



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

**CIVIL APPEAL NO. 82 OF 2012**

**F M K.....APPELLANT**

**-VERSUS-**

**S W M.....RESPONDENT**

**RULING**

1. On the 27/11/2014 the appellant / applicant filed a Notice of Motion dated the 26/11/2014 seeking the following order amongst other orders that, “*the committal to civil jail of the appellant on the 24/11/2014 for a term of six (6) months by the Children’s Court, Nairobi in Children’s Case No. 260 of 2010- M K versus S W M be set aside and that costs of the application be provided for.* The application is brought under Order 21 of the Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act.

2. The background of this application is the appellant sued the respondent at the Children’s Court seeking orders for visitation and access to the minor M M. By a judgment dated the 27/9/2012 the respondent was given custody of the minor and he was granted the right to visitation and access to the minor. The court ordered that they share equally the educational and house help expenses of the minor. That during the hearing of the maintenance case in the Children’s Court he filed an affidavit of means indicating that he was not financially capable of providing for maintenance for the minor to the extent demanded by the respondent. That he has been pursuing the transfer of a property in Likoni Mombasa which the respondent can dispose off and apply the proceeds of sale towards the maintenance of the minor but the process is incomplete. That the Children’s court in Case No. 260 of 2010 on an application of execution of the decree made by the respondent who sought arrears of maintenance for the minor in the sum of Kshs.1.5 million, committed him to civil jail for a period of six months on the 24/11/2014 which committal will be in force till the 23/5/2015.

3. The appellant claims that no documentary evidence was tendered to justify the amount or prove expenditure of the same and that it is unjust and unfair to commit him to the maximum jail term. That the respondent is not entitled to the said orders since she has refused to comply with the decree by refusing him access to the minor and that she should not be allowed to ignore part of the decree that does not favor her and at the same time seek to execute the part of decree that favors her. That he loves the minor and is ready and willing to the extent of his means to provide for the maintenance of the minor.

4. The respondent in response argued that the appellant has not contacted him since the order was given on access, that she was given the legal custody , care and control of the minor, that since the court orders were given the appellant has never made an attempt to honor the orders hence their application to have the appellant to show cause why he should not be committed to civil jail, that on appearing before the court the appellant was given opportunities to furnish the court with a proposal which he failed to do so and then a warrant of arrest was issued, that she is a stranger to the averments that the appellant is in the process of transferring any property to here as she has not been called upon to sign any

transfer document neither has she seen any title to support the appellants claim and that if the appellant was serious he should have appended the transfer form if any, that the applicants failure to comply with the court orders led to him being committed to civil jail, that he was committed to civil jail for accumulated arrears of food, school fees, related expenses, clothing and house help. It was further submitted that the lower court's orders were not made in vain and that the appellant should purge his contempt before he can be given a chance to be heard, that if she had denied the applicant a chance to see the minor he could have moved to the children's court to obtain an order to compel her to do so, that the appellant has not laid before the court any proposal on how he intends to offset the accumulating arrears and that this shows that he is not ready and willing to honor the welfare and best interest of the child, that the appellant should not seek a review through the back door.

5. The appellant in his response to the respondent's replying affidavit filed a supplementary affidavit reiterating the contents of his supporting affidavit, that he has been denied access to the minor despite the court order, that they had a joint venture with the respondent which did not do well and she abandoned the project that later a debtor of the venture chose to settle the debts by transferring a property to them and he chose to surrender his rights to the said property and to transfer it to the respondent in whole on account of the maintenance of the minor as he has become jobless after collapse of the said venture, that the transfer has been delayed due to the delays in the various registries in Nairobi and Mombasa and that he was at an advance stage in pursuit of completion of the same before he was taken to civil jail, that the entire process culminating to his arrest and being placed in civil jail is defective, that according to him the amounts outstanding as at October 2014 is Kshs. 448,000/-.that he has demonstrated his inability to settle the amounts in cash but is will willing to transfer the property to the respondent worth much more and that his incarceration is not in the best interests of the minor or his family as he is not engaged now in any economic activities that will enable him fend for the minor and feed his family.

6. Apart from the affidavits learned counsel made oral submissions at the hearing of this application. Apart from reiterating what has deposed in the affidavits the following submissions were made. Mr. Kinyua for the appellant submitted that the decree is defective as it does not show the monetary calculation and therefore the execution was defective and that since the decree did not contain any figures it was incumbent upon the respondent to establish the figures, that when the appellant was served with the NTSC application he filed his affidavit of means and explained his inability to settle the decretal sum, that from the correspondence attached the appellant has tried to get in touch to have access to the minor. Miss Njagi in her oral submissions reiterated what is deposed in the respondents affidavit and submitted further that; the NTSC was taken out 2 years after the judgment that the appellant did not make any proposals, that the orders have not been reviewed or set aside, that the orders made were in the best interest of the child, that the appellant cannot transfer the property as he is not Bandari Juma Biko, that the respondent does not know the appellant's economic status, that there is no evidence on the joint venture, that if he is a pauper the appellant can move the court under the Civil Procedure Rules for an appropriate order.

7. I have considered the submissions made. The appellant filed a memorandum of appeal on the 26<sup>th</sup> of October on a ruling delivered by Hon, Mwicigi on the 27<sup>th</sup> of September 2012 the appeal is yet to be heard. The respondent has raised an issue that the lower court orders on the appellant's committal can be reviewed by the trial court. I agree with this submission . The appellant is making proposal in this court which he should have made in the lower court. The trial court is still at liberty to consider his proposal by way of review. Having considered the circumstances of this case I order the release of the appellant on him depositing a security of Kshs. 50,000/- ( fifty thousand ) in court pending him appearing before the trial court to seek a review of the court's order . The same to be paid forthwith to secure his release, in default of him making the application within the next 14 days the orders of the lower on committal to civil jail shall come into force forthwith. This is a temporary measure to enable him pursue the matter in the lower court. The lower court shall consider his application on merit.

Orders accordingly.

Dated, signed and delivered this 23<sup>rd</sup> of **December 2014.**

**R. E. OUGO**

**JUDGE**

In the presence of;-

.....**For the Appellant**

.....**For the Respondent**

.....**Court Clerk**