



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**CIVIL APPEAL NO. E056 OF 2020**

**IN THE MATTER OF AN APPLICATION UNDER CHILDRENS ACT, 2001**

**IN THE MATTER OF MWO (MINOR)**

**RON.....APPELLANT/APPLICANT**

**VERSUS**

**EWV.....RESPONDENT**

*(Being an appeal from the Ruling and Order of Ms. Mary Otindo Senior Resident Magistrate at Nairobi CM Children's Case No. 591 of 2019 delivered on 17<sup>th</sup> November 2020)*

**JUDGEMENT**

1. Before this Court for determination is the Appeal filed by **RON** (the **Appellant**) through the Memorandum of Appeal dated **20<sup>th</sup> November 2020**. The Appeal arises out of a Ruling delivered on **11<sup>th</sup> November 2020** by **Hon M. Otindo Senior Resident Magistrate** in **Nairobi Children's Case No. 59 of 2019**.

2. The Respondent **EWV** opposed the Appeal. The Appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated **29<sup>th</sup> July 2020** whilst the Respondent relied upon her written submissions dated **15<sup>th</sup> September 2021**.

**BACKGROUND**

3. The Respondent herein filed a suit (as **Plaintiff**) in **the Children's Court** in Nairobi being **Suit No. 591 of 2019** seeking the following orders against the Appellant who was the Defendant in the Childrens case.

**“a) A sum of Kenya Shillings Forty Thousand (Kshs 40,000/-) monthly being maintenance as enumerated in Clause 10 above.**

**b) A sum of Kenya Shillings Thirty Six Thousand (Kshs 36,000/-) monthly being monthly rent/accommodation for the minor.**

**c) The Defendant be compelled to cater for school fees and school related expenses when the minor attains school going age.**

**d) The Defendant to take out a separate Medical Cover for the minor for both inpatient and outpatient.**

**e) Costs of this suit.**

**f) Any other and/or further relief that this Honourable Court may deem fit to grant”.**

4. On **17<sup>th</sup> June 2019** **Hon M. W. MURAGE Chief Magistrate** made the following orders: -

**“1. THAT the Defendant is hereby ordered to continue paying rent at 36,000/-.**

**1. THAT the Defendant is ordered to pay Kshs 20,000/- to supplement the household needs that the plaintiff is not**

able to meet. He should therefore send a total of Kshs 56,000/-.

**2. THAT this orders given to last for 90 days to enable parties comply with order 11 and fix suit for hearing.**

**3. THAT cost be in the cause.”**

5. The Appellant failed to comply with the above orders and a Notice to Show Cause dated **13<sup>th</sup> August 2019** was extracted and served upon the Appellant. The Appellant failed to appear in court in response to the NTSC and with the result that on **15<sup>th</sup> October 2019** the **Chief Magistrate** granted orders for the attachment of the Appellants salary to recover arrears of **Kshs 112,000.00** due to the Respondent as maintenance. The Court also extended for a further **90 days** the maintenance order which had been made on **17<sup>th</sup> June 2019**.

6. Upon being served with the order for attachment of his salary the Appellant filed an application dated **3<sup>rd</sup> December 2019** seeking to stay the order of attachment of his salary and also seeking to set aside and/or vary the maintenance orders issued on **15<sup>th</sup> October 2019**. The Appellant further sought for orders that the minor in question undergoes DNA test and leave to file his defence out of time.

7. Vide a Ruling delivered on **17<sup>th</sup> November 2020** **Hon M.A. Otindo SRM** dismissed in its entirety the application dated **3<sup>rd</sup> December 2019** as lacking in merit. Being dissatisfied with this Ruling of **17<sup>th</sup> November 2020** the Appellant filed a Memorandum of Appeal dated **20<sup>th</sup> November 2020** in which he listed **four (4)** grounds of appeal as follows: -

**“1. THAT the learned trial magistrate erred in law and in fact by dismissing the appellant’s application on the single ground that the appellant did not seek to cross-examine the process server.**

**2. THAT the learned trial magistrate erred in law and in fact by ignoring, disregarding, and/or failing to apply the law requiring prove of personal service on the appellant or service to an agent empowered to accept service on his behalf before dismissing the appellants’ application.**

**3. THAT the learned trial magistrate erred in law and in fact in holding that service upon the Appellant was proper when the main Affidavit of Service relied on was not commissioned and was therefore not admissible as part of evidence.**

**4. THAT the learned trial magistrate erred in law and in fact by failing to apply the tenets of substantive justice in the administration of justice and the ruling amounts to the Appellant being condemned unheard.”**

8. As stated earlier the appeal was vehemently opposed by the Respondent.

#### **ANALYSIS AND DETERMINATION**

9. I have carefully considered this appeal as well as the submissions filed by both parties. The Appellant is challenging the Ruling delivered by the **Children’s Court** on **17<sup>th</sup> November 2020**. In that Ruling the learned trial magistrate found and held that the Appellant had been validly served with the NTSC and that he chose not to participate in the proceedings. The trial court further took issue with the failure by the Appellant to call the process-server for cross-examination. Accordingly, the court saw no reason to exercise its discretion in favour of the Appellants and dismissed his application in its entirety.

10. The Appellant submitted that it was not mandatory to summon the process-server for cross examination as the relevant provision being **Order 5 Rule 16** uses the word ‘**may**’ which is discretionary in nature. The Appellant also argued that he was not served personally with the summons. That the documents were left with his secretary who was not his appointed agent for the purpose of accepting service of summons.

11. The Appellant further contended that the Affidavit of service dated **14<sup>th</sup> June 2019** was defective as the same had not been commissioned in accordance with the provisions of **Section 5** of The **Oaths and Statutory Declaration Act Cap 15 Laws of Kenya**. The Appellant argued that in the circumstances he had not been accorded a chance to be heard before orders adverse to himself were made.

12. In opposing the appeal the Respondent submitted that the Appellant had been properly served with summons. It was further submitted that if the appellant disputed service then he ought to have sought to have applied to have the Process Server called for purposes of cross-examination. That since the Appellant failed to do this the Affidavit of service dated **14<sup>th</sup> June 2019** is deemed to be evidence of proper service upon the Appellant.

13. The Respondent also submitted that the appellants challenge against the Service upon his secretary was a new matter being raised on appeal and ought not be entertained by the court. That the Appellant is in disobedience of court orders, and cannot be heard to say that he was not allowed an opportunity to be heard.

14. The following are the issues which arises for determination in this appeal are as follows:-

(i) Whether service of summons upon the Appellant was proper.

(ii) Whether the Affidavit of Service is fatally defective.

(i) **Service of Summons**

15. The Appellant alleges that he was never served with summons, hearing Notices and/or the NTSC in respect of **Childrens Case No. 59 of 2019** which had been filed against him by the Respondent. I have perused the record of appeal and the judgment delivered by the learned trial magistrate on **17<sup>th</sup> November 2020**. There are **three (3)** Affidavits of service in issue are as follows:-

(i) Affidavit of service dated **14<sup>th</sup> June 2019** filed by **FRANCIS XAVIER KUBASU** a licensed process-server who deponed that he served the Plaintiff, Certificate of Urgency and Application dated **10<sup>th</sup> May 2010** upon the secretary of the Appellant who had been instructed by the Appellant to receive the documents on his behalf. It was averred *inter alia* that-

**“3. THAT on the same day, at about 9.20 hrs I proceeded to the defendant’s work place on [Particulars Withheld] Avenue and City hall way where he works as Human Resource Manager at [Particulars Withheld] bank.**

**4. THAT upon my arrival in the defendant’s office I met the secretary to whom I introduced myself and the purpose of my visit where she made an internal phone call to one Mr RON the defendant in this matter who instructed her to forward the documents to him since he was in a meeting.**

**5. THAT Mr RON instructed the secretary to keep the documents in his incoming documents so that he will work on them after the meeting. He declined to receive on my copies citing that he consult his Advocate first, which I herewith return to this Honourable court as duly served.”**

(ii) The same process-server **FRANCIS XAVIER KUBASU** swore another Affidavit of service dated **22<sup>nd</sup> August 2019** averring that he served the hearing notice for the NTSC upon the secretary of the Appellant.

(iii) Affidavit of Service **Dated 8<sup>th</sup> July 2019** sworn by **KS** he served upon a female security officer on the **7<sup>th</sup> Floor, [Particulars Withheld] HOUSE** the building in which the Appellant worked.

16. The learned trial magistrate accepted that the three Affidavits provided proof that the Appellant had been properly served with notice of the suit against him as well with the hearing for the date of hearing of the NTSC. In her Ruling the trial magistrate stated as follows:-

**“The Applicant did not apply to call the process server and thus he failed to discharge the burden of proof to dislodge the affidavit of service filed by the Respondent. I thus find that the Respondent has sufficiently demonstrated that the Applicant was validly and duly served he chose not to participate in the proceedings and the court finds no reason to exercise its discretion in his favour. I find no reason to setting aside the orders of the 15<sup>th</sup> October, 2019 and the subsequent consequential orders. The prayer is dismissed.”**

17. The Appellant submitted that the above finding by the trial magistrate was erroneous. He argued that the requirement for a party who disputes service to have the process server summoned for cross-examination **is not mandatory**. As such his application ought not to have been dismissed on grounds that he failed to summon the process server for cross-examination. The Appellant cited in support of this submissions the case of **WILLIAM LANGAT VS JOSEPH K. SINDAI [2021] eKLR** in which the Court observed as follows:-

**“Under order 5 Rule 16 where there is allegation that a summon had not been properly served, the court may have the process server summonsed to be cross-examined on the service. A reading of this Rule suggest the court may at its own motion make an order for the process server to be examined. One would however expect that the applicant who disputes service to be on the frontline in seeking to have the process server summonsed to be examined. The court it appears did not make any order for the examination of the process server and no request was made by the applicant to have the process server summonsed for examination.”** (own emphasis)

18. This is a matter in which the Appellant disputed service. The Affidavits of Service in question indicated the dates, times and places where service was effected and also indicated the person served. If the Appellant disputed the averments in the said Affidavit as service then he ought to have summoned the process server for cross-examination in order to challenge the averments made by said process-servers.

19. In the case of **SHADRACK ARAP BAIYWO – VS – BODI BACH [1987] eKLR**, the **Court of Appeal** held as follows:-

**There is a presumption of services as stated in the process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service.**”(own emphasis)

20. The Appellant merely disputed the averments made in the Affidavit of service but took no steps to challenge and/or controvert the said averments. This he ought to have done. In the circumstances, I find that the learned trial magistrate did not err in dismissing the Appellants application for his failure to summon the process server for cross-examination.

21. The Appellant has also submitted that service as indicated in the said Affidavits was not satisfactory at the summons and notices were not served on him personally.

22. A look at the question of Affidavits of service indicate that indeed the Appellant was not served **personally**. In one case, service was effected upon the secretary found in the office whilst in another case service was effected upon a female security Guard found on duty on the

**7<sup>th</sup> Floor of [Particulars Withheld] House.**

23. The Appellant submitted that service effected on the secretary and/or the security Guard could not be deemed proper service on himself as neither the said secretary nor the security Guard were his ‘agents’ and neither had been authorized by the Appellant to receive service of summons on his behalf.

24. **Hon Justice Bosire** (as he then was) set out the requirements for service of summons through an agent in the case of **KIMEU VS KASESE [1970] KLR 32** where it was held as follows:-

**“Whenever it is practicable, service of summons and any other process shall be made on the defendant in person unless he has an agent empowered to accept service, in which case service on the agent may be effected”.**

The court went further to hold that-

**“It is not the relationship of the person served to the defendant but that he was in fact authorized to receive service. Also that the affidavit of service should specifically state that that person was authorized to receive service”.**(own emphasis)

25. Similarly, in the case of **BONIFACE OOKO GANDA V STANLEY MARINA & ANOTHER [2005] eKLR** on the issue of service through an agent the court stated that:-

**“From the records in the file, there is no evidence that the 2<sup>nd</sup> Defendant (the 1<sup>st</sup> Defendant’s driver) was an authorized agent of the 1<sup>st</sup> Defendant to receive service of court documents. I find that the 2<sup>nd</sup> Defendant was not an agent of the 1<sup>st</sup> defendant, authorized to accept service, and the purported service was therefore not proper service... the judgment entered herein and all consequential orders be and are hereby set aside.”**

26. The question of service in litigation is a critical issue and the court must satisfy itself that the opposite party has been informed of the existence of the suit leaving it up to said party to decide whether or not to enter appearance. If a party is not served then they stand the risk of being condemned unheard. This is why ‘personal service’ is the preferred mode of service. In the case of **NATIONAL BANK OF KENYA – VS – PUNTLAND AGENCIES LIMITED & 2 OTHERS [2006] eKLR** the **Court of Appeal** stated as follows: -

**“The ideal form of service is personal. It is only when the defendant cannot be found that service on his agent empowered to accept service is acceptable.”** (own emphasis)

27. Ordinarily, an agent who is recognized in law as an agent authorized to accept service on behalf of a party in a suit would be the Advocate on record for said litigant. Where a party has not appointed counsel to act for him/her then the preferred mode of service is personal.

28. **Order 5 Rule 8(1)** of the **Civil Procedure Rules** provides as follows:-

**“8. (1) Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.”**

29. In this case service was effected upon a secretary and a security Guard. Neither has been identified by name. There is nothing to prove that the person served was in actual fact the secretary of the Appellant. This was not a personal residence where one would be at liberty to presume that the occupants therein had some relationship with the Appellant. In case service was effected in an office building where undoubtedly there were several secretaries and several security Guards on duty. There is nothing to show that the said persons worked exclusively for the Appellant.

30. Secondly, there was no indication in the Affidavits that the persons served were authorized to accept service on behalf of the Appellant. **Order 5 Rule 8(1)** talks of an ‘agent’ ‘**who is empowered to accept service**’. The process servers merely served the persons whom they found in the office. He did not enquire if she was authorized by appellant to accept service on his behalf. Although it is alleged that the Appellant directed his secretary by phone to accept the documents, it is not indicated what phone number was used to contact the Appellants and there is no proof that the phone number in question was a line registered to the Appellant.

31. Moreover it would appear that the process server made only one attempt to serve the Appellant personally. This in my view is not sufficient.

32. **Order 5 Rule 12** provides thus:-

**“Where in any suit, after a reasonable number of attempts have been made to serve the defendant, and the defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him.”**

33. In this case the process-server made no disclosure of how many times he had attempted to serve the defendant. It appears from the Affidavit that only **one (1)** attempt at service was made.

34. Where there is no advocate on record, a process server ought to make at least **three (3)** attempts to effect service personally before resorting to serving a third party instead. In the circumstances, I find that the service effected upon the secretary and the security Guard was invalid and cannot be deemed to have been proper service upon the Appellant. The trial magistrate erred in relying on said service.

35. Finally the Appellant challenged the Affidavit of service dated **14<sup>th</sup> June 2019** on grounds that the same was fatally defective and had not been commissioned.

36. The Respondent countered that striking out of the Affidavit of service dated **14<sup>th</sup> June 2019** would have no effect on the issues which were before the trial court.

37. **Section 5 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya** provides as follows:-

**“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”**

**Section 8** of the same also provides: -

**“A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule.”**

38. It is a legal requirement that an Affidavit be commissioned by either a Magistrate, a Commissioner of Oaths or by a Notary Public. An Affidavit is a sworn statement which contains matters of evidence deponed on oath and as such legal consequences such as perjury would attend if one is found to have sworn a false affidavit. Therefore an Affidavit must be executed on oath by the deponent. An Affidavit which has not been properly commissioned is at best a mere signed statement of facts.

39. It is the commissioning of the Affidavit by an authorized officer which elevates the signed statement to the status of an Affidavit. Therefore commissioning of the document is a crucial step without which the statement cannot be deemed to be an Affidavit. Failure to commission an Affidavit cannot be dismissed as a mere technicality and is an omission which cannot be ignored and/or overlooked by the court.

40. In the circumstances the Affidavit dated **14<sup>th</sup> June 2019**, Annexure **EWV'2'** which appears at **Page 9** of the Record of Appeal is not a legal document and cannot be taken as proof that service actually occurred

41. In the premises based on the above I do find that service was not properly effected upon the Appellant. As such, the orders made by the trial court on **17<sup>th</sup> June 2019** were made without proper notice being served upon the Appellant. In the circumstances, such orders are null and void and are hereby set aside.

42. Having said that this court is mindful of the fact that the suit in the **Childrens Court** involves the welfare (maintenance) of a minor. **Article 53 (2)** of the **Constitution of Kenya 2010** provides that-

**“A child’s best interests are of paramount importance in every matter concerning the child.”**(own emphasis)

43. Similarly **Section 4(2)** of the **Children Act, 2001** provides as follows:-

**“(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”** (own emphasis)

44. The orders made by the **Children Court** on **17<sup>th</sup> June 2019** were orders which involved the maintenance of a minor. The Appellant is the father of said minor. It is trite law that **both parents** of a child have an obligation to provide for the welfare of said child. The Appellant as the child father has a legal obligation to contribute towards the maintenance of the child. The burden cannot be left to the mother alone. In the circumstances whilst this court sets aside the orders of **17<sup>th</sup> June 2019** I substitute it with orders that the Appellant be required to pay an amount of **Kshs 30,000** per month towards the upkeep of the child effective **17<sup>th</sup> June 2019** until the suit in the **Children Court** is heard and determined.

45. Finally and in conclusion this court makes orders as follows:-

**(1) This Appeal partially succeeds.**

**(2) The orders made by the trial court on 17<sup>th</sup> June 2019 are hereby set aside.**

**(3) In the place of said orders the court substitutes orders of maintenance requiring the Appellant to pay an amount of kshs30,000 monthly effective 17<sup>th</sup> June 2019 pending hearing and determination of Children Case No 591 of 2019.**

**(4) The Appellant to make good any and all arrears arising from the orders of this court.**

**(5) In the event that the said arrears are not cleared within forty (40) days then the Respondent is at liberty to apply for enforcement of said orders in the normal manner.**

**(6) No orders on costs.**

**DATED IN NAIROBI THIS 19TH DAY OF NOVEMBER 2021.**

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**MAUREEN A. ODERO**

**JUDGE**