



**RPM v PKM (Divorce Cause 154 of 2008)  
[2012] KEHC 5407 (KLR) (Family) (16 February 2012) (Ruling)**

*R.P.M V P.K.M [2012] eKLR*

Neutral citation: [2012] KEHC 5407 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**DIVORCE CAUSE 154 OF 2008**

**GBM KARIUKI, J**

**FEBRUARY 16, 2012**

**BETWEEN**

**RPM ..... PETITIONER**

**AND**

**PKM ..... RESPONDENT**

**Court commits to civil jail a party who defaulted to pay maintenance charges for his wife and children.**

*The applicant sought an order to commit the respondent to civil jail for failure to pay maintenance charges for his wife and children. The court held that there would be no need to send a debtor to civil jail if one could attach his property and recover the debt owed. Civil jail was a measure to be taken as a last resort. The petitioner had resorted to civil jail because she was unable to identify any property belonging to the respondent which she could attach and therefore cannot be blamed. It was the duty of the court to ensure that the rights of the petitioner and her children were enforced and redress obtained. The application was granted, a warrant of arrest and detention for a period of one month was issued.*

Reported by John Ribia

**Civil Practice and Procedure** - stay - stay of execution - application by respondent to stay execution of court order pending appeal - considerations in granting an order of stay - court considering the best interest of the child principle - whether parameters considered in granting stay in matters of maintenance under the Children Act were different from those in commercial transactions - whether the respondent's application for stay could be granted in the circumstances.

**Civil Practice and Procedure** - execution proceedings - committal to civil jail - where an applicant sought an order for committal of respondent to civil jail in default of paying sums ordered by High Court for maintenance of applicant and her children - considerations by court in making an order for committal to civil jail - other available



*remedies considered by court in recovery of debts from a debtor - whether respondent was subject to civil jail in default of payment - whether court could order committal to civil jail in the circumstance.*

**Family Law** - child rights - application for maintenance of children claim where the petitioner sought the committal of the respondent to civil jail for the failure to pay the decretal amount/sums ordered by the court in a claim for child maintenance.

### **Brief facts**

The petitioner sought an order for committal of the respondent to civil jail for defaulting in payment of sums ordered by the court in regard to maintenance of the petitioner and her children. The respondent applied for stay of the orders pending his appeal.

### **Issues**

- i. Whether parameters considered in granting stay in matters of maintenance under the Children Act were different from those in commercial transactions.
- ii. Whether a children's court could issue stay orders in child custody and maintenance matters where the stay order would be detrimental to the best interests of the child.
- iii. Whether the court was justified in making an order for committal to civil jail where a party defaulted to pay maintenance charges for his wife and children.

### **Held**

1. There was no merit in the respondent's application for stay. The prayer for stay had been overtaken by events and in any event, would have undermined the welfare of the children which the court considered paramount.
2. The payment arose from an obligation to maintain a spouse and her children whose needs could not wait until the outcome of the appeal. It was therefore not money in respect of which a refund could be sought if an appeal court were to reduce the amount payable.
3. In matters of maintenance under the Children Act, the parameters in considering stay were different from those obtaining in commercial transactions. The Respondent had not established any basis on which the Court could have stayed the order requiring him to pay the petitioner and the children of the marriage.
4. The court order requiring the respondent to pay had been honoured in breach and there was no evidence to show that the respondent was not capable of paying. Unless court orders were obeyed the authority of the court would be undermined. The Constitution of Kenya, 2010 had vested in the Judiciary to determine disputes for the benefit of parties in particular and the society in general.
5. Judicial authority emanated from article 159(1) of the Constitution of Kenya, 2010. That authority was exercised in good faith and in the lawful performance of judicial function. It was exercised to dispense justice guided by the principles enshrined in articles 159(2) and the national values and principles of governance in article 10 of the Constitution. Therefore, the court had a duty to ensure that its decisions were not mere rhetoric but rather were decisions that had to be obeyed by those to whom they were directed.
6. No one could be sent to civil jail for inability to pay a debt as it would be morally wrong to do so. Arguably, it would amount to discrimination against the have-nots. In any case, it would make no sense to send to civil jail a person who was unable to pay his debt.
7. The object of civil jail was to deprive the debtor of freedom in the hope that he would pay and therefore should be resorted to because the creditor was unable to trace or lay his hands on the assets of the debtor that could be attached. There would be no need to send a debtor to civil jail if one could attach his property and recover the debt owed. Civil jail was a measure to be taken as a last resort.
8. The petitioner had resorted to civil jail because she was unable to identify any property belonging to the respondent which she could attach and therefore cannot be blamed. It was the duty of the court to ensure that the rights of the petitioner and her children were enforced and redress obtained.



*Application granted. Warrant of arrest and detention for a period of one month issued.*

#### **Citations**

None referred to

#### **Statutes**

##### ***East Africa***

1. Children Act, 2001(Act No 8 of 2001) (Repealed) In general - (Cited)
2. Constitution of Kenya articles 10, 45, 53, 159(1), (2) - (Interpreted)
3. Matrimonial Causes Rules (cap 152 Sub Leg) rules 58, 59 - (Interpreted)

### **RULING**

1. This ruling relates to the three applications dated September 12, 2011 (made by the petitioner) and August 10, 2011 (made by the respondent) and September 22, 2011 (made by the respondent). The request for a composite ruling was reached by consent of both counsel on behalf of the petitioner and the respondent.
2. The application dated September 12, 2011 was filed by the petitioner on September 14, 2011 seeking an order for committal of the respondent to civil jail in default of paying the sums ordered by the court on May 24, 2010 which were reinforced by this court's order of February 12, 2011. It was averred in the application that on May 24, 2010, the Honourable Justice RN Nambuye, as she then was, ordered the respondent to make certain payments towards maintenance of the children and the applicant in the sum of Kshs 250,000.00 per month and Kshs 150,000.00 per month if the children were in boarding facilities. Mrs Judy Thongori, the learned counsel for the petitioner submitted that the respondent had not replied to this application which, in effect, was not therefore opposed. She submitted that the formal order was extracted and was served on the respondent but in spite of this the respondent failed and/or refused to pay the money demanded. It was Mrs Thongori's contention that the court has jurisdiction under rules 58 and 59 of the *Matrimonial Causes Rules* to issue orders for the committal of the respondent to civil jail until he pays. These rules provide:

Rule 58;

An application for attachment or committal shall be made to a judge, and any person attached or committed may apply to a judge for his discharge.

Rule 59;

- (1) In default of payment to any person of any sum of money at the time appointed for the payment thereof, an application may be made to a judge in chambers supported by affidavit (of service of the order and of non-payment), and the judge may make such order as to attachment of the person or of the property of the person so failing to pay as in the circumstances may seem expedient.
- (2) A decree or order requiring a person to do an act thereby ordered shall state the time within which the act is to be done, and the copy to be served upon the person required to obey the same shall be endorsed with a notice in form 16 in the appendix.
- (3) Where a party who has been ordered to lodge damages in court fails to do so in accordance with the order, the party in whose favour the order was made may apply to the judge at any time to vary the order by directing the payment of such damages to an individual to be specified in



the application, and the judge, if satisfied that in the circumstances it is just and equitable to do so, may vary the order for lodgment of damages accordingly upon an undertaking by that individual to lodge the same in court or otherwise deal with the same as and when received as the judge may direct.

Provided that if the application is made after decree absolute the judge may, if satisfied as aforesaid, dispense with the undertaking.”

3. Advocate Thongori further contended that the respondent was not unable to pay. He was unwilling to pay, she said. He has capacity, she added, and referred to article 45 of the Constitution and contended that there is equality of spouses which entailed dignity and further referred to article 53 which obligates both parties to care and provide for the children. Under article 53 of the Constitution, she said, every child has a right, inter alia,  

“to parental care and protection which includes equal responsibility of the mother and father to provide for the child . . .”.
4. Mr Ondieki, the learned counsel for the respondent urged the court to decline to commit the respondent to civil jail and dismiss the application.
5. The application dated August 10, 2011 was made by the respondent. It sought stay of the orders dated July 12, 2011 pending the filing and hearing of the intended appeal.
6. Advocate Ondieki, the learned counsel for the respondent, contended that under articles 53 of the Constitution, parental responsibility was equal between spouses and that the order requiring the respondent to pay alone Kshs 250,000.00 per month was unrealistic and “exposed men to danger and that men may be forced to leave their homes”. It seemed Advocate Ondieki made this statement with tongue-in-cheek. It was his contention that the respondent’s appeal shall be rendered nugatory if stay was not ordered.
7. In opposing the application, Advocate Judy Thongori relied on the petitioner’s replying affidavit (filed in this application) which was sworn on August 17, 2011. She drew the attention of the court to the fact that the Honourable Mr Justice Ombija had given ex parte orders during vacation and leave to appeal to the respondent. In issue, said Advocate Judy Thongori, was whether the order for stay should be granted when there was no substance in it not least because The Honourable Justice Nambuye, as she then was, had already ordered stay for 30 days. In her submission, Advocate Thongori contended that the Respondent’s application was a delaying tactic and was frivolous and should be dismissed with costs.
8. The application dated August 22, 2011 was made by the respondent seeking to vary, review and/or set aside the orders for maintenance. Advocate E Ondieki submitted that this application was not overtaken by events. He contended that the application was good and alive and that the variation of the orders sought could be granted. He contended that the sum of Kshs 250,000.00 ordered by the court was speculative. He told the court the order was draconian.
9. On her part, Advocate Judy Thongori opined that this application had been overtaken by events not least because quite apart from the fact that the order sought to be varied had not been formally extracted, an order for civil jail had been made on August 20, 2011. All the applications, said Advocate Thongori, were to be heard *inter partes* together on September 29, 2011 and that the honourable Justice Wanjiru Karanja, as she then was, had ordered that the orders would be suspended pending the *inter partes* hearing on October 27, 2011. The Applications were not heard, said Advocate Thongori, because the Respondent raised the issue of disqualification of this Judge which has since



been determined. It was Advocate Thongori's contention that there was no application for variation before the court.

10. I have carefully perused the three applications and considered the submissions made by Advocate E Ondieki and Advocate Judy Thongori. In the light of the above what decision is just and fair and serves the ends of justice?
11. The respondent applied in the application dated August 10, 2011 for stay of the orders pending his appeal. There is no merit in the application. As rightly pointed out by Advocate Thongori, the prayer for stay has been overtaken by events. At any rate, stay, if ordered, would undermine the welfare of the children which the court considers paramount. Moreover, the payment does not arise from a commercial transaction.
12. It springs from an obligation to maintain a spouse and her children whose needs cannot wait the outcome of an appeal. It is not money in respect of which refund can be sought if an appeal court were later to reduce the amount payable monthly. In short, the respondent cannot show that he will suffer irreparable damage unless stay is ordered. In matters of maintenance under the *Children Act* the parameters in considering stay are different from those obtaining in commercial transactions. It is my finding that the Respondent has not established any basis on which the court can stay the order requiring him to pay to the Petitioner and children of the marriage.
13. For this reason, I dismiss the application dated August 10, 2011 with costs to the petitioner.
14. With regard to the respondent's application dated September 22, 2011 seeking variation of the orders for payment, I find no merit in it. I dismiss it with costs.
15. On the application dated September 12, 2011 the petitioner sought committal of the applicant for non-payment of the monies ordered by the court. The respondent's counsel labelled the sum of Kshs 250,000.00 draconian and speculative. He submitted that he had lodged appeal and at one time informed the court that the appeal was within an ace of being heard. It was on October 24, 2011 that this court enhanced the sum payable by the respondent from Kshs 60,000.00 to Kshs 250,000.00. An informal application for stay of payment of the enhanced sum was made belatedly on November 3, 2011 and was rejected by the court on November 10, 2011. There is no evidence tendered to the court that the respondent has paid the money ordered by the court. The orders were not made in vain and court litigations are not matters to joke about. Failure to obey court orders attracts serious penalties. For starters, the Respondent's counsel's vaunted appeal does not appear to be in place and if it is, no steps seem to have been taken to prosecute it. But no matter. The court order requiring the Respondent to pay has been honoured in breach. There is no evidence to show that the Respondent is not capable of paying. On the contrary, there is evidence to show that he has the wherewithal but he continues to default in paying. In short, he is unwilling to pay unless compelled to do so. Unless court orders are obeyed, the authority of the court will be undermined. The *Constitution of Kenya*, and hence the people of Kenya, have vested in the Judiciary judicial authority to determine disputes for the benefit of parties in particular and the society in general. That authority emanates from article 159(1) of the *Constitution*. That authority is exercised in good faith and in the lawful performance of judicial function. It is exercised to dispense justice guided by the principles enshrined in articles 159(2) and the national values and principles of governance in article 10 of the *Constitution*. This court has a duty to ensure that the decisions of the court are not mere rhetoric but rather are decisions that must be obeyed by those to whom they are directed. In part the confidence of the public in our system of justice depends on the efficacy in the implementation and obedience of court decisions. It is for these reasons that the court takes a serious view of the respondent's failure to obey the court order.



16. I am inclined to allow the application dated September 12, 2011 by the petitioner. I hereby grant it for the reasons hereinabove stated. However, I hold the view that no one should be sent to civil jail for inability to pay a debt. It would be morally wrong to do so. It would arguably also amount to discrimination against the have-nots. And it would make no sense to send to civil jail a person who is unable to pay. That would be malicious. In any case, it would amount to throwing away good money after bad for the creditor. Civil jail is for those who refuse to part with their money to pay debts. The respondent in this case is not unable to pay. He is not a man of straw. The thesis by the Honourable Justice Nambuye in her Ruling delivered on May 24, 2010 clearly shows that the respondent possesses resources from which he can, if he so wishes, pay the money he owes by way of maintenance. The petitioner is not able to identify any property in the name of the respondent which she can attach. The object of civil jail is to deprive the debtor of freedom in the hope that he will pay so as to regain it or so as to eschew losing it. Civil jail is resorted to because the creditor is unable to trace or lay his hands on assets of the debtor that can be attached. There would be no need to send a debtor to civil jail if one can attach his property and recover the debt owed. Civil jail is a measure taken as a matter of final resort. In this case, the petitioner has resorted to civil jail ostensibly because she is unable to identify any property belonging to the respondent which she can attach. She cannot be blamed. It is regrettable that the respondent has failed to shoulder his obligation as a husband and a father and has allowed the matter to drift to this level. It is the duty of this court to ensure that the rights of the petitioner and her children are enforced and redress obtained. The law shall be enforced without fear or favour against all regardless of their social status. Kenya is governed in accordance with the Rule of law. All are equal in the eyes of the law. The law shall be blind to trappings of power influence, and social status. It is my duty to enforce the law. I grant the application and make the following orders:

- (1) I order that a warrant of arrest and detention in civil jail at industrial area Nairobi for a period of one month do issue against the respondent to be executed by the Officer in Charge of the Police Station nearest the respondent's place of residence unless the Respondent pays in full all the maintenance due from him to date. The petitioner shall furnish the requisite charges and/or resources to the Prison Authorities at Industrial Area for the maintenance of the respondent in civil jail for one month or until the respondent pays in full the maintenance ordered.
- (2) The respondent shall pay the costs of the three applications determined by this composite ruling.

**DATED AT MILIMANI LAW COURTS, NAIROBI, THIS 16<sup>TH</sup> DAY OF FEBRUARY 2012.**

**G.B.M. KARIUKI, SC**

**JUDGE**

**Counsel Appearing**

Mrs Judy Thongori Advocate for the Applicant

Mr. E. Ondieki Advocate for the Respondent

Mr. Kugwa - Court Clerk

