



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

COURT CIVIL APPEAL NO. 14 OF 2017

J K W.....APPELLANT

VERSUS

A W M.....RESPONDENT

JUDGMENT

(Being an appeal and cross-appeal against the ruling of the delivered by the Honourable J. Kituku on 1/02/2017 in Kiambu CM Children Case No. 10 of 2016)

1. The Respondent herein filed a Complaint dated 27/04/2016 in the main seeking custody of two minor children she has with the Appellant following more than seven years of marriage. She also sought for maintenance of Kshs. 178,000/- per month.
2. Contemporaneously with the Complaint, the Respondent filed a Notice of Motion seeking interim relief for both custody and maintenance. That Application was also dated 27/04/2016 ("Maintenance Application").
3. The matter came up for hearing of the Maintenance Application on 11/05/2016 before the Honourable J. Kituku. The Appellant did not show up. Being satisfied that the Maintenance Application had been duly served, the Learned Magistrate granted the orders as prayed.
4. The Appellant, then, approached the Court vide two Applications dated 17/06/2016 ("Visitation Application") and another one dated 20/06/2016 ("Application to Set Aside"). Both were filed under Certificate of Urgency. The latter sought to set aside the orders granted on 11/05/2016, and, in the interim, a stay of those orders. The former sought visitation rights for the Appellant for the two children.
5. Though the Applications were certified urgent, it would seem that they were not immediately heard. Meanwhile, it would appear that the Appellant did not comply with the Court orders prompting the Respondent to bring an Application dated 07/10/2016. This was an Application for a Notice to Show Cause why the Appellant should not be committed to civil jail for failure to comply with the Court orders of 11/05/2016.
6. The Respondent's Application was duly heard on 26/10/2016. A ruling was delivered on 02/11/2016. The Court ordered the Appellant to be present in Court on 13/11/2016 to show cause. The Respondent filed the Notice to Show Cause as directed by the Court and served it on the Appellant. It is dated 07/11/2016.
7. The Notice to Show Cause eventually came up for inter partes hearing on 21/12/2016. The Learned Magistrate reserved ruling and gave it on 01/02/2017.
8. Both the Appellant and the Respondent are dissatisfied with the ruling given by the Learned Trial Magistrate. The Appellant filed a Memorandum of Appeal listing a remarkable seventeen (17) grounds of appeal. Not to be outdone, the Respondent filed a Cross-Appeal listing thirteen (13) grounds of appeal.
9. What was in the ruling dated 01/02/2017 that provoked these duelling appeals? In short, the Learned Magistrate invoked section 101 of the Children's Act and reviewed his orders of 11/05/2016. In particular, the Learned Magistrate noted what he thought were changed circumstances (in the employment of the Appellant) and ordered the Appellant to pay Kshs. 50,000/- per month. This is a review downwards from the Kshs. 178,000/- he had ordered on 11/05/2016.
10. In short, the Appellant is dissatisfied with the ruling and order because he feels that the maintenance ordered is excessive in the circumstances and that it was wrong in principle because it failed to take into account the constitutional principle that parental responsibility is shared between the two parents. Instead, the Appellant insists, the Learned Magistrate imposed the sole parental responsibility on the Appellant.

11. On the other hand, the Respondent is aggrieved that the Learned Magistrate failed to make a finding on the Notice to Show Cause that was before him. Additionally, the Respondent complains that it was an error for the Learned Magistrate to have reviewed the interim order for maintenance when that Application was, in fact, not before him.

12. Both parties submitted at length in support of their grounds of appeal. I have carefully perused the submissions by the two parties' advocates. I do not propose to analyse them as presented but I have taken them into consideration. In my view, the appeal raises three questions:

- a. Whether it was proper for the Learned Magistrate to review his orders of 11/05/2016 *vide* his ruling dated 01/02/2017 on a Notice to Show Cause.
- b. Whether it was proper for the Learned Magistrate to give no orders regarding the accumulated sum of Kshs, 1,246,000/- respecting which the Notice to Show Cause had been issued and, instead, giving orders of maintenance going forward.
- c. Whether the maintenance of Kshs. 50,000/- ordered by the Court is too low or excessive in the circumstances.

13. I propose to answer the three questions contemporaneously rather than sequentially.

14. As both parties urge, I will begin by reminding myself the overriding principle in a case such as the one at hand. This is stipulated in section 4 of the Children's Act. It provides as follows:

(1) Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.

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

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to -

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as it necessary for the welfare of the child and in the public interest.

15. When a Court is faced with an application to enforce a maintenance order, section 101 of the Children's Act is applicable. The relevant provisions provide as follows:

(1) Any person, including the child in whose favour a maintenance order has been made pursuant to section 91, may apply to the court for the enforcement of the order under this section, if the person against whom the order is made has failed to comply with any provision contained in a maintenance order or has defaulted in any payment specified by the order, for the recovery of any arrears with regard to any financial provision stipulated in the order.

(2)

(3)

(4) Prior to the making of an order under this section, the court may hold an enquiry as to the means of the respondent who shall, whenever possible, be present and where such enquiry is held the court may direct that—

(a) enquiries be made as to the means of the respondent by such person as the court may direct; or

(b) the respondent's income, assets and liabilities be searched to establish such information as the court may require to make an order under this section; or

(c) a statement of means from the respondent's employer, or auditors or from such other person as the court shall direct, be availed to the court.

(5) Where the court is satisfied that the respondent has failed to make payment of any financial provision under a maintenance order or a contribution order, the court may—

(a) order that any arrears in respect of any maintenance monies or contribution monies as the case may be, be paid forthwith, or by instalments or within such other period as shall be specified by the court;

(b) order the remission of the arrears, but the court shall not make an order of this nature without prior notice to the child,

or the person or institution as the case may be, in favour of whom the maintenance order or contribution order has been made and without allowing them a reasonable opportunity to make representations;

(c) issue a warrant for distress on the respondent's property forthwith or postpone the issue of the warrant until such time as the court may direct, or on such conditions as the court may deem fit and order the attachment of the respondent's earnings including any pension payable to the defaulter if the court is satisfied that—

(i) the failure to make payment was due to the wilful refusal or culpable neglect of the respondent; and

(ii) the respondent is gainfully employed or is engaged in some business enterprise or undertaking or owns property from which

he derives an income:

Provided that the court shall not, unless special circumstances exist, make an order for the attachment of the respondent's earnings in an amount which shall exceed more than 45% of the respondent's annual income in any period of twelve months;

(d) order the detention, attachment, preservation or inspection of any property of the respondent and, for all or any of the purposes aforesaid, authorise such person, as the court may deem fit, to enter upon any land or building in which the respondent has an interest whether in the possession or control of the defaulter or not;

(e) subject to the rights of a bona fide purchaser for value without notice, set aside any disposition of any property belonging to the respondent from which any income has occurred and on an application, the court may make orders for the re-sale of the said property to any person and may direct the proceeds of such sale to be applied to the settlement of any arrears of maintenance monies and to the payment of future maintenance monies for the child concerned;

(f) restrain by way of an injunction the disposition, wastage or damage of any property belonging to the respondent.

(6) The court shall not make an order under subsection (5) paragraph (c), (d), (e) or (f) unless satisfied that—

(a) the respondent has wilfully and deliberately concealed or misled the court or any person appointed or directed to carry out enquiries under subsection (4) of this section as to the true nature and extent of his earnings or income; or

(b) the respondent, with the intent to obstruct or delay the execution of any order that may be passed against him under this section or with the object of reducing his means to provide maintenance for the child —

(i) is about to dispose of most or the whole of his property; or

(ii) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court; or

(iii) is about to abscond or leave the local limits of the jurisdiction of the court

(7)

(8)

(9) The court shall have power to vary, modify or discharge any order made under this section.

16. This is the section that the Learned Magistrate applied in his ruling which is impugned. In dealing with the Notice to Show Cause filed the Respondent as a means of enforcing the Maintenance Order given on 11/05/2016, the Learned Magistrate observed that the Appellant's financial situation had changed adversely after he changed employment from Safaricom to Nairobi Academy. The Learned Magistrate then invoked section 101(9) of the Children's Act to vary the Maintenance Order he had earlier given. He revised downwards the amount payable in monthly instalments from Kshs. 178,000/- to Kshs. 50,000/-.

17. Was the Learned Magistrate at liberty to vary the Maintenance Order as he did? In my view the answer is in the affirmative. However, the enabling provision is not section 101(9) which the Learned Magistrate cited but section 99 as read together with section 101(5)(b) of the Children's Act. However, while the Children's Act envisages situations where a Maintenance Order can be varied or modified and even arrears accumulated under an existing Maintenance Order to be cancelled.

18. However, section 101(5)(b) is explicit and section 99 is implicit that such a variation order should only be issued after the parties – and, specifically, the party in favour of whom the Maintenance Order was issued have been heard. In the present case, the Court was considering an enforcement motion of its Maintenance Order given on 11/05/2016. The parties did not have an opportunity to address the Court on the need for variation of that Maintenance Order. Indeed, there was a pending Application (dated 20/06/2016) to set aside or vary the Maintenance Order. In the circumstances, while it is conceded that the Court had authority to vary its Maintenance Order given on 11/05/2016, it should only have done so after hearing the parties on the need for that variation.

19. The same analysis goes for the second issue raised by this appeal: whether it was an error for the Learned Magistrate to fail to make a

finding regarding the accrued maintenance amount of Kshs. 1,246,000/- at the time of the Application. With respect, I am of the view that it was an error. If the Court intended to order a remission of the accrued arrears as that date, then it was incumbent upon it to hear the representations of the Respondent before doing so and then pronounce itself directly on the question as provided in Section 101(5)(b) of the Children's Act. The Application before the Learned Magistrate was an enforcement action against the Appellant for the arrears. No order was made regarding that amount. There is no question that the amount was payable at the time of the Application since the Maintenance Order had not been varied. That amount is still due as at today and is payable by the Appellant unless the Court makes a finding that a remission is appropriate under section 101(5) (b) of the Children's Act.

20. I will finally turn to the question whether the order varying the maintenance amount from Kshs. 178,000/- to Kshs. 50,000/- is the correct one in the circumstances. I have already held that while the Court has authority donated to it by the Children's Act to periodically review maintenance orders where circumstances change, both our sense of fair play and the right to fair administrative action (Article 47 of the Constitution) demands that the parties be fully heard before such modification or variation is ordered. As stated above, I am not satisfied that such a hearing was conducted in this case since the variation was ordered in the context of an Application to enforce the Maintenance Order.

21. In the circumstances, the correct action would be to remit the Application back to the Lower Court for determination of the appropriate maintenance amount in the circumstances of this case after hearing both parties.

22. The orders that recommend themselves, then, are as follows:

a. The case is remanded back to the Lower Court for a re-hearing of the Notice to Show Cause as a means of enforcing the maintenance arrears of Kshs. 1,246,000/-. For avoidance of doubt that amount remains outstanding and due unless the Court, after hearing both parties, orders a remission of all or part thereof.

b. In addition to the Kshs. 1,246,000/- due, the Appellant is also liable to pay Kshs. 32,500/- per month for the period between February, 2017 and the time the Application for revision of the Maintenance Order of 11/05/2016 (the Appellant's Application dated 20/06/2016) is heard and determined.

c. The Appellant is directed to prosecute his Application dated 20/06/2016 in the Lower Court. To this extent, the Appellant shall fix the Application for hearing within fourteen (14) days of the date hereof.

d. Each party shall bear its own costs.

23. Orders accordingly.

Delivered at Kiambu this 22nd day of November, 2018.

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JOEL NGUGI

JUDGE