PJ v KM (Civil Appeal E066 of 2020) [2022] KEHC 15847 (KLR) (Family) (25 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15847 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL E066 OF 2020

MA ODERO, J

NOVEMBER 25, 2022

BETWEEN

PJ ..... APPELLANT

AND

KM ..... RESPONDENT

JUDGMENT

1. Before this court is the memorandum of appeal dated December 14, 2020 by which the appellant PJ prays the following:-

> " 1. The appeal be allowed entirely.
>
> 2. That this appeal be allowed and the ruling of the lower court dated November 30, 2020 be set aside in its entirely and be substituted with the order of this honourable court.
>
> 3. That the costs of this appeal and suit appealed from the awarded to the appellant.
>
> 4. That the court to grant any other or further orders as it may deem just."

2. The appeal was opposed by the respondent KM. The matter was canvassed by way of written submission. The appellant filed the written submissions dated June 16, 2020 whilst the respondent relied upon her written submissions dated July 13, 2022.

Background

3. This appeal arises from the ruling delivered by Hon GN Opakasi Senior Resident Magistrate on November 30, 2020.

4. The parties herein who are parents to the minors ARJ and CNJ had been embroiled in a dispute at the Nairobi Children's Court. The respondent (who was the applicant in Nairobi Children's Case No 257 of 2020) had filed an application to be awarded interim custody of the two (2) minors, as well as Kshs 200,000/- for the childrens upkeep. The respondent also sought for orders to compel the appellant to meet the education expenses for the two (2) minors.

5. On February 28, 2020 Hon MW KIBE issued an order directing the appellant to meet the cost for school fees and other education related expenses for the minors at their current school. The appellant failed to comply with the orders and the arrears of school fees accumulated to Kshs 562,950.

6. The respondent then took out a notice to show cause against the appellant leading to the issuance of a warrant of arrest against him. The warrant of arrest was executed on July 20, 2020.

7. Upon the appellant being arraigned in court the parties entered into a consent in the following terms:-

> " The defendant shall today the July 20, 2020 pay the plaintiff the sum of Kshs 100,000/- upon which he will be released and after 3 weeks on August 10, 2020, the defendant shall pay Kshs 200,000/- to the plaintiff and the last instalment of Kshs 262,950/- shall be paid on the September 7, 2020 and the notice to show cause dated the July 9, 2020 shall be deemed as settled."

8. Thereafter on August 11, 2020 the appellant filed an application in the Childrens Court seeking to review and/or set aside the consent order on grounds that he acceded to the said consent under duress. In the ruling dated November 30, 2020 the children's magistrate dismissed the application to set aside the consent.

9. Being aggrieved by that ruling the appellant filed this present appeal which is premised upon the following grounds-

> " 1. That the learned trial magistrate erred in law and fact in failing to accord the appellant an opportunity to be heard in the application dated February 24, 2020.
>
> 2. That the learned trial magistrate erred in law and fact in failing to consider that the order of February 28, 2020 ordered parties to file an affidavit of means and the same was to proceed on March 30, 2020 a time the courts were closed.
>
> 3. That the learned trial magistrate erred in law and fact by failing to consider that the affidavit of service filed in the matter dated July 1, 2020 may not have been properly served.
>
> 4. That the learned trial magistrate erred in law and fact by failing to consider that the notice of show cause dated June 15, 2020 was not served upon the appellant hence failing to give him an opportunity to be heard.
>
> 5. That the learned trial magistrate erred in law and fact by failing to give the appellant an opportunity to be heard prior to issuing warrants of arrest

dated July 15, 2020 and further failed to take into consideration the current prevailing Covid-19 situations.

6. That the learned trial magistrate erred in law and fact by issuing a warrant of arrest again against the appellant and committing him to civil jail yet the appellant clearly indicated in his statement that he was not aware of any court proceedings.

7. That the learned trial magistrate erred in law and fact by failing to consider and give probative value to the evidence given by the appellant with regards to the consent entered into between the parties herein whereby the appellant indicated that his signature was appended under duress in order to release him from jail failure to which he would spend more time there.

8. That the learned trial magistrate erred in law and fact by issuing interim orders for a prayer also sought in the main suit clearly violating the appellants constitutional right to be heard before a ruling is issued.

9. That the learned trial magistrate erred in law and fact by showing outright bias in favour of the respondent by endangering his life on the pretext of enforcing court orders during the current covid-19 situation.

10. That the learned trial magistrate erred in law and fact by issuing an order designed to punish the appellant, an order that clearly was not designed to take into consideration the best interest of the child.

11. That the learned trial magistrate erred in law and fact by failing to take into consideration that the respondent is employed hence should equally provide for the minors as is provided for in Article 53 (e) of the *Constitution*.

12. That the learned Trial Magistrate erred in law and fact by failing to grant the prayers sought by the Respondent without taking into consideration the current covid-19 restrictions could have contributed to an act of omission that would result in a miscarriage of justice."

10. As stated earlier the appeal was opposed.

Analysis and determination

11. I have carefully considered the appeal filed by the appellant herein, the record of proceedings at the childrens court as well as the written submissions filed by both parties.

12. This being a first appeal the court is obliged to reconsider and re-evaluate the evidence and to draw its own conclusions on the same. In the case of *Selle & Another v Associated Motor Boat Co Ltd & others* [1968] EA the court held as follows: -

> "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

13. Additionally this court is alive to the fact that this is a matter which concerns minor and as such the "best interests of the minor" should be given priority. In *MA v ROO* [2013] eKLR it was held thus:-

> " Article 53(2) of the *Constitution* requires this court to treat the best interest of the child as of paramount importance in every matter concerning the child. Section 4(3) of the *Children Act* requires all judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any power conferred by this act to treat the interest of the child as of first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to safeguard and promote the rights and welfare of the child, conserve and promote the welfare of the child, and secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest."

14. The appellant claimed that the learned trial magistrate failed to accord him an opportunity to be heard with respect to the application dated February 24, 2020 which was the original application which the respondent had filed seeking to compel the appellant to pay school fees for the minor.

15. It is a fact that the Article 52(2) of the *Constitution* of Kenya 2010 provides for the right to be heard. The appellant herein was properly served with the application dated February 24, 2020. The trial court found that the appellant was properly served on March 3, 2020 but opted not to file any reply to the application. Despite having been served the appellant did not attend court and as such the applicant was deemed to be unopposed and was allowed by the court. Having ignored the pleadings served upon him the appellant cannot now claim that he was denied a hearing.

16. I find that through service appellant was accorded the right and opportunity to be heard. The fact that the appellant chose not to exercise that right cannot be blamed on any person other than himself.

17. The appellant claims that he was prejudiced by the Covid-19 pandemic ravaging the country at the time and claims that he was not aware of the court proceedings. Here again I disagree. A close perusal of the record indicates that the appellant was served several times but tried his best to evade and/or frustrate the efforts to serve him.

18. The appellant cannot now feign ignorance regarding the matter in the children court. He probably mistakenly thought that by failing to attend court he could pretend not to have been served but that is not how the law works. In any event, the arrears of school fees accrued prior to the onset of the Covid – 19 Pandemic in Kenya. The appellant cannot use COVID as an excuse. I find that appellant was accorded an opportunity to be heard and I dismiss this ground of the appeal.

19. The appellant claimed that he was unable to pay the childrens school fees arguing that the respondent had enrolled the minors in a very expensive school. These are the very issues which the appellant ought to have raised during the hearing of the application if he had bothered to respond to the application filed by the respondent.

20. The appellant is seeking to have the consent entered into between the parties on June 20, 2020 set aside. A consent order is tantamount to an agreement or contract between the parties. It is trite that a consent may only be set aside on grounds which a contract may be set aside i.e. proof of fraud, collusion or misrepresentation by one of the parties.

21. In the case of *Flora N Wasike v Destimo Wamboko* [1988] eKLR the court state as follows:-

> "It is now settled law that a consent judgment or order has contractual effect and can only be set side on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out."

22. In *Purcell v F C Trigell Ltd* [1970] 2 All ER 671, Winn LJ said at 676 that;

> "It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons."

23. Likewise in *Samuel Wambugu Mwangi v Othaya Boys High School* Civil Appeal No 7 of 2014 [2014] eKLR the court observed that:-

> "Circumstances under which a consent judgment may be interfered with were considered in the case of *Brooke Bond Liebig (T) Limited v Maliya* (1975) EA 266. It was stated that prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts or in misapprehension or ignorance of material facts or in general for a reason which would enable the court to set aside an agreement."

24. The appellant has not availed any evidence of fraud, or misrepresentation on the part of the respondent in securing the consent.

25. The appellant claims that he entered into the consent under duress having been arrested and was seeking to secure his freedom from the cells. As rightly pointed out by the trial magistrate the proposal to settle the matter was made by counsel for the appellant himself. The parties were accorded time by the court and negotiated back and forth before the consent was reached. At all times the appellant had the benefit of legal counsel. I find no evidence of duress in a situation where parties were allowed time to negotiate and the appellant was represented by counsel.

26. Finally, the respondent in her submissions has pointed out the fact that even after the children's court dismissed his application to review the consent and even after the High court *vide* a ruling dated July 9, 2021 declined to stay the orders made by the children's court the appellant still continues to defy the orders directing him to pay the school fees. Therefore, the appellant does not approach this court with clean hands.

27. The appellant seems to believe that he is a law into himself. He has persistently refused to obey the orders made by court in this matter. courts do not make in vain. A party to whom a court order is directed is under an obligation to obey the said order even if he does not agree with it.

28. In the case of *K v JW* [2017] eKLR, Hon Lady Justice Achode (as she then was) stated as follows:-

> "A litigant who refuses to obey court orders as shown that he will not submit himself to the jurisdiction of the court when it does not suit his purpose. To blatantly choose to obey orders made by a court of competent jurisdiction is to abuse the dignity of the court and to have no regard whatsoever for the rule of law."

29. Further in *Econet Wireless Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828, Ibrahim J (as he then was) stated thus:-

> "It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is plain and unqualified obligation of every person against whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."

30. Finally the Court of Appeal in the case of *Fred Matiangi, Cabinet Secretary Ministry of Interior and Co-ordination of National Government vs Miguna Miguna & 4 others [*2018] eKLR states as follows:-

> "When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance."

31. The appellant herein is a serial contemnor. He does not deserve any audience or consideration from this court. It is a contradiction for the appellant to persistently ignore court orders and then approach the same courts seeking relief.

32. In adamantly refusing to provide for the education of his own children the appellant is placing the entire burden of providing for the minors on their mother. The appellants persistent refusal to pay his children school fees cannot be in the best interests of the minors who deserve to be provided for by both parents. The mother is already providing for the minors food, shelter, medical cover and clothing. The only thing the appellant is being asked to provide for is the minors education.

33. In conclusion, I find no merit in the appeal. It is clear that the appellant does not care for the best interest of his children. It is just a delaying tactic in furtherance of the appellant attempt to evade his obligation to educate his children. The appeal is dismissed in its entirety. Costs will be met by the appellant.

DATED IN NAIROBI THIS 25TH DAY OF NOVEMBER, 2022.

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MAUREEN A. ODERO

JUDGE