



**WMK v RNK & another (Civil Appeal E064 of 2022)
[2024] KEHC 6103 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 6103 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E064 OF 2022
DO CHEPKWONY, J
APRIL 12, 2024**

BETWEEN

WMK APPELLANT

AND

RNK 1ST RESPONDENT

CHAKA & COMPANY AUCTIONEERS 2ND RESPONDENT

JUDGMENT

1. By way of background, and so as to provide context herein, the parties herein are parents to LK who is a minor born on 25th October, 2019 as per his Birth Certificate. The mother of the minor RNK (hereinafter the Respondent) filed a suit against the father, WNK (hereinafter referred to as the Appellant) before the Children’s Court at Ruiru vide a Plaint dated 8th February, 2021 seeking for:-
 - a. Actual and sole custody, care and control of the child.
 - b. Permanent injunction against the Appellant from removing and or taking away the child from the custody of the Respondent or in any way influencing the mind of the Minor.
 - c. A declaration and order that the minor is lawfully in the custody of the Respondent and continue to be in the custody of the Respondent with visitation rights granted to the Appellant.
 - d. The Respondent to provide medical cover and shelter for the minor and the Appellant to provide maintenance in the tune of Kshs.66,000.00.
 - e. Any other order the court deems fit to grant.
 - f. Costs of the suit.



2. The Appellant did not enter appearance nor file defence despite having been served with Summons and pleadings by the Respondent. As a result of this, interlocutory Judgment was entered against the Defendant and the matter proceeded for formal proof. Upon hearing the Respondent's case on 15th June, 2021. In her Judgment, the trial Magistrate found the Respondent had proved her case against the Appellant on a balance of probabilities and proceeded to order:-
 - a. The Plaintiff shall have actual custody, care and control of the child pending the hearing and determination of the suit.
 - b. The Defendant shall have limited and supervised access to the child on alternate Saturdays from 10.00am to 3.00pm. with effect from July, 2021. The parties shall meet at a neutral point with the assistance of the Plaintiff's advocate.
 - c. The Defendant shall pay school fees and meet school related expenses for the child when the child reach school going age and the parties shall mutually agree on the school the child is to attend.
 - d. The Defendant shall take out a medical cover to take care of the medical needs of the child as and when they arise. He parties shall agree on a suitable cover through the advocate on record.
 - e. The Plaintiff shall provide food, house-help, clothing, entertainment and other child's needs.
 - f. The Respondent shall also pay a sum of Kshs.20,000/= every month as contribution towards rent and utilities. The money shall be paid to the Plaintiff by fifth day of every month with effect from July, 2021, through mobile money transfer or any other mode that they shall agree on through the advocate on record.
3. The Appellant then filed an Application dated 14th December, 2021 seeking:-
 - a. leave to file his defence, and the annexed draft defence to be deemed filed.
 - b. to set aside the interlocutory judgment delivered on 30th August, 2021, consequential decree issued on 14th October, 2022, warrant of attachment or sale dated 1s December, 2021
 - c. the Proclamation by Chala Auctioneers and all pending hearing of application interparties
4. In response, the Respondent filed her Replying affidavit sworn on 10th January, 2022 opposing the application. The trial Magistrate carefully considered the application, the affidavits filed in support or in opposition of the application alongside the submissions filed by counsel for both parties.
5. In its Judgment, the subordinate court allowed the application dated 14th December, 2021 and ordered:-
 - a. the father (Appellant)of the minor to pay the outstanding arrears of Kshs. 120,000/= together with auctioneer costs within 21 days so that his Motor Vehicle Registration Number KCJ xxxR and any other attachable goods could



be released, failure to which the Appellant would be at liberty to proceed with execution process.

6. Being aggrieved by the said Ruling, the Appellant filed the present Appeal vide a Memorandum of Appeal citing ten grounds of appeal as follows:-

- a. That the Honourable Learned Magistrate erred in law and fact by ordering the Appellant to pay a monthly sum of Kshs. 20,000/= and condemned the Appellant unheard to pay maintenance arrears of Kshs. 120,000/= together with Kshs. 50,000/= auctioneer fees.
- b. That the Honourable Learned Magistrate erred in law and fact by failing to consider that the figures of Kshs. 20,000/= per month was excessive, exorbitant and oppressive in the circumstances.
- c. That the Honourable Learned Magistrate erred in law and fact on failing to take into account the Appellant's earning capacity and sources of income in arriving at her decision.
- d. That the Honourable Learned Magistrate erred in law and fact in holding that the Appellant was properly notified of the existence of the suit and properly served in arriving at her decision.
- e. That the Honourable Learned Magistrate erred in law and fact in failing to consider provisions under Order 5 Rule 22 (c) of the Civil Procedure Rules on service to Summons.
- f. That the Honourable Learned Magistrate erred in law and fact in failing to consider all prayers in the Appellant's application dated 14/12/2021 in arriving at her decision.
- g. That the Honourable Learned Magistrate erred in law and fact in arriving at the ruling dated 21/03/2022 as the orders which were given were harsh and biased against the Appellant.
- h. That the Honourable Learned Magistrate erred in law and fact in holding that the Appellant had not complied with Order 42 Rule 6 (2) (a) and (b) of the Civil Procedure Rules to warrant stay orders.
- i. That the Honourable Learned Magistrate erred in law and fact in failing to appreciate the totality of the evidence before her and not considering the submissions on behalf of the Appellant and reaching into conclusion that is contrary to the evidence on record.
- j. That the Honourable Learned Magistrate erred in law and fact in failing to adhere to the Constitution and thereby denying the Appellant a fair trial.

The Appellant sought the following orders:-

- a. That the Appeal be allowed.
- b. That the Honourable Court be pleased to set aside the Ruling of J.A Agonda delivered on 21st March, 2022 and the orders made in terms of the maintenance of the minor be reviewed.



- c. That this Honourable Court be pleased to remit the matter back in the Senior Principal Magistrate court in Ruiru for full hearing.
 - d. That the Respondents do pay costs of this Appeal.
 - e. That such further relief as may appear just to the Honourable court.
7. On 30th January, 2023, the appeal was admitted for hearing and on 3rd July 2023, parties were directed to dispose of the appeal by way of written submissions and the directions on the disposal of the appeal. The Appellant's submission were dated 17th October, 2022 and therein he raised 4 issues.
8. This being the first appeal this court is required to re-examine both the facts of the case and law so as to establish whether the ruling of the subordinate court was erroneous. This position was buttressed in the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
9. Having read through the proceedings of the trial court alongside the Memorandum of Appeal and submissions filed herein, this court finds the main ground of the Appeal being whether the Appeal has merit to warrant the orders sought. To determine this, the court has taken into consideration the four issues raised by the Appeal in his submissions.

Analysis and Determination.

10. On the first issue, the court has considered the sentiments raised by the Appellant with regard to the trial court's order that he pays Kshs.20,000.—per month, an amount he found to be excessive and proposed a sum of Kshs.5,000.00. According to the Appellant he had been condemned unheard and without considering his source of income or earnings. Having read through the Judgment delivered on 30th August, 2021, from which the impugned ruling emanated, established that the Respondent gave a breakdown of the child's basic needs as totalling Kshs.66,000.—and which was not rebutted. The trial Magistrate in ordering the Appellant to pay the said amount had taken into account the principle of parental responsibility which falls on with the parent's child and the evidence that the Appellant was in gainful employment.
11. Article 53(1) of the *Constitution* provides:-
- [53]. (1) Every child has the right—
- (a) to a name and nationality from birth;
 - b. to free and compulsory basic education;
 - c. to basic nutrition, shelter and health care;
 - d. to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
 - e. to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and
 - f. not to be detained, except as a measure of last resort, and when detained, to be held—
 - i. for the shortest appropriate period of time; and
 - ii. separate from adults and in conditions that take account of the child's sex and age.



12. Section 4 of the *Children's Act* No.6 of 2001 provides :-

[4]. Survival and best interests of the child

- (1) Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.
- (2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
- (3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—
 - (a) safeguard and promote the rights and welfare of the child;
 - (b) conserve and promote the welfare of the child;
 - (c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

13. Section 24 of the *Children's Act* provides:-

[24]. Who has parental responsibility

1. Where a child's father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.
2. Where a child's father and mother were not married to each other at the time of the child's birth and have subsequently married each other, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in the exercise of such parental responsibility.
3. Where a child's father and mother were not married to each other at the time of the child's birth and have not subsequently married each other—
 - (a) the mother shall have parental responsibility at the first instance;
 - (b) the father shall subsequently acquire parental responsibility for the child in accordance with the provisions of Section 25.

14. Section 90(e) of the *Children's Act* states:-

90(e) Joint maintenance of children

Unless the court otherwise directs, and subject to any financial contribution ordered to be made by any other person, the following presumptions shall apply with regard to the maintenance of a child—

- (e) where the mother and father of a child were not married to each other at the time of birth of the child and have not subsequently married, but the father of the child has



acquired parental responsibility for the child, it shall be the joint responsibility of the mother and father of the child to maintain that child.

15. Section 94(1) of the *Children's Act* goes on to provide that:-

[94]. Financial provisions by step-parents and father of child born out of wedlock

(1) The Court may order financial provision to be made by a parent for a child including a child of the other parent who has been accepted as a child of the family and in deciding to make such an order the court shall have regard to the circumstances of the case and without prejudice to the generality of the foregoing, shall be guided by the following considerations—

- (a) The income or earning capacity, property and other financial resources which the parties or any other person in whose favour the court proposes to make an order, have or are likely to have in the foreseeable future;
- (b) the financial needs, obligations, or responsibilities which each party has or is likely to have in the foreseeable future; (c) the financial needs of the child and the child's current circumstances;
- (d) the income or earning capacity, if any, property and other financial resources of the child;
- (e) any physical or mental disabilities, illness or medical condition of the child;
- (f) the manner in which the child is being or was expected to be educated or trained;
- (g) the circumstances of any of the child's siblings;
- (h) the customs, practices and religion of the parties and the child;
- (i) whether the respondent has assumed responsibility for the maintenance of the child and if so, the extent to which and the basis on which he has assumed that responsibility and the length of the period during which he has met that responsibility;
- (j) whether the respondent assumed responsibility for the maintenance of the child knowing the child was not his child, or knowing that he was not legally married to the mother of the child;
- (k) the liability of any other person to maintain the child;
- (l) the liability of that person to maintain other children.

16. In arriving at her decision, clear that trial Magistrate analysed and appreciated the above-cited provisions of law and considered the costs and circumstances of the case. It will be noted that the Respondent extricated the child's needs as requiring about Kshs.66,000.00 out of which the Appellant was ordered to pay Kshs.20,000.00 which was not even half of the given amounts.

17. In this court's view, the amount of Kshs.20,000.00 is fair and reasonable considering the high cost of living, inflation and other circumstances that came up in raising children. This is because it will be appreciated that as a child grows older, the more the his/her financial needs increase. The Appellant has not demonstrated to this court and neither he did not at trial court that his total earning cannot support the said amounts. This court finds Kshs.20,000.00 reasonable and will not disturb the same. Based on



this findings on the first issue, it then follows that that the maintenance arrears of Kshs. 120,000/= was not excessive as claimed by the Appellant as the calculation was based on the Kshs.20,000.00 that had been ordered to be contributed by the Appellant on every month.

18. On the third issue, the Appellant held that the subordinate court erred in failing to consider his application for stay of execution. However, it is trite law that the courts should be slow to issue stay of execution on maintenance orders since the parents of a child have a mandatory duty to take care of their children and this cannot be halted or stayed by a court order. Reliance is placed on Musyoka J's decision in the case of in *RWW v EKW* Civil Appeal No. 13 of 2013 [2019] eKLR where he held;

“As a matter of principle, grant of stay of execution of maintenance orders in children's cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute. To my mind once a maintenance order is made where parentage is undisputed it should not be suspended pending appeal, where the appeal is on the quantum payable. The solution ideally lies in expediting the disposal of the appeal and staying the matter before the Children's Court to wait the outcome of the appeal. Tinkering with the quantum at this stage would amount to determining the appeal before arguments are heard from both sides on the merits of the same.”

19. This court therefore finds that there was no error on the part of the subordinate court to decline the stay of execution orders to warrant the interference of this court.

20. On the last issue of service of the court pleadings, according to the Appellant, the service of the pleadings which were done by way of WhatsApp messages was not effective as the Respondent ought to have served him through email or physically. However, on this the court is guided by the Practice Directions issued by the Chief Justice in respect to the Corona Virus Guidelines which allowed service by electronic means such as email and whatsapp to avoid direct contacts. This led to the amendment of the *Civil Procedure Rules* Order 5 Rule 22C to allow for these changes which law has not been amended or ratified and is therefore lawful.

21. The Order provides as follows;

Mobile-enabled messaging Applications [Order 5, rule 22C]

- i. Summons may be sent by mobile-enabled messaging Applications to the defendant's last known and used telephone number.
- ii. Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
- iii. Service shall be deemed to have been effected when mobile-enabled messaging services when the Sender receives a delivery receipt.
- iv. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the delivery receipt confirming service.

22. Having carefully gone through the proceedings of the trial court in this case, I find there is sufficient proof to show that the Appellant was aware of the court case and he ought to have filed his responses



in time. The Respondent attached numerous Affidavits of Service such as that filed on 18th April, 2021 sworn by Nancy Wachera showing service of Summons to Enter Appearance, Plaint and other documents. There is another Affidavit of Service sworn by Tabitha Muthoni Ndiritu sworn on 12th July, 2021 serving Court Ruling of 15th June, 2021 and another sworn by Tabitha Muthoni Ndiritu serving Hearing notice dated 2nd August, 2021 with a pre-trial questionnaire dated 3rd August, 2021. This court finds all these sufficient evidence to confirm that the Appellant was aware of the court proceedings and there is therefore no reason to set aside the judgment of the trial court.

23. In the upshot, this court finds the Appeal herein lacks merits and proceeds to dismiss it with costs to the Respondent.

It is so ordered.

RULING DELIVERED, DATED AND SIGNED AT KIAMBU THIS 12TH DAY OF APRIL, 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for the Appellant

No appearance for the Respondents

Court Assistant - Martin

