



HKN v LNW (Civil Appeal 1 of 2017) [2024] KEHC 7966 (KLR) (Civ) (7 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7966 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL 1 OF 2017
PM NYAUNDI, J
JUNE 7, 2024**

BETWEEN

HKN APPELLANT

AND

LNW RESPONDENT

RULING

Introduction

1. The Appellant/ Applicant presents application dated 21st August 2023 under Sections 3A & 80, Order 45, 51, 80 of the Civil procedure rules, 2010 Section 91, 98 and 99 of the Children’s Act 2001 and Article 53 of *the Constitution* and seeks that the Court partly review the judgment delivered on 4th April 2019 and;
 - i. Vacate the orders of payment of Kshs 17500 of maintenance by him and in its place order that both the Applicant and Respondent cater for the expenses of the minors (accommodation, transport and medical services) during school holidays, as and when they are with the minors.
 - ii. Order that both the Applicant and respondent pay school fees and school related expenses equally.
2. The Application is supported by affidavits sworn on 21st August 2023 and 9th October 2023. It is the 2nd time that the Applicant is seeking a review of the judgment and he contends that this is on account of new evidence and some changed circumstances. It is his assertion that the Respondent is now employed at ABSA bank and the Children are currently in boarding school. That currently he is meeting all the bills for the children and the Applicant does not account for the Kshs 17500 that he remits to her. He also avers that he is taking care of his ailing mother and he requires at least Kshs 15000 per month for her treatment.



3. In the Applicants submissions he identifies the issue for determination as
 - i. Whether the Court should vacate the Order for payment of monthly maintenance of Kshs 17,500 from the Applicant since the children are in boarding school and whether the Court should order the Respondent to be contributing towards the children's school fees as part of her monthly Kshs. 17500 upkeep.
4. The Applicant submits that this being a children matter the Court is vested with jurisdiction to vary orders in the best interests of the child and relies on the decision in *MKN v JC* & Children Court at Kericho [2019] eKLR and *JA v AA* [2020] eKLR and contends that in issuing orders on maintenance the Court must be guided by the earnings of the parents, their obligations and responsibilities.
5. The Appellant submits that the Respondent is not making any contribution towards maintaining the children and yet the law is clear that parental responsibility is shared as was stated in the case of *M.O.A vs H.A.O* [2021] .
6. The Respondent opted not to file a response and proceeded to file submissions in which she sought to introduce evidence. I will proceed to expunge the annexures to the submissions from the Court record as they are improperly before the Court.
7. The Respondent submits that the Appellant has not complied with the Court order and has not been submitting the monthly maintenance as directed. Further she concedes that she was employed at ABSA but has since left that job. She submits that it would not be in the interests of the child that the orders be varied.

Analysis And Determination

8. Having considered the pleadings herein, affidavits relied upon, submissions filed, authorities cited and the relevant law, I consider the following as the issues for determination
 - i. Whether the Court should vary the orders of 4th April 2019 in the manner proposed by the Applicant.
 - ii. Who should pay costs
9. The guiding principle in determining matters where children are concerned is Article 53(2) of *the Constitution* of Kenya 2010 which provides:

“ A child's best interests are of paramount importance in any matter concerning the child.”
10. The same principles are echoed in Section 4(2) and 3(b) of the *Children's Act* that provides that:
 - (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.

11. It is not in dispute that parental responsibility is a shared responsibility and that each parent must be seen to 'step up to the plate' and make their contribution towards the maintenance and provision of the Child. In DS (Minor Suing through her Mother) *JWM v CKK* [2021] eKLR, the Court reiterated that parental responsibility was shared but not necessarily equal and the Court in determining will have regard to the earnings of the parents and the needs of the children. In that case the court cited with approval the decisions in *E.M.M Vs M.O.O*(2016)eKLR where the Court stated:-

“However equal responsibility does not mean equal and similar contribution as the income of each parent, and other non-monetary contribution must be borne in mind.”

12. Further In the case of *M.O.A Vs H.A.O*[2021]eKLR the court held:-

“Although parents may not have equal financial ability for the court to demand equal contribution, one must at least exhibit some sense of seriousness in making some contribution as a sign of good will that he or she is not geared towards overburdening the other parent for the sole purpose of punishing him or her using the best interest of a child principle or as a ground to settle scores out of marital differences.”

12. I note that in the judgment the Court ordered inter alia that

- a. The defendant provide for the school fees and related expenses for the two children at their current school. Any changes to the minors shall be with mutual consultations of the parties
- b. The defendant shall provide maintenance of Kshs 35000 per month with effect from December 2016
- c. That the plaintiff shall meet the shortfall thereon and provide none school clothing for their children.

12. In Judgment delivered on 4th April 2019, the Court varied the amount payable as maintenance form Kshs 35000 to Kshs 175000. The Appellant moved to court to vary this order and the court vide its ruling of 28th April 2022 declined to do so.

13. It is not disputed that since 2022, the Children have now been moved to a boarding school. This appears to be a decision made unilaterally by the Appellant.

14. The Appellant alleges that the Respondent is now in employment. The Respondent concedes that she was in employment for a short period but she has since lost the job. It therefore has not been demonstrated to my satisfaction that the Respondent has a steady income that would necessitate the review of the judgment.

15. The Appellant also raises the fact that he is providing for his ailing mother. It is the appellant who unilaterally moved the children from the school they were attending to boarding school. I must assume that at the time he was doing so he was well aware that he was required to pay a monthly maintenance for the children in the sum of Kshs 17500.

16. In the final analysis I find that this Application is similar to that presented in December 2021 and having found that the change in circumstances does not warrant a review of the orders, I have no hesitation in concluding that the Appellant seeks a second bite of the cherry. Therefore, for the reason



that it would not be in the best interests of the children, I decline and dismiss the entire application dated 21st August 2023.

17. Each party will bear their own costs

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF JUNE 2024.

P M NYAUNDI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Advocates for the Applicant

Advocates for the Respondent

Fardosa Court Assistant

