



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 55 OF 2017

EAW.....APPELLANT

VERSUS

WAN.....RESPONDENT

RULING

1. The applicant EAW and the respondent WAN got married in 1998 and separated in 2009. They have three children, born in 2001, 2003 and 2006, respectively. They have been in the Children Court at Milimani for a long time over the upkeep and education of the children. In an application dated 9<sup>th</sup> December 2016 the appellant sought the review of the court's ruling and orders dated 13<sup>th</sup> July 2016 that had attached Kshs.30,000/- of the respondent's monthly salary. In a ruling delivered on 25<sup>th</sup> July 2017 the court allowed review, and raised the amount to Kshs.45,000/- per month. The respondent was dissatisfied and appealed the decision to this court. In a judgment delivered on 5<sup>th</sup> November 2019, the appeal was allowed. The monthly salary of the respondent was to continue being attached at Kshs. 30,000/=

2. In a notice of motion dated 19<sup>th</sup> August 2020 the appellant asked for the review of the judgment on the basis that she had new material evidence that was not in her possession at the time of the hearing of the appeal. The alleged new evidence was that at the time of the order for the attachment of Kshs.30,000/= monthly the children were in lower classes but that were now in secondary school and university and therefore their needs had substantially increased. Secondly, that the earnings of the respondent had increased and he could therefore meet the payment of higher amount for the upkeep and education of the children. The application was opposed on several grounds. One of the grounds was that there had been no demonstration that the income of the respondent was higher. Secondly, that the respondent had another family that he was taking care of. Thirdly, that there had been no demonstration that the educational needs of the children had changed, even as he had continued to support them. Lastly, that the evidence regarding the income of the respondent had been illegally obtained by the respondent.

3. Under **section 73** of the **Children Act, 2001** the court with the primary jurisdiction over matters custody, maintenance and education of children is the Children Court. Under **section 98** of the **Act**

**“A court shall have power to make an interim maintenance order and in so doing may dispense with any notice that may be prescribed to be given to any person, if it is satisfied that it is in the best interests of the child so to do.”**

Lastly, under **section 99** of the **Act** –

**“The court shall have power to impose such conditions as it thinks fit to an order made under this section and shall have power to vary, modify or discharge any order made under section 98 with respect to the making of any financial provision, by altering the times of payments or by increasing or diminishing the amount payable or may temporarily suspend the order as to the whole or any part of the money paid and subsequently revive it wholly or in part as the court thinks fit.”**

4. The Children Court has the jurisdiction to periodically review and adjust the maintenance and education orders which it has issued where the circumstances of the child and the parents change (**J.K.W. –v- A.W.M. [2018]eKLR**). In order to review upwards or downwards, as the circumstances may demand, the court has to fully hear the parties and examine whatever evidence of means that will be availed. It is only then that the court can reach a decision as to the appropriate maintenance and education amount. Such decision is reviewable, or appealable, as the case may be.

5. That being the case, I remit this dispute to the Children Court in which the applicant shall make an appropriate application for the variation of the order of attachment of Kshs.30,000/= of the respondent's monthly income, and present evidence to support the request for variation so that the respondent can appropriately respond. The Court will then hear the parties and make a determination based on the evidence and the law.

6. I make no order as to costs.

**DATED AND DELIVERED NAIROBI THIS 18<sup>TH</sup> DAY OF MARCH 2021.**

**A.O. MUCHELULE**

**JUDGE**