



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO.5 OF 2017

G GAPPELLANT

VERSUS

Z G Thro' next friend

Z DRESPONDENT

(Being and appeal from the Judgement and order of the honourable B.M. Ombewa Principal Magistrate and delivered on 7.3.2017 in Marsabit Children No.17 of 2004)

JUDGMENT

The appeal is from the ruling of the trial court delivered on 7th Mars, 2017. The grounds of appeal are:-

- 1. The Honourable Court P.M. erred in law and infact in dismissing the application dated 11.02.2017 when there was enough evidence on record that the applicant was not within the jurisdiction of the court in the year 2013.***
- 2. The Honourable learned magistrate erred in law and infact in holding the civil jail in respect of the applicant was arrived at as a matter of last resort when the applicant is a civil servant and his salary could be further attached.***
- 3. The honourable learned principal magistrate's erred in law and infact in arriving at the conclusion that the applicant was properly served with the notice to show cause.***
- 4. That whole ruling was against the evidence and submission on record.***

Mr. Ondieki, Counsel for the appellant submit that the appellant is a sergeant in the Kenya Defence Forces. The parties were married and got separated in 2004. The Kadhi's Court ordered the appellant to pay Ksh.1000 monthly for the upkeep of their child. This amount was increased to Ksh.3000 on 10.9.2009. In 2012 the appellant's salary was attached to the extent of Ksh.5000 monthly. In 2013, the respondent approached the Court and sought to have the monthly payment increased to Ksh.15,000. The appellant was based at the Kulbiyow camp in Somali and was not aware of the application. The respondent's application was granted. While on off duty, the appellant was arrested and committed to civil jail.

The respondent submit that the most important issue is the best interest of the child. The applicant's salary was being paid from Kenya therefore the contention that he was outside the jurisdiction of the court does not arise. The appeal is based on an application dated 11.2.2013 whose purport has been overtaken by events. The deductions on the appellant's salary are for his own benefit and not for the benefit of the child. The appellant enjoys tax exemptions and gets other allowances. It is further submitted that the appellant filed his appeal after he realized that the respondent was about to execute for arrears totaling Ksh.300,000. The respondent has taken equal parental responsibilities of the minor.

The record shows that the respondent filed an application dated 25th March 2013 seeking to have the monthly payment reviewed from ksh.3000 to Ksh.15,000. The respondent in her supporting affidavit stated that the order of Ksh.3000 monthly was made in 2004 when the minor was four years old. In 2013 the minor was 13 years old and in primary school. They were living in a single room and they required extra space so that the child could concentrate on her studies.

The respondent's application was heard ex-parte and in its ruling of 3.4.2013, the trial court granted the request. The appellant filed his notice of motion dated 11.2.2017 seeking the following orders.

1. That the application be released on a personal bond pending the hearing and determination of this application.

2. That the orders dated 3.4.2013 be reviewed, set aside and or be varied.

3. That the applicant defendant be allowed to continue paying the amount of 5000 wherein the salary is attached pending the hearing and determination of this application.

In its ruling of 7.3.2017 the trial court dismissed the appellant's application. This ruling is the subject of the appeal. At the time the application was made the appellant had been committed to civil jail. In his supporting affidavit, he stated that the respondent could have attached his salary instead of committing him to civil jail which action could have made him lose his job. The appellant also sought to continue paying Ksh.5000 monthly.

The appellant's recent payslip for August 2016 indicate that he earns a gross salary of Ksh47,526/=. The proceedings before the trial Court of 2004 indicate that the parties were married in June, 1999. They got one child who was born on 15.04.2000. After the divorce, each party got married and by 2004 each had an extra child from their subsequent marriage. When the appellant appeared before the trial court on 13.06.2014, he told the court that he had four children.

The issue for determination is whether the appellant should continue paying Ksh.15,000 monthly as ordered by the trial court in 2013. Article 53 of the 2010 constitution provides for the rights of a child. Such rights include the right to parental care and protection. This includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not (Article 50(e)). The record shows that the appellant's total earnings is about Ksh.48,000. The appellant has a wife and other children. The issue is whether Ksh.15,000 monthly for one child is a fair settlement of the parties' dispute.

The earlier orders of 10.12.2004 by Honourable Njuki which directed a payment of Ksh.3000 monthly did indicate that the payment was to continue until when the child would be 18 years. I believe the child has now turned 18 years. This is the parties' only daughter. The respondent did not indicate whether the child has joined secondary school.

From the circumstances of the case, I do find that it would be oppressive to order the appellant to pay Ksh.15,000 monthly for one child. If one child taken Ksh.15,000 out of his salary, then his other four children would also be entitled to Ksh.15,000 each. This would make a total of Ksh.75,000 monthly for five children. The appellant has a wife and also has to meet his personal needs. The respondent also has the responsibility of parental care. A sum of Ksh.5000 monthly translates to Ksh.60,000 each year. If the respondent was also to make a similar contribution, that translates to Ksh.120,000 yearly. In my view, such an amount can sufficiently meet the needs of the child including school fees, medical and accommodation. From the record herein, it appears that the respondent is nursing the belief that it is upto the appellant to cater for his child. The child has now grown to maturity and can decide where to reside. All what is important for now is for the parties to meet the child's school fees and other needs. Since the respondent is taking care of the child, the sum of Ksh.5000 paid monthly sufficiently covers the other needs of the child. Parental care goes with one's capacity in form of his/her earnings. One child cannot take Ksh.15,000 monthly. This would leave the appellant and his family to grapple with the balance of Ksh.33,000. Would that be a fair distribution of the appellant's income? It should not be lost that the appellant also has his personal needs such as parental care and assisting other relatives.

I do find that the appeal herein is merited. It's not prudent for the appellant to pay Ksh.15,000 monthly for one child out of his monthly salary of about ksh.48,000. The orders of the trial court of 7.3.2017 are hereby set aside. The appellant shall continue paying Ksh.5000 monthly. This amount shall be deemed to have accrued form 3.4.2013. Parties to compute any arrears that may not have been paid. There is need to find out if the child is continuing with her education. If that is established, parties should ensure that the child's school fees is duly paid. This being a dispute emanating from a dissolved marriage, each party shall meet his/her own costs.

Dated, Signed and Delivered at Marsabit this 28th day of June 2018

S. CHITEMBWE

JUDGE