



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
FAMILY DIVISION
CIVIL APPEAL NO. 23 OF 2010

J M N.....APPELLANT/APPLICANT

VERSUS

E W M.....RESPONDENT

R U L I N G

1. Before this Court for determination is a Notice of Motion dated 3rd December, 2014 and taken out under **Order 42 Rule 6, Order 43 Rule 2, Order 51 Rule 1** and **Section 79** of the **Civil Procedure Act**. The 1st and 2nd prayers having been spent the Appellant/ Applicant now seeks that the order requiring the Appellant/Applicant to pay Kshs. 200,000 on or before 30th November, 2014 be set aside.

2. The application is premised on the grounds that that warrants of arrest were issued against the Appellant/Applicant on 2nd December, 2014 and that the sum of Kshs. 200,000 ordered to be paid by the Appellant/Applicant is beyond his means. The Appellant/Applicant argues that the best interests of the children will not be adversely affected as the Appellant/Applicant is maintaining them and that it is fair and just to grant the orders sought.

3. The application is supported by the affidavit of J M N, the Appellant/Applicant herein, sworn on even date, in which he deposes among others that the Children's Court ruled on 26th September, 2014 that he was in arrears of maintenance of Kshs. 1,540, 000. That on 23rd October, 2014 he made a proposal through his Advocate to liquidate the arrears by monthly installments of Kshs. 20,000. Further, that the Children's Court ordered that he makes an initial payment of Kshs. 200,000 by 30th November, 2014 and thereafter monthly installments of Kshs. 20,000.

4. He avers that he has not managed to raise the Kshs. 200, 000 and therefore had not paid the lump sum by 2nd December, 2014. Further, that he earns a net salary of Kshs. 48,000 as a Research Fellow and applies that the said order be set aside and he be allowed to make a monthly installments of Kshs. 20, 000 for the time being, and proposes to increase the monthly installments once T M completes University in 2 years' time.

5. It is his averment that he and the Respondent are divorced and that he has another family to maintain.

6. Opposing the application, the Respondent filed a Replying Affidavit on 14th January, 2015 and averred

that the Applicant has not honoured even his proposal of paying Kshs. 20,000 since 23rd October, 2014 when this matter came for mention before the Children's Court. The Respondent avers that, the Applicant has been ignoring the duly issued orders of the Lower Court to clear arrears.

7. It is her contention that the Applicant has not told the Court what he can offer, or how he will clear the pending arrears of Kshs. 1,540,000 and is only telling the court that he cannot pay Kshs. 200,000. It is further her position that the Applicant is misleading the court by stating that he only depends on his earning of Kshs. 48,000 while the fact is that he is a consultant and has several businesses.

8. This court having carefully considered the application, the affidavits for and against as well as the respective oral arguments, forms the view that the main issue for determination is whether the Applicant has made out a case for setting aside the said orders.

9. The orders that the Applicant seeks to set aside relate to children. Indeed, the law is that in any matter concerning the child, the best interest of the child is paramount. Accordingly, this Court's attention is drawn to **Section 4(3)** of the Children Act, which reads thus:-

“(3) All judicial 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 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...”

It is worth repeating herein that the said orders made by the Children's Court, which this Court has been invited to set aside were made in favour of the said Children, and were meant to serve the interests of the said Children.

10. More importantly, the Applicant has not obeyed the said orders, neither has this court been shown that the Applicant took steps to have the said orders varied by the Children Court. This Court has on several occasions emphasized that Court orders have to be obeyed as soon as they are issued and it matters not whether one agrees with them or not. See ***Hadkinson vs. Hadkinson (1952) All ER 567***, in which the court maintained that court:

“Orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away is to underestimate and belittle the purpose for which the court is set up”.

See also ***Kanchanben Ramniklal Shah vs. Shamit Shantilal Shah & 6 Others (2010) eKLR*** in which Njagi, J (as he then was) emphasised the point.

“A Court Order is valid and effective from the moment it is made. It is born mature and has no period of infancy, and therefore commands obedience forthwith.”

11. Therefore, it is not lost on this Court that when the Children's Court made the said orders it considered the welfare of the children and the Applicant has not established that this was not the case. What this court has been told by the Applicant is that the sum of Kshs. 200,000 ordered by the Children's Court is beyond his means. He has not in the words of the Respondent told this Honourable Court what he can offer, or how he will clear the pending arrears of Kshs. 1,540,000 besides telling the court that he cannot pay Kshs. 200,000.

12. The Applicant has not endeavored to make any part payment, to convince this Court to take him seriously. The sum of Kshs.1,540,000/= did not accumulate overnight. It took a long period of

disobedient of court orders to get the Applicant to this position. To blatantly choose to disobey orders made by a Court of competent jurisdiction is to abuse the dignity of the court, and to have no regard whatsoever for the rule of law. These were the sentiments of Ibrahim J (as he then was) in **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828**, wherein he stated as follows:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.

13. In view of the foregoing, this court holds that the circumstances of this case are such that it cannot exercise its jurisdiction to grant the orders sought, for to do so would not serve the best interest of the said children. Secondly these orders having been made by a court of competent jurisdiction the Appellant who is aggrieved thereby must first indicate that he has endeavoured to comply with them even as he moves the higher court on appeal. The conduct of the Applicant demonstrates that he does not deserve the discretion of this Court.

Accordingly, the Applicant’s application must fail.

SIGNED DATED and DELIVERED in open court this **22nd** day of **May 2015**.

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L. A. ACHODE

JUDGE