



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
(PETITION NUMBER 429 OF 2015)
CIVIL APPEAL 105 OF 2015

B.M.N & D.K.N SUING THRO FATHER & NEXT FRIEND J.N.M...PETITIONER

VERSUS

SRM CHILDREN COURT.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

B.W.K.....3RD RESPONDENT

JUDGMENT

The Applicant filed a petition on 7th October 2015. It was under **Articles 10, 19, 20,21,22,23 &165 of Constitution of Kenya**. The claim is alleged violations of rights and freedoms under **Articles 27, 28, 29, 50 & 53 of the Constitution**.

The matter based on the nature of dispute was transferred to Family Division as the appropriate forum for hearing and determination.

The Applicant sought the following orders;

- a. Pending hearing and determination of this petition, a conservatory order do issue aimed at staying and or suspending the warrants of arrest ordered and issued on 2nd October 2015 by the 1st Respondent in **Children Court Case Number 299 of 2013 B.W.K. vs. J.N.M.**
- b. The Court to stay any further proceedings of the **Children Court Case Number 299 of 2013 B.W.K. vs. J.N.M.** pending hearing and determination of the petition.
- c. The Court issues conservatory orders as prescribed under **Article 23** and the Court's jurisdiction under **Article 165(3) of the Constitution** to stay the Warrants of arrest until the Court pronounces itself on the rights of the Petitioner and whether those rights have been violated or not.

The Applicant's grounds as elucidated through learned Counsel Mr. Mwangi are;

1. The 1st Respondent issued warrants of arrest against the Petitioner on Friday, 2nd October 2015, which was effective after 3 days from that day. There's a high risk that the Applicant would be

- arrested and committed to civil jail.
2. The warrants of arrest result from a Court order that the Petitioner vacates the matrimonial property, pays mortgage instalments and provide suitable medical care to the children of the marriage.
 3. The Applicant has an arguable petition; the petition raises serious issues for determination;
 - a. What constitutes the best interests of the child prescribed in **Article 53 (2) of the Constitution and Section 4 of the Children Act 2001?**
 - b. How would the Petitioner's arrest and committal to civil jail advance the provision of care by the Petitioner/Parent?
 - c. Whether the Petitioner was accorded a fair trial by the Children Court as envisaged under Article 50 of the Constitution?
 - d. Whether the Children Court had jurisdiction under **Section 73 of the Children Act** to determine issues of matrimonial property by ordering the Applicant to vacate the matrimonial home?
 - e. Even with the consent filed in the Children court matter, whether the Court could enforce an order in excess of the Court's jurisdiction.
 - f. The petitioner also took issue with the execution of the Court orders. Specifically the process of execution was at the Interlocutory stage and contrary to **Section 38 & 40 of the Civil Procedure Act**.
 - g. The petitioner took issue with the decree not being an only money decree as provided by **Order 22 Rule 18 & 31 of Civil Procedure Rules 2010**.

The 3rd Respondent filed the Replying Affidavit on 19th October 2015 and opposed the Petition on the following grounds;

- a. That the Petitioner did not come to Court with clean hands as he who seeks equity must come with clean hands. The Petitioner is in contempt of the orders issued by the Children Court.
- b. The petitioner failed to comply with the Court orders as shown by **Exhibit 3** attached to the Affidavit.
- c. The Petitioner was served with Notice to Show Cause why warrants of arrest should not be issued as evidenced by Annexure **Exhibit 4**
- d. The Petitioner claims that his rights under **Article 24, 27, 28 & 43 of the Constitution** are not absolute. He has infringed on the rights off the children of the marriage by failing to provide for their upkeep.
- e. The Children Court orders on vacating the matrimonial home are not in excess of the Court's jurisdiction; the Petitioner through his former Counsel on record voluntarily proposed to vacate the home for the Respondent and children, to look for alternative accommodation and pay the mortgage repayments.

The 3rd Respondent's learned Counsel Ms Machio informed the Court the following issues;

- a. The Petitioner filed paid arrears of maintenance on 8th October, 2015 after the Children Court Ruling of 2nd October, 2015. The petition was filed on 7th October 2015.
- b. The Petitioner paid arrears of maintenance on 8th October, 2015 after the Children Court Ruling of 2nd October, 2015
- c. The Trial Court had powers to issue and grant the orders of the Ruling of 2nd October, 2015 by virtue of **Sections 92, 98, 99 & 114 of the Children Act 2001**.
- d. The Court issued the Notice to Show Cause, the Petitioner was served and he participated in the proceedings as required under **Section 101 of the Children act 2001**.
- e. The issues before this Court could have been canvassed in the Children court which has power to vary, amend, suspend or set aside orders.
- f. The decree and NTSC were appropriately issued and the Court Orders legally granted.

ISSUES

The Court has considered the pleadings filed by the parties and submissions made in Court and the issues for determination are;

1. Did the Children Court act in excess of jurisdiction in the orders of the Ruling of 2nd October, 2015?
2. Was the Petitioner accorded a fair hearing prescribed by **Article 50 of the Constitution 2010**?
3. Are the Petitioner's rights violated by the issuance of warrants of arrest?
4. Are the best interests of the children protected as stipulated by

Article 53 of the Constitution?

The petition arises from the proceedings and orders of the Children Court with regard to parental care and protection of the children of the Marriage. The children are entitled to parental care and protection which includes equal responsibility of the mother and father to provide for the children. In practical terms the care and protection by each parent is determined by the prevailing financial and other circumstances of each parent.

The parties filed affidavit of means and the Court granted orders of 25th February, 2014.

Among these orders is the contentious provision;

“That the defendant does move out of the matrimonial home and allow the Plaintiff and the children stay there. The defendant shall continue paying the mortgage.”

The Petitioner questioned the Children Court jurisdiction to hear and determine the rights of the parties with regard to the matrimonial home. cursory glances through the pleadings filed in the Children court confirm that the Petitioner voluntarily offered to vacate the matrimonial home for the Respondent and the children.

The Defendant's written submissions filed on 25th October, 2013 through the previous advocate on record attached to the Respondent's Replying Affidavit confirm this fact. At the conclusion of the submissions it shows as follows;

“It is therefore our humble prayer that your Honor makes the following orders;

1. The Respondent continue paying school fees and related expenses for the minors
2. The Respondent to take out an insurance cover for the minors and /or take care of all medical expenses of the minors.
3. The Respondent to buy clothing for the minors on a need basis.
4. The Respondent to offer entertainment to the minors on a need basis
5. Custody [is] with the Applicant pending hearing and determination of the suit in the parties' matrimonial home in South C.
6. The Respondent to look for alternative accommodation.
7. The Respondent to continue paying mortgage for the matrimonial house.
8. The Respondent to get visitation every weekend.
9. The Respondent to have custody of Brandon during December holidays

The applicant to maintain the children by shopping and food pending hearing and determination of suit

There be leave to apply”

The Court complied with the request and adopted the proposals as orders of the Court. The orders were to ensure and promote the best interests of the children of the marriage with specific reference to provision of shelter by the Respondent.

This Court finds no arrogation of powers and jurisdiction by the Children Court to determine rights in matrimonial property. The Defendant through Counsel on record at this time moved the Court and presented the proposals voluntarily. If and when the Petitioner found the Court orders challenging to comply with or there were new developments, he ought to have presented his case before the Court with a view to vary, suspend, amend or vacate the orders as provided under **Section 99 of the Children Act 2001**.

The Defendant's Affidavit to Notice to Show Cause of 24th April, 2015 paragraph 15 provides;

“That as to vacation of the matrimonial home, I wish to state that although I had intimated my willingness to move out of the same, the circumstances have since changed. The fact of the matter is I am cohabiting with another woman with whom we have a baby boy aged ten (10) months. In view of that development, it will be unjust for the child who is at his infancy to be ordered to vacate the house. Again, I wish to state that the child enjoys the same rights and protection of this Honorable Court in the same way as the other two”

This Court concurs with the Trial Court that the above mentioned circumstances are not sufficient to legally deprive the children of the marriage their right to shelter *vis a vis* the newborn child in the current relationship. All 3 children belong to the Petitioner and shall be accorded equal rights and not discriminated against for any reason as stipulated under Article 27 of the Constitution.

The claim of the Court acting in excess of its jurisdiction is therefore dismissed.

Was the Petitioner granted a fair trial in the Children Court? **Section 50 (1) of the Constitution** provides;

“Every person has the right to have any dispute and can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and in impartial tribunal or body”

The test is whether if there is a real apprehension on the part of the Petitioner that he will not order a fair trial before the Trial Court. This Court has not been presented with copies of proceedings of the Children Court except the photocopy of the ruling of 2nd October, 2015. This document alone is not sufficient to inform the Court on the issue of possible or alleged bias or lack of hearing on pertinent issues.

With regard to execution of the Court orders; the decree was drawn in terms of;

1. A arrears mortgage payments Ksh. 198,941/-
2. Maintenance arrears Ksh. 200,000/=
3. School related expenses Ksh. 12,000/=
4. Sum total of Ksh.41 2,441.50 and to vacate matrimonial home, obtain insurance and payment arrears.

The Petitioner is of the view that the proceedings culminating to the issuance of the warrant of arrest were not fair to him due to the content of the decree which did not comply with **Order 22 of Civil Procedure Rules 2010**. The decree ought to be a money decree. This Court finds that the content included both monetary sum and non- monetary demands and both the Petitioner had not complied with. If he complied with the monetary amount then what was left were the nonmonetary demands then the argument made would be valid. The mortgage payments by withdrawn by the Trial Court on 2nd October 2015 as they constitute contractual obligations between the Petitioner and the bank and cannot be paid to the Respondent. The maintenance arrears were paid after issuance of warrants of arrest on 2nd October, 2015. If the decree was illegal and invalid the Petitioner would not have complied.

The Notice to show cause proceedings that culminated with the issuance of warrants no arrest for committal to Civil Jail on 2nd October, 2015. Again, this Court has not had the benefit of presentation of the Trial Court's proceedings. The Applicant/Petitioner has attached only the Ruling of the Court.

The orders of 12th March, 2013 were served on the Petitioner together with a Penal Notice, that is attached to the Petition. The orders of 10th September, 20114 were served on the Respondent together with a Penal Notice also attached to the Petition

The decree was a valid order of the Court with both monetary and non -monetary claim as provided for by **Order 22 CPR 2010 and Section 38 and 40 CPA**

The Respondent was duly served at all times he was accorded a hearing or a Notice to show Cause why the decree would not be executed against him and Ruling of 2nd October, 2015 was delivered setting out the reasons for issuance of warrants of arrest. The Ruling of 2nd October, 2015 indicates as follows; Page 86 – 87 of the Petitioner’s bundles;

“This Court directed the defendant to take out suitable medical insurance for the children... he is in contempt. The Court directed the defendant to move out of the matrimonial home. ...The order was granted after the defendant himself intimated to the Court, he would be amenable to such a decision. It is however clear, he has not vacated the matrimonial home....Going forward the defendant must strictly send the money on the stipulated time.”

Clearly, the Petitioner defaulted in payment of arrears of maintenance at Ksh. 20,000/= a month, provision of medical cover and vacation of the matrimonial home. With regard to payment of the mortgage, the Court upheld his assertion that the payments could only be made to the contractual partner; the bank and not to be paid the Respondent.

From the Ruling of the Court I found no ulterior motive, or baseless issuance of warrants of arrests for committal to civil jail. The Respondent’s Counsel submitted that the arrears of maintenance were paid on the eve of filing the present petition so that at the time of hearing of the NTSC maintenance was due and owing.

Therefore the Petitioner’s right to a fair trial has not been violated.

The Court complied with **Section 38 and 40 CPA and Order 22 CPR 2010** in issuing the warrants of arrest.

The Petitioner claimed the issuance of the warrants of arrests were in violation of the Constitutional rights as provided in Article 27, 28, 29 , 50 and 53 of the Constitution 2010.

1. **In Civil Appeal No 48 of 2013 S.A VS F.J.C** the Court held;

“The main issue for determination is whether an order for stay for execution should be granted pending the hearing of the appeal. It is agreed that the 2 parties have a child born out of their relationship. Granting the orders being sought would mean that the child will go without them having funds to cater for its care.”

2. **In Civil Appeal No. 13 of 2013 . Z.M.O VS E.I.M** the Court held;

“Suspension of a maintenance order is not in the best interests of the child particularly incase such as this one where paternity is not in dispute. To my mind once a maintenance order is made it should not be suspended pending appeal..... parents have a statutory and mandatory duty to provide for the upkeep of the child”

The law fortifies the position that the best interests of the child are paramount. The child’s needs orders must be and upheld and parental responsibility shared by both parents. There are constitutional rights under **Article 53(1) and (2) Constitution 2010.**

The rights cannot be overridden or circumvented by the Constitutional rights of the Petitioner.

In Republic vs Permanent Secretary Office of the President; Ministry of Internal Security and Corporal Alphonse Lumosi Exparte Nassir Mwandishi Miscellaneous Application JR Number 132 of 2010 citing Diamond Trust vs. Daniel Muema Mulwa HCC 70 of 2012 the Court held;

“It is not unconstitutional for a judgment debtor to be committed to a Civil Jail upon his failure to pay his debts.”

In Jane Wangui Gachoka vs. KCB Petition Number 51 of 2010 the Court held;

“The deprivation of liberty sanctioned by Sections 38 and 40 of the CPA is permissible and is not a violation of either the Constitution or CCPR. (International Convention on Civil and Property Rights 1966) the caveat however, which has been emphasized in all the cases set out above, is that before a person can be committed to Civil Jail for nonpayment of debt, there must be strict adherence to the laid down procedures held in the CPA and CPR which provide due process safe guards essential in making the limitation of the right to liberty permitted in this case acceptable in a free and democratic society....”

In the instant case; the Petitioner was duly served and was accorded a hearing before the orders were granted. The Court upheld some of the objections that the Petitioner raised and considered reasons advanced in the Notice to show cause proceedings and granted orders of warrants of arrest.

Therefore the Court finds that the Petitioner rights are protected except that he failed to comply with the Court orders. It is the orders of the Court that the Petitioner found challenging to comply but due process culminating to these orders was followed. He also did not exercise his rights for review before this Court.

The Court finds that although the Court orders of 21st October, 2015 were valid, legal and appropriate in the circumstances in issuance of the warrants of arrest for committal to Civil Jail. However, since then there have been new developments and mitigating circumstances;

- a. The maintenance arrears were paid on 8th October, 2015
- b. The mortgage payments for the matrimonial home are paid directly to the bank and the Petitioner was absolved of the same as provided in the Ruling of 21st October, 2015.
- c. In paragraph 13 of the defendant’s affidavit in reference to the Notice to Show Cause the Petitioner stated

“he was committed to provide suitable medical insurance cover for the children and as such he made contacts with a number of reputable medical cover service providers”

This shows that the Petitioner has been in the process of procuring medical cover for the children.

The Petitioner has shown willingness to pursue and comply with the Orders to commit him to Civil jail before he has exhausted the efforts to comply with these orders would be harsh and unfair. Coupled with the fact that the primary focus and consideration is the best interests of the Children then the Petitioner ought to be granted opportunity to fulfill these rights and orders of the Court.

This Court shall not consider conservatory orders prescribed in **Article 23 of the Constitution** instead it shall rely on **Section 22 of Order 22 of CPR 2010** which allows for stay of execution of a decree upon sufficient reasons being shown for a reasonable time to allow the judgment debtor to apply in Court for an order of stay of execution or any other order relating to the decree and the Court may obtain security or impose any conditions.

The crux of the matter is the matrimonial home of both the Applicant and the Respondent. The Applicant wanted to vacate the home for the Respondent and the children of the marriage and later changed his mind and now resides in the home with another family member and 10 month old child.

The matter regarding the matrimonial home is not within the jurisdiction of the Children Court. However,

it is pertinent to the extent of provision of shelter of the children by both parents.

This Court is mandated to adjudicate on matrimonial property. From the pleadings filed in the Children's Court, they strongly suggest that the matrimonial home is matrimonial property as defined in **Section 6 and 7 of the Matrimonial Property Act 2013.**

Section 7 provides;

“Subject to Section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage otherwise dissolved.”

Therefore the home belongs to both spouses the Petitioner and Respondent and both spouses enjoy the rights provided in **Section 12 of the Matrimonial Property Act** to the exclusion of all other parties. Since at this stage of the proceedings, the Petitioner is in *situ* and has withdrawn intention to vacate as earlier intimated to the Children Court, he shall remain in the said home and pay the mortgage to the bank, but the home is exclusive to him and the Respondent and the children of the marriage.

It is with concern the Court notes that the Petitioner seems to discriminate the Children; the 10 month child is more entitled to the home than the other two (2) with the Respondent. They are all his children and ought to be granted equal treatment and not discrimination of some against others.

The matrimonial home shall remain exclusively to the Petitioner and Respondent until the divorce or dissolution of marriage proceedings are completed. They shall establish ownership, possessory rights and or beneficial interest to the matrimonial property in another forum at a later stage. It is therefore the duty of the Court to preserve the property so that the division of property shall not be a futile exercise at the appropriate time and forum.

The Respondent is at liberty to apply for rent payment to cater for the Children right to shelter by the Respondent in lieu of vacating the matrimonial home. They shall file updated affidavit of means.

FINAL ORDERS

The Court orders are as follows;

- 1. The Children Court did not act in the excess of jurisdiction with regard to the order to have the Petitioner vacate the home. The order arose from the Petitioner's voluntary offer at the time and has since been revoked.**
- 2. The warrants of arrest issued on 2nd October, 2015 were appropriate in the circumstances at the time. However, it is in the best interests of the children the warrants are stayed to allow the petitioner to comply. The same are stayed on the following conditions;**
 - i. To continue payment of maintenance of Kshs. 20,000/= a month for the children when due**
 - ii. To obtain medical care for the two 2 children of the marriage within 60 days from today**
- 3. By virtue of Article 165(3) Constitution 2010 and Section 3 & 3A of CPA, the Court issues an injunction against the Applicant/Petitioner servants/agents to restrain them from transferring, selling, subdividing, alienating or in any way interfering with the ownership, possessory and/or beneficial interest of the Respondent over the matrimonial home until hearing and determination of the divorce proceedings and division of matrimonial property.**
- 4. The matter shall be mentioned before the Trial Court for compliance of the above orders or other relevant applications.**
- 5. Copies of the Court's judgment shall be availed to the 1st Respondent in Children's Case 299 of 2013 by Deputy Registrar of the Division.**
- 6. Any aggrieved party is at liberty to apply.**
- 7. Each party to bear its own costs.**

READ AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF
NOVEMBER, 2015

M. W. MUIGAI

JUDGE

In the presence of;