



RM v MAO (Family Appeal E068 of 2024) [2025] KEHC 12120 (KLR) (23 June 2025) (Judgment)

Neutral citation: [2025] KEHC 12120 (KLR)

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

FAMILY APPEAL E068 OF 2024

F WANGARI, J

JUNE 23, 2025

BETWEEN

RM APPELLANT

AND

MAO RESPONDENT

*(Being an Appeal from the Ruling of Hon. N. Chepchirchir
delivered on 31/07/2024 in Children's Case No. 29 of 2010)*

JUDGMENT

1. This appeal arises from the Ruling of the Tononoka Children's Court delivered on 31/07/2024. The Memorandum of Appeal dated 07/11/2024 was filed after execution proceedings were instituted against the Defendant/ Appellant after failing to comply with the court's orders dated 31/07/2024.
2. This being an appeal on interlocutory proceedings, the court will limit itself to the proceedings prior to the ruling and the subsequent proceedings. The genesis of these proceedings are that the Defendant/ Appellant and the Plaintiff/ Respondent had a partial Mediation Agreement dated 09/02/2023, pending the full determination of the suit on the lower court. The partial agreement was as a result of mediation proceedings between them.
3. The Defendant/ Appellant was in default of the mediation agreement and this led to the Plaintiff/ Respondent filing a Notice to Show Cause why execution by way of personal arrest and committal to civil jail, should not issue. The same is dated 28/01/2024. The court directed that the NTSC be canvassed by way of written submissions. Both parties complied.
4. The Trial Court thereafter proceeded to render its Ruling on 31/07/2024 where the court considering the admissions by the Appellant by being in default of most of the claims, the court found the Appellant to be in default of Kshs. 1,365,250/=. The Appellant was ordered to appear in court on 11/09/2024 to give a proposal on how the outstanding amount should be settled.



5. On 11/09/2024, the Appellant did not attend court. Notice was issued to the Appellant to appear in court on 20/09/2024. On the said date, the Appellant attended court and said he would give a proposal for settlement. The court gave a mention date for 14/10/2024 to allow the Appellant come up with a settlement plan. On 14/10/2024, the Appellant did not attend court.
6. The matter was further adjourned to 30/10/2024. On the said date, the Appellant did not attend court. 3 months having passed since the orders of the court and with no compliance, the court allowed the NTSC by issuing a warrant of arrest against the Appellant.
7. On 08/11/2024, the Appellant was present in court and he prayed for time to put his house in order so as to raise the outstanding amount. The court declined to allow the application and having found that the Appellant had had several opportunities to come up with a proposal on how to pay the outstanding amount but failed to do so, and no efforts having been made to pay the outstanding amount, the court ordered that in default of payment of half of the outstanding amount in 15 days, the Appellant be committed to civil jail.
8. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal. It is important to note that the appeal was lodged almost 4 months after the delivery of the Ruling in question. In the Notice of Motion dated 07/11/2024, the Appellant sought for leave to file the appeal out of time.
9. Several applications were filed before the hearing of this appeal. The said applications dated 07/11/2024, 27/11/2024/ 14/01/2025 (overtaken by events) and 16/05/2025 were held in abeyance to allow the matter be fast tracked and have the appeal be heard, as the issues raised therein would be settled by the outcome of the appeal.
10. It is as a result of the directions of the court that it is deemed that leave to file the appeal out of time to have been granted. If the application on grant of leave to file appeal out of time was to be heard on merit, the same would have not met the threshold of granting such leave as the reasons for delay given had no merits and the same would have been struck out. The saving grace was the orders of this court issued on 28/05/2025 directing that the appeal be heard.

Analysis

11. Having considered the pleadings filed on appeal including the rival submissions, the issues for determination are;
 - a. Whether the Ruling on the minors' welfare should be set aside
 - b. Who bears the costs
12. This court is alive to the constitutional imperative that the children's best interests are paramount. Article 53 (2) of the *Constitution* provides as follows;

“ A child's best interest are of paramount importance in every matter concerning the child”
13. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. (see *Peters v Sunday Post Limited* [1958] EA 424 and *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123)



14. It is a fact that there was a partial Mediation Agreement between the Appellant and the Respondent. He parties distributed their respective responsibilities towards the minors in issue. The Appellant admitted that he had defaulted in making the payments but it is only on this appeal that the Appellant states that he was ambushed with payments of amounts towards the maintenance of the children.
15. Even after the ruling was delivered, the Appellant admitted to owe outstanding amounts and sought for time to give a proposal on how he would pay the said amount. If in deed he was aggrieved by the Ruling of the Court, the Appellant would have moved the court immediately to have the ruling set aside, instead of asking the court to give him time to make proposals on how to settle the outstanding amount.
16. I find that this appeal is an afterthought after the court ordered for the committal of civil jail of the Appellant. Section 121 (1) of the *Children's Act* provides as follows;
 121. Enforcement of orders for maintenance or contribution
 - (1) Any person, including a child in whose favour a maintenance order has been made pursuant to section 111, may apply to the Court for the enforcement of the order and recovery of any sums due and payable thereunder if—
 - (a) the person against whom the maintenance order was made has failed to comply with any provision contained in the order; or
 - (b) the person against whom the order was made has defaulted in any payment specified under the order.
17. Further, Section 121 (6) of the *Act* provides as follows;

“The Court may issue a warrant committing the respondent to imprisonment for a term not exceeding thirty days if the Court is satisfied on evidence that—

 - (a) the respondent has persistently and willfully refused or neglected to make payment of all or any part of the monies ordered to be paid under a maintenance or contribution order without reasonable cause;
 - (b) the respondent is present at the hearing;
 - (c) an order for attachment of the respondent's income would not be appropriate;
or
 - (d) it has enquired into the cause of the default and is satisfied that such default was due to the respondent's willful refusal or neglect.
18. I have perused through the Ruling of the court and the proceedings thereafter. I am satisfied that the court considered that there was an agreement between the parties in regard to their parental responsibilities, the excuses given by the Appellant as to why he had not complied with the agreement and the analysis done in finding the total outstanding amount. This court is satisfied that due regard was given to all the circumstances of the case, and I find to reason to interfere with the said ruling of the court. The subsequent proceedings are also merited.
19. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. The Appellant having filed this appeal to avoid his parental responsibilities, he is to meet the costs of this appeal.



Determination

20. In the upshot, I make the following orders: -

- a. The Appeal has no merits and is hereby dismissed.
- b. The Appellant to bear the costs of this appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 23RD DAY OF JUNE, 2025.

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F. WANGARI

JUDGE

In the presence of;

Mr. Sadik Advocate for the Appellant

Ms. Mulongo Advocate for the Respondent

Ms. Getrude, Court Assistant

