



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 27 OF 2017**

**J O O.....APPELLANT**

**-VERSUS-**

**A J M (Suing as next friend).....RESPONDENT**

(Being an appeal from the Ruling and Order of the Honourable Senior Resident Magistrate M. A. Otindo (Ms) delivered on 3<sup>rd</sup> March 2017 in Children's Case No. 1259 of 2015)

**JUDGMENT**

1. On 3<sup>rd</sup> May 2017 the appellant J O O filed this appeal from the ruling and order of the learned Senior Resident Magistrate at Nairobi Children Court which was delivered on 3<sup>rd</sup> March 2017. The ruling followed an application dated 22<sup>nd</sup> March 2016 seeking that the court does issue a notice to show cause upon the appellant who had failed to pay maintenance totalling Ksh.261,000/= as had been directed by the court. Upon hearing the defended application, the trial court found that no cause had been shown; that the appellant had not complied with the order to pay the maintenance. The application was allowed. However, the appellant was indulged when he was asked to pay the amount in 3 equal monthly instalments on the 5<sup>th</sup> of each month until payment in full. In case of any single default, he was ordered to be arrested without further notice.

2. The background of this case was that the appellant and the respondent A J M are husband and wife. Between them was on 6<sup>th</sup> June 2012 born a child C.O. The couple separated. On 17<sup>th</sup> September 2015 the respondent filed a plaint seeking the maintenance of the child. What was sought was the monthly maintenance of Kshs.104,800/= and the annual school fees and transport of Kshs.177,000/=. The appellant filed a defence to deny the claim. He stated that he had been maintaining the child. Further that, the respondent had since been married by a rich man who had assumed parental responsibility over the child.

3. The trial court heard the matter. Part of the appellant's case was that he had three other children whom he was taking care of. In a judgment rendered on 16<sup>th</sup> February 2016 it was found that maintenance of Kshs.58,000/= was required monthly for the child; and that the parties were to share that equally by paying Kshs.29,000/= monthly. The respondent had custody of the child. The appellant was directed to be remitting to her Kshs.29,000/= on the 5<sup>th</sup> of each month starting end of February 2016. There was no appeal against the judgment. However, by the time the application to show cause was being heard, the appellant had filed an application for the review of the judgment. That application has not been heard to date.

4. It is clear that the application to show cause was filed because the appellant had not paid the Kshs.29,000/= monthly maintenance sum that had been ordered in the judgment. The figure had grown to Kshs.261,000/=. This is why, in dismissing the application, the trial court noted that the appellant was bound to pay the amount now that the judgment had not been appealed against, varied or set aside.

5. In the instant appeal, the appellant sought that the ruling and orders of 3<sup>rd</sup> March 2017 be set aside. The grounds were that:-

- a. the trial court erred in fact and law in holding that he had not adduced sufficient evidence to prove his current financial status;
- b. the trial court erred in law and fact when it had concerned itself only with the interests of C.O. without considering the interests of his other three children; and
- c. the trial court erred in both fact and law when it failed to appreciate that it was impossible for the appellant to comply with the lower court orders in the judgment in light of his other parental and financial responsibilities.

6. This appeal was prosecuted by Mr Saluni for the appellant and defended by Mr Malinzi for the respondent. One of the issues raised against the appeal was that it was bad in law, incompetent, fatally defective, misconceived and otherwise an abuse of the process of the court in view of the fact that **section 79G** of the **Civil Procedure Act (Cap.21)** had not been followed; that the appeal had been filed out of time, and without leave. Counsel filed written submissions both on the objection and the appeal.

7. In my considered view, the consideration of the competence of the appeal would be an exercise in futility. This is because the appeal itself has no merits. Once the judgment that contained the order that the appellant pays the child's maintenance of KShs.29,000/= to the respondent has not been varied or set aside, either by appeal or review, the same had to be obeyed. It had become the responsibility of the appellant to pay. He had not paid by the time of the application to show cause, hence the orders now subject of this appeal. Infact, the appellant was indulged when he was asked to pay the outstanding KShs.261,000/= by three equal instalments. To that extent, infact, he had succeeded in the application. He was, otherwise, required to pay the entire decretal sum immediately. The application was not the opportunity or forum for the appellant to relitigate the issue that he had three other children to take care of. This was not an application for the court to review its decision contained in the judgment dated 16<sup>th</sup> February 2016. The decree arising from the judgment had to be executed.

8. In short, the appellant's appeal lacks merits and the same is dismissed with costs.

9. I direct the trial court to move with due speed to complete this case, considering that it touches on the rights of a child.

**DATED and SIGNED at NAIROBI this 24<sup>TH</sup> OCTOBER 2018**

**A.O. MUCHELULE**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 29<sup>TH</sup> OCTOBER 2018**

**A.N. ONGERI**

**JUDGE**