show cause may be issued requiring the judgment debtor to show cause and where he fails to appear a warrant of arrest is issued. In the case the court found that the requirement for notice to show cause is mandatory and whether the judgment appears for notice to show cause or under warrant of arrest, it is the duty of the decree holder to satisfy the court that the judgment debtor is not suffering from poverty, or any other sufficient



cause and is able to pay the decretal sum or proof the provisions of order 22 rule 35 Civil Procedure Rules, that is examination of the debtor as to his property.

9. As execution by way of arrest and committal to prison deprives the debtor his liberty, the trial court ought to have ensured strict compliance with section 38 supra and order 22 rule 31 (1) supra to determine the appellants' ability to pay. The court had a duty to ensure constitutional safeguards as to due process by ensuring the notice of intended execution by way of committal was personally served and a due inquiry and satisfaction of the court by the decree holder as to the judgment debtor's ability to pay. It is only then that the court would rightly commit him to prison. A judgment debtor in view of the provisions of section 38 of the procedure act and order 22 rule 31 (1) will not be committed to prison on account of his inability to pay or on account of poverty.

10. It has been held severally that no person should be sent to prison for inability to pay a debt. In *Zippora Wambui Muthara – Milimani BC Cause 19/2010* (unreported) Justice Koome (as she then was) observed as follows:

“There are several methods of enforcing a civil debt such as attachment of property. The respondent's claim that the debtor has money in the bank, that money can also be garnished. An order of imprisonment in civil jail is meant to punish, humiliate and subject the debtor to shame and indignity due to failure to pay a civil debt. That goes against the international covenant on civil and political rights that guarantees parties' basic freedoms of movement and of pursuing economic cultural development”

11. It is incumbent on the party seeking to execute a civil debt by way of committal to civil prison to adhere to the legislative safeguards before a party can be committed to civil jail. In the case of *Braeburn supra* and *Jane Wangui Gachoka v Kenya Commercial Bank Petition 51/2010* it was held that section 38 and 40 of the *Civil Procedure Act* are neither inconsistent with the provisions of the relevant provisions of the *Constitution* and International Bills of Human Rights. I am persuaded to agree with the findings. However, for a judgment debtor to be committed to prison, the court must ensure that the conditions for committal to prison on account of a money decree are strictly followed. A judgment debtor will not be committed to prison for inability to pay or to fulfill contractual obligation. There must be additional reasons and the court being satisfied after the debtor has been given notice to show cause and give reasons in writing as provided under section 38 of *Civil Procedure Act* and order 22 rule 31 (1) Civil Procedure Rules. There is also a requirement that the debtor be served with notice of entry of judgment under order 22 rule 20. This gives the debtor opportunity to pay before the decree holder starts the execution process.’

27. Being guided by the above provisions of law, I am of the view that the best interests of the children herein will not be served with the applicant in jail. The applicant still has obligations that he needs to fulfil to the children and cannot do so while in jail.

28. In view of the foregoing, and in the best interests of the children, I hereby by order that in the circumstances of this case:



- a. The children court orders of September 28, 2021 and February 21, 2022 are hereby stayed; warrants of arrest withdrawn conditionally.
- b. The appellant shall pay school fees and upkeep of Kshs 10,000/= for the (5) children when due.
- c. The appellant is hereby granted leave to file an appeal out of time against the ruling of the court delivered on January 24, 2020.
- d. Each party shall bear its own costs

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 21<sup>ST</sup> DAY OF OCTOBER, 2022.**

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**R. NYAKUNDI**

**JUDGE**

