REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL 54 OF 2005

MN.....APPELANT

VERSUS

1. RMM

2. SKM

3. MM.....RESPONDENT

JUDGMENT

On 20th January, 2012, **RMM, SKM** and **RMM** suing through their mother **, AMM,** hereinafter "*the respondents*" filed a motion seeking to have this appeal dismissed for want of prosecution amongst other prayers. They complained that since their father **MN,** hereinafter "*the appellant"* preferred this appeal in September, 2005, he had not taken any steps to prosecute the same.

In response, the appellant conceded to the delay in prosecuting the appeal but attributed it to financial constraints. That lack of money as a result of heavy deductions from his salary had hampered his movement and had led to the delay in prosecuting the appeal. Further, that he worked in Migori which is very far away from this court and hence the long distance had also contributed to the delay in prosecuting the appeal. Finally, the appellant maintains that the respondent was engaged in meaningful employment and as such, no injustice and or prejudice had been occasioned to her.

When the application came before me for *interpartes* hearing on 8th May, 2012, the appellant had already filed and served his written submissions. **Mrs. Muumbe,** learned counsel for the respondents then opted to withdraw the application and instead proceed with the main appeal. She subsequently filed the respondent's submissions opposing the appeal.

I have carefully read and considered the respective written submissions and the authorities cited. The appeal basically arises worn the ruling delivered on 31st August, 2005 by **Hon. J.K. Ngarngar, R.M.** in the Resident Magistrates Court, Mwingi. The ruling was pursuant to an application by the appellant dated 7th April, 2005 to set aside the judgment which had been entered in favour of the respondents on 10th March, 2005. The grounds on support of the application were that the appellant had not been served with a hearing notice, that in the interest of justice, the application ought to be allowed and the case be heard on merit.

In opposition to the application, the respondents maintained that the orders of maintenance granted were for the children of the marriage, judgment had been regularly obtained after the appellant had opted not to defend the suit, the appellant was employing delaying tactics whereas the children were suffering.

The application was heard *interparties* on 27th July, 2005 and by a ruling delivered on 31st August, 2005, the learned magistrate allowed the application on condition that the appellant paid the respondents thrown away costs of Kshs 5,000/= prior to the case being re-heard on March. It is this order that triggered this appeal. In his memorandum of appeal filed in court on 23rd September, 2005, the appellant laments that the learned magistrate erred in law and fact by awarding the respondents throw away costs, the magistrate did not consider that this was a family dispute and costs to any party were injurious to the party condemned to pay them, the costs awarded were in any event excessive in the circumstances and had no

legal basis.

It is trite law that costs are normally at the discretion of the trial court. Such discretion cannot be challenged or impeached unless it is demonstrated that in exercising the discretion, the court acted capriciously or whimsically and took into account considerations which it ought to have or failed to take into account such considerations. I do not discern such misgivings in the circumstances of this case. In my view the learned magistrate was quite justified in awarding Kshs.5,000/= as thrown away costs to the respondents. The decision was arrived at after the consideration of all maternal facts. The appellant had been properly served with the pleadings. As a result he had entered appearance and filed his defence. The case was then set down for hearing and he was again served with a hearing notice and he acknowledged such service. Indeed he was aware that the suit was coming up for hearing on 17th February, 2005 because he had written a letter to court on 14th February, 2005 seeking an adjournment. Hence he could not be heard to claim that he was not served with a hearing notice. Based on the above, the magistrate was of the opinion and rightly so in my view, that the matter had proceeded to hearing in a regular and proper manner. Infact to the learned magistrate it was the appellant who had taken the court for granted. As correctly submitted by the respondents nevertheless, the magistrate was kind enough to allow the application but on terms. I cannot see how the magistrate could have erred in law and fact by awarding the respondents thrown away costs. The order was entirely within his discretion. Given the circumstances, it was wholly justified: The dispute giving rise to this appeal is indeed a family dispute. But that fact alone cannot bar a court from making an order for costs where circumstances permit or merit. Given the conduct of the appellant and that the respondents had incurred expenses in commencing execution proceedings; surely they were entitled to recoup their outlay against the appellant. More so when it is quite apparent that the appellant deliberately failed to attend court. The costs awarded were modest and fitted the occasion. I therefore reject the notion being propagated by the appellant that the costs awarded were excessive and had no legal basis.

The upshot of all the foregoing is that what the appeal lacks merit. Accordingly it is dismissed with costs to the respondent. It is further directed that the subordinate court file be remitted back to the Senior Resident Magistrate Court forthwith so that the pending case may be heard and determined expeditiously.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **28TH** dayof **SEPTEMBER 2012.**

ASIKE MAKHANDIA

JUDGE