



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 73 OF 2018**

**IN THE MATTER OF DGK. (MINOR)**

**PKW.....APPLICANT**

**-VERSUS**

**CWM.....RESPONDENT**

**(Being an appeal from the Ruling and order of the Honourable Ms. M. A. Otindo –Senior Resident Magistrate dated 29<sup>th</sup> June 2018 at Nairobi CC No. 30 of 2013)**

**JUDGMENT**

1. This is an appeal from the Order dated 29.6.2018 requiring the appellant to reimburse Ksh.702,921.20 which was tax deducted from a sum of Ksh.2,524.333 which the Appellant paid to the Respondent in respect of upkeep arrears in a children's matter.

2. The parties had entered into a consent that the Director of Pensions releases the sum of Ksh.2,524.333 to settle all outstanding arrears as per interim orders for the upkeep of minors school fees and related expenses.

3. The Appellant was aggrieved by the order and he filed this Appeal on the following grounds:

**(i) THAT the trial Magistrate erred in law and fact by ruling that the Appellant should re-imburse the amount taxed off from the share of his pension paid directly to the Respondent.**

**(ii) THAT the trial magistrate erred in law and fact by failing to hold that it was the Respondent who was supposed to request for tax exemption.**

**(iii) THAT the trial magistrate misinterpreted the Consent Order dated 7.9.2017 which stated that the amount owed was to be recovered from the pension funds being sent directly to be Respondent's account.**

**(iv) THAT the trial Magistrate erred in holding that the tax obligation was on the appellant.**

4. The parties filed written submission which I have duly considered. I find that it is not in dispute that the parties entered into a consent order dated 7.9.2017.

**“The Director of Pensions be ordered to release from the Plaintiff's Pension held by the Director a sumo of Ksh.2,524.333 (Two Million, Five hundred and twenty four thousand three hundred and thirty three thousand) directly to settle all the outstanding arrears as per the interim orders”**

5. The Appellant submitted that the Respondent was supposed to seek tax exemption from KRA and because she did not seek the exemption, she was to blame for the deduction of Ksh.702,921.20 in respect of tax.

6. The Respondent on her part submitted that the payment was in respect of maintenance of a minor and it is the Appellant who was responsible for the payment for tax.

7. I find that issue payment of tax was not mentioned in the consent record in court.

8. The issued this Court must determine are as follows:

(a) Whether it was the Responsibility of the Respondent to seek tax exemption.

(b) Who pays the tax in respect of the child maintenance arrears?

(c) Who pays the costs of this Appeal?

9. On the issue as to whose responsibility it was to ask for tax exemption, it is clear from the record that the said issue was not mentioned at the time the consent was recorded.

10. I find that the Appellant has no basis for blaming the Respondent for an issue that was omitted when the consent was recorded.

11. On the issue as to who should pay the tax, I find that the arrears are in respect of a minor. The fact that the same were in arrears is already detrimental to the child. If the Appellant had been up to date in the payments the same would not have accumulated to arrears of over two million and the same would not have attracted such a huge tax.

12. As stated above, cost follows the cause the appellant is therefore liable as it is because of omission on his part in payment of child maintenance that the tax issue arose.

13. However, I find it prudent to mention that Maintenance is not an income and therefore should not attract tax deduction. The appellant should then visit the relevant authorities for explanation and refund purposes.

14. I find that it is not in the interest of a child to reduce monies paid in respect of maintenance and in the Circumstances it is the appellant to pay the tax deduction. The same were caused by his failure to remit prompt payment of maintenance.

15. Finally, this is a family matter and I order that each party pays its own costs of this appeal.

16. The Appeal is accordingly dismissed with no orders as to costs.

Orders to issue accordingly.

**DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 26 DAY OF APRIL, 2019**

**ASENATH ONGERI**

**JUDGE OF THE HIGH COURT OF KENYA, NAIROBI**