



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 67 OF 2013

E W R..... APPELLANT

Versus

L W M RESPONDENT

(Being Arising from the ruling and Order of hon. M.A. Otindo, SRM, delivered on the 22nd April 2013 in Nakuru Children Case No. 214 of 2012 Nakuru)

JUDGMENT

1. This appeal is from the ruling delivered on the 22nd April 2013 in **Nakuru Children's Court Case No 214 of 2012**.

It was ordered:

1. *That the application to lift the warrants of arrest issued against the Defendant, E W R, be and is hereby disallowed.*
2. *That the Warrants of arrest herein to remain in force until the Defendant presents himself in person before this court.*

Being dissatisfied with the said orders, the appellant E W R filed this appeal and preferred the following grounds:

1. *The Learned Magistrate erred in law and in fact in finding that the Appellant had not purged the contempt.*
2. *The Learned Magistrate erred in law and in fact in declining to lift the warrants of arrest issued against the Appellant.*
3. *The learned Magistrate erred in law and in fact in failing to find that the Respondent has substantially complied with the court order.*
4. *The Learned Magistrate erred in law in failing to find that the said warrants were issued using wrong provisions of the law.*
5. *The learned Magistrate erred in law in finding that the Appellant personal attendance was required for her to lift warrants of arrest.*
6. *The Learned Magistrate erred in law and in fact in failing to consider the submissions by*

the Appellant's advocate.

It is proposed that the appeal be allowed and the ruling above be set aside or varied with costs.

2. While the appeal was pending for hearing, the Appellant approached the Court by his application dated 1st June 2013 seeking an order of stay of execution of the warrants of arrest issued against him on the 5th October 2012 and all consequential orders therefrom. He further sought an order to stay proceedings in the **Children's Case No. 214 of 2012** pending determination of the appeal.

On the 20th December 2013, the Court (RPV. Wendo, J) granted the said orders.

3. Parties filed written submissions on the appeal and highlighted the same. A brief background leading to this appeal shall suffice. The trial Children's Court was brought by L W M the plaintiff and mother of the minor M W against the appellant alleged to be the father of the minor, though not the biological father, by virtue of the respondents marriage to the appellant and allegedly assumed parental responsibilities over the minor.

4. The Respondent moved to court *ex parte* on the 27th September 2012 seeking maintenance for the minor in the sum of Kshs.110,000/= per month. The court without hearing the appellant directed that the appellant do deposit his passport in court which would be released to him upon him depositing six months maintenance at Kshs.110,000/= in a joint account of the parties Advocates, as security for his court attendance. That was not done, and on the 5th October 2012 the court issued warrants of arrest against the appellant.

The appellant, upon being served with the court order deposited a sum of Kshs.604,675/= as directed. It is on record that the said monies were released to the Respondent by order of the said Children Court without the appellants consent and involvement as he had not been accorded a hearing.

5. By an application dated 30th January 2013 the appellant approached the court for an order to set aside the warrants of arrest issued on the 17th October 2012 but the court failed to lift the warrants of arrest. This is the basis of the appeal.

6. The appellant by his Advocate Mr. Mukururi submits that the appellant complied with the court orders and deposited the sum of Kshs.604,675/= as directed that has been released to the Respondent in effect purging the contempt orders. He submits that the order of arrest ought to have been lifted as the appellant had been attending court by Advocate who explained the circumstances that led to the appellant not complying with the court order in time, and tendered an apology.

It is submitted that although the trial court accepted the apology, it has insisted that the appellant attend in court in person.

7. The appellant submits that the issue of whether the appellant assumed parental responsibility over the minors maintenance is still pending in the Children's Court for determination.

8. For the Respondent, Ms. Magana Advocate submitted that under **Section 24(2) of the Childrens Act**, a man automatically acquires parental responsibility over a woman's child once he marries that woman, and once acquired, it remains, permanent and cannot be terminated. She stated that the contested order issued on the 22nd April 2013 required personal attendance of the appellant and as he disobeyed the same, the court was right to issue the warrants of arrest, which in her submission are in force until purged. She further submits that the appellant failed to pay the monthly maintenance of Kshs.110,000/= per month. It is her submission that the trial court was being requested to sit on appeal on its orders to set aside the said arrest orders. She submits that the appellant complied with the court orders partially by payments of the deposit of Kshs.604,000/ but has failed to pay the monthly instalments, a sum of Kshs.3,041,807/= as at June 2014. It is also stated that the minor is now over 18 years old.

To that, it is urged that an order be issued directed to the appellant to make good the arrears in maintenance sums pending hearing and determination of the Children's case in the Children's Court.

9. I have considered the circumstances leading to the appeal hereof together with the pleadings and counsel submissions.

There is no dispute that the appellant has complied partially with children's court order by payment of deposit for security for his court attendance. That money was without his consent removed to the order of the Respondent. It is also not in dispute that the orders of maintenance to the tune of Kshs.110,000/ per month were made *ex parte*, and without giving the appellant a chance to ventilate his defence before the seat of Justice which is a fundamental right enshrined in the Constitution. See **Article 50 of the Constitution 2010**.

10. It is on record that the appellant tendered an apology for failure to attend court and pay the sums ordered on time, and that the court acknowledged and accepted the apology but failed to lift the warrants of arrest. It does appear that the trial Magistrate required more from the appellant than payment of the sums ordered, his personal attendance in court. The appellants failure to appear in person was disobedience of a lawful court order. The warrant of arrest was however stayed by this court pending determination of the appeal.

11. Given the circumstances stated above, the court finds that the ruling dated 22nd April 2013 subject of this appeal was merited. It is true that the appellant failed to appear before the court in person but his explanation for the failure was accepted as well as the apology.

The court having accepted the explanation, it ought to have lifted the warrant of arrest. It had no cause or reason for the failure unless, like I have stated, it had something more, to demand the appellants personal attendance in court.

If that were so, the court should not have accepted the explanation and the apology.

I find the trial court's instance on the appellants personal appearance in court as unwarranted after it accepted the apology, and the failure to lift the warrant of arrest was not explained sufficiently as the reason given "overtaken by events" was not expounded. It was submitted by the appellants counsel that the appellant has already left the court's jurisdiction, to Germany.

12. The Children's case is pending hearing. There are triable issues for determination as raised in the defence, and acknowledged by the respondents counsel in her submissions, as to whether or not under the Children's Act a man automatically assumes parental responsibility over the woman's children from other unions.

Until that issue is determined, this court shall stay all orders of execution issued by the trial court against the appellant.

In particular, an order of stay of execution against arrears of maintenance at the rate of Kshs.110,000/= per month is stayed pending hearing and determination of the Children's Case.

13. The court further notes that the sum of Kshs.604,750/ ordered as security for the appellant's court attendance was by order of the Children's Court released to the respondent. The trial court erred in ordering release of that money to the appellant as it was not ordered for maintenance but for "security for appellants court attendance." It ought to have been retained during the pendency of the case. That was in my opinion a misdirection on the part of the Children's Court Magistrate.

14. For the reasons stated above, the court finds the appeal merited and it is allowed, in the following manner:

1. That the ruling of the Children's Court dated 22nd April 2013 is set aside, and the Warrants

of arrest against the appellant are hereby lifted.

*2. That the Children's Court **Case No. 214 of 2012** shall be listed down for hearing on priority basis and in any event within 60 days of this judgment.*

3. That pending the hearing and determination of the Children's case, there shall be an order of stay of execution of all orders of maintenance for the minor (now adult) issued against the appellant by the Children's Court.

4. Each party shall bear its costs of the appeal.

Dated, signed and delivered in open court this 28th day of July 2016

JANET MULWA JUDGE