



**JWMO (Suing Through His Mother and Next Friend EBO) v DON (Civil Appeal 82 of 2022) [2024] KEHC 9460 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9460 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 82 OF 2022**

**TA ODERA, J  
JULY 10, 2024**

**BETWEEN**

**JWMO (SUING THROUGH HIS MOTHER AND NEXT FRIEND  
EBO) ..... APPELLANT**

**AND**

**DON ..... RESPONDENT**

**RULING**

1. The Applicant herein filed a notice of motion Application dated 14<sup>th</sup> May, 2024 under sections 4, 7, 9, 24(3b), 76, 80-88, 90, 98 & 97 of the *Children Act* 2001, and the *Regulation of the Children (Practice and Procedure Parental Responsibility) Regulations* 2001; Sections 3A and 63 (e) of the *Civil Procedure Act*; Article 53(1)(2), 159 of the *Constitution* of Kenya, 2010, and all enabling provisions of the law seeking the following orders against the defendant/Respondent.
  - a. spent
  - b. spent
  - c. That the Defendant/Respondent be directed by this Hon Court to pay Kshs. 46,100/= school fees due / balance for Term II 2024, at [particulars withheld] Junior School, Nairobi, and to cater for all education related expenses for Term II 2024.
  - d. That the Defendant/Respondent be directed by this Hon Court to pay Half Monthly House Rent refund to the applicant, being Kshs. 475,000/= (Kshs 50,000 / 2 = Kshs 22,500/=) and in arrears since November 2022, (Kshs 25,000/= x 19 months)
  - e. That the Defendant/Respondent be directed by this Hon Court to continue to his part of monthly house rent, being, Kshs 25,000/=.



- f. That in the alternative notice to show cause be issued against the Defendant/Respondent to explain why he should not be committed to civil for will disobedience of this Court's Decree and Judgment delivered on 29<sup>th</sup> January 2024.
  - g. That costs of this application be on provided for.
2. In support of her Application the Applicant averred that she is the biological mother of JWMO, the subject minor herein, well versed with the conduct of the matter. She averred too that at all the material time I am the one having the actual custody of the subject minor.
  3. She deponed that the pending matter before this court is connected to the general welfare and the educational rights of the subject minor herein, who has not reported to school yet; schools have reopened for the new term. She disposed further that on 29<sup>th</sup> January 2024 this Court delivered a Judgment in her favor and for specific performance by parties, as follows: -
    - a. That the Respondent shall cater for the school fees.
    - b. That the Respondent shall cater for school related expenses, purchase of uniform, pay transport and buy writing materials and school books.
    - c. That the Respondent shall pay half of the rent.
    - d. That the Respondent shall enroll the minor in his NHIF medical immediately.
    - e. That the appellant shall furnish the Respondent with a copy of the minor's birth certificate within 7 days.
    - f. That the appellant shall shoulder the cost of the other basic need of the child.
    - g. That the rest of the orders shall remain intact.
    - h. That the cost to the Appellant.
  4. It was her contention that immediately after delivery of Judgment she communicated to the court registry and a Decree was extracted which she served upon the respondent advocates together with the Judgment and copy of the minor's birth certificate on 31/1/2024. She equally shared the said court documents Decree and Judgment together with copy of the copy of the minor's birth certificate to the respondent through WhatsApp. She said that therefore that, the Respondent was fully aware of the Court Judgment but rather he has intentionally and willfully disobeyed the said Orders. Further that she was not aware of any stay order either from the court or the higher court / Court of appeal.
  5. She decried that the respondent's willful disobedience of the court's judgment delivered on 29<sup>th</sup> January 2024 is detriment of the Minor who has not reported to school for the 2<sup>nd</sup> Term 2024 School Calendar. She decried too that the defendant/respondent only paid Kshs. 54,900/= for minor's school fee for Term I 2024, but rather, he has not paid school fees for Term II 2024 education calendar.
  6. It was her cry too that respondent has willfully disobeyed to contribute and pay half of the monthly house rent equivalent of Kshs. 25,000/= since November 2022, to-date, leaving the whole burden for to carry contrary to Orders of the Court.
  7. She went on to state that she had decided to withdraw the notice to show cause dated 13<sup>th</sup> March 2024, as the same is defective and it does not contain core actual ingredients of school fees and school related aspects, and it was erroneous filed. She contended that the instant application is concerned and connected to the advancement of the minor's rights under the Constitution of Kenya 2010, as the



subject minor herein has not reported to school yet; and schools have since reopened for the new school calendar 2024 Term II.

8. It was her averment too that despite the fact she is meeting her part of parental obligations and as per Court Decision/Judgment, the respondent has abandoned to meet his part of the obligations including refusal to pay half of the house rent which is equivalent of Kshs. 25,000/= per month since November 2022, and leaving it for the applicant.
9. She therefore asked this court to act in the best interest of the minor's education, welfare and justice by considering the instant application and grant orders sought.
10. In response the Respondent filed grounds of opposition dated 28/5/2024 which were premised following grounds: -
  - i. Application by the Appellant/Applicant is utterly misconceived,
  - ii. The application lacks merit,
  - iii. The application is bad in law,
  - iv. The Application is frivolous and an abuse of the court machinery,
  - v. The Respondent has fully complied with the orders of the court given on the 29<sup>th</sup> day of January 2024.
12. Further the Respondent also filed a replying affidavit on the same date wherein he admitted that he and the Appellant are the biological parents of the subject minor. He recalled that on 29<sup>th</sup> January, 2024, this court delivered a judgement regarding the upkeep of the subject minor to the effect that he was required to school fees for the minor and half of the rent. He averred further that in satisfaction of the court he intended to enroll his son at Fort Vision in Kisii at the start of second term and had paid school fees. He attached receipts of the said payments. On the issue of the rent the Respondent decried that the Plaintiff intended to punish him by purporting to rent a house worth Kshs. 50,000 in Nairobi which he finds outrageously expensive. He claimed that he has been paying monthly rent of 12,000 faithfully and produced receipts for the same.
13. He averred too that his interpretation of the orders of the court was that he was only to provide for his child to the extent he can afford but the main aim of the Plaintiff was to use his son a pawn to enrich herself.
14. In reply to the above averments the Applicant filed a further affidavit dated 4<sup>th</sup> June, 2024 wherein she stated that from the Respondent's reply is evident that that he is aware of the judgment and decree of this Court, but rather, he has willfully disobeyed the said judgment. She reiterated her she was neither aware of any stay orders of the execution of this Court's Judgment entered on 29/1/2024 nor was she aware pending review application in respect of the said judgment by the Defendant/Respondent. she insisted that the Respondent who is a man of means has willfully disobeyed this Court decision judgment delivered on 29<sup>th</sup> January 2024 to the detriment of the Minor who has not reported to school for the 2<sup>nd</sup> Term 2024 School Calendar.
15. She contended that the subject minor's best interest is at great risk if this court is going to allow the respondent's tricks to succeed herein. She contended too that the Respondent's grounds of opposition, application dated 28.5.2024, is incurably defective, lacks merit, is frivolous, vexatious, an abuse of the court process and is solely calculated to merely to delay and or deny the subject minor the benefit of this Court/s judgment delivered on 29.1.2024.



16. She urged this court to dismiss the Respondent's grounds of Opposition, application dated 28.5.2024, with costs and grant of orders sought in her application which shall shield the minor against defendant's excesses, malice and mischief. She equally urged this Court to be pleased to grant and / or allow her application for execution in its entirety.
17. The matter was heard on 6.6.24 wherein the court allowed the parties to make their oral submissions.
18. The Applicant submitted that Respondents were bringing new issues which were not canvassed during the hearing substantive hearing of the matter. She contended that the Respondent who did not appeal against the Judgment of the main intention court was to confuse the court by introducing the new issues which they ought to have raised during the hearing of the matter.
19. She submitted too that has been living in Nairobi for the past 20 years. She stated that the respondent has plans to kill her and hence he is bringing the issue of rape. She stated too that she is a pastor and not a prostitute. She disclosed further the rape case was concluded and had nothing to do with this case. She submitted further that the child is out of school to date. She equally submitted too that she is in arrears with rent. She thus urged this court to order the Respondent to comply with the orders of the judgment of this court delivered on of 29.1.24.
20. The learned counsel for the Respondent, Mr. Bosire Gichana on his part submitted that Respondent was required to pay school fees and half rent and has paid fees in a school at Kisii and paid a house in Kisii but the Applicant has refused to take the child to that school and house. The learned counsel further submitted that the Respondent annexed typed proceedings where the Appellant had stated she lives at Nairobi and the respondent was paying fees. He contended that applicant is now married to one Uvinalis who pays rent for her house in Nairobi. The learned counsel contended that Respondent is only required to pay rent for the sake of the child while the husband is required to pay her rent. He went on to submit that Respondent has paid rent in Kisii.
21. The learned counsel contended that was seeking rent for the house her husband is paying for. He contended that the Applicant is fond of trying to get money from other people using improper ways. The learned counsel submitted that terms in the lower court judgment capped at 10000/= wherein the Applicant was to pay half. The learned counsel argued too that the Applicant had not objected to the Respondent paying rent in Kisii.
22. In response to the submissions by the learned counsel for the Respondent the appellant submitted that she is not remarried. She also stated that she did not say that she has another husband who pays her rent. She submitted that all she had stated was that the father of her other child pays part of the rent. He refused the claim that she misuses men. She also denies ever living in a house worth Kshs 10,000/=.

### **Determination**

23. After considering the Application, the response thereto, all the documentary evidence supplied by the parties as well as their oral submissions, I find that the sole issue of determination are:
  - a. Whether the respondent should be paying school fees at Rophine Field Junior School Utawala in Nairobi related expenses, purchase of uniform, pay transport and buy writing materials and school books.
  - b. Whether Appellant should be ordered to pay half rent being 25,000 from November, 2022.



**Whether the respondent should be paying school fees at Rophine Field Junior School Utawala in Nairobi related expenses, purchase of uniform, pay transport and buy writing materials and school books.**

24. The Applicant has claimed that the respondent has willfully disobeyed the court's judgment delivered on 29<sup>th</sup> January 2024 by failing to pay school fees due for the 2<sup>nd</sup> Term 2024 totaling to 46,100. She decried too that the respondent only paid Kshs. 54,900/= for minor's school fee for Term I 2024, but rather, he has not paid school fees for Term II 2024 education calendar. In support of her claim the Applicant attached a bundle of school fees payment for term I and school fees demand note Term II 2024.
25. From the proceedings of the trial court and of this court it is outright that the minor is a pupil at Rophine Field Junior School, Utawala in Nairobi and that she stays with the Applicant who was taking care of her. It is undisputed fact the trial court granted the Applicant actual custody of the minor. The Applicant has also averred that the Respondent had paid school fees totaling to Kshs. 59,400 for the minor at Rophine Field Junior School, Utawala for the first term but refused or ignored to pay fee arrears for the second term. The Respondent in order to further prove that he did not pay school fees for the minor at Rophine Field Junior School, Utawala as he intended to enroll his son at Fort Vision in Kisii at the start of second term and had paid school fees in that school.
26. Having established hereinabove that Respondent was directed to pay school at Rophine Field Junior School, Utawala, the Respondent has no option but to comply with the orders and directions of this court. The Respondent claim that he has decided to enroll the child at a new school in Kisii is total contravention of the clear orders of this court and those of the trial court as well as the best interest of the minor a child of tender years who is schooling at Rophine Field Junior School, Utawala while staying with the mother. The respondent has not stated how he arrived at the decision to move the child to the school in Kisii. Parental responsibility is the duty of both parents and their consultation is key before making decision relating to a child.
27. From the record, there was an attempt by the applicant to move the child to school Kisii which was dismissed by the lower Court. The Respondent cannot there purport to claim that he is complying with the court order by his attempts to transfer the child to a new school in Kisii which is not part of the orders of this court.
28. If the Applicant was dissatisfied with the orders of this court he had an opportunity to Appeal against the decision of this court. He cannot seek review through the back door to suit his own interests. He is completely out of order and this court cannot entertain his actions that are contrary to the orders of this court.

**29. Whether Appellant should be ordered to pay half rent being 25,000 from November, 2022.**

30. The Applicant averred that the Respondent has willfully disobeyed to contribute and pay half of the monthly house rent equivalent of Kshs. 25,000/= since November 2022, to-date, leaving the whole burden for to carry contrary to Orders of the Court. The Appellant has attached rental receipts from November, 2022 to date.
31. From the Response, the Respondent has conceded that has never made any rent payment of rent as directed by the court wherein he was required to pay half the rent. In fact, in his replying affidavit, Respondent has attached a copy of rent receipt to demonstrate he has paid rent totaling to Kshs. 12,000 for a house in Kisii. This is quite ridiculous considering the fact the minor stays and goes to school in Nairobi. As I have pointed herein above the trial court gave actually custody of the minor to the



Applicant who stays in Nairobi which finding was upheld by this court on Appeal. I therefore agree with the Applicant the Respondent can only pay half rent in the house the Applicant and the minor resides.

32. This court ordered that the Respondent to pay half rent but did not address the issue of amount payable as rent. The Appellant claims that rent payable is 50,000 and has produced receipts to that effect. The Respondent on his part claims that he finds the rent of outrageously expensive.
33. I however note the Applicant filed receipts from Bhagdad Court in the lower court file indicating that she had paid rent of 30,000, 17,400, 27,000, 27, 750 and 30,000 as rent for the months of April to November 2021. On 10.6.22 during the trial attempts by the applicant to produce the rent receipts were thwarted as defence counsel objected to production of the same as they did not bear revenue stamp. The court indicated that it would rule on the same but it did not. Considering the current market rent in Nairobi and the best interest of the minor herein, I will apply a modest conventional figure of Kshs 25,000/= per month as rent for the applicant in Nairobi. The Respondent will bear Kshs. 12,500/= which is half of the monthly rent.
34. I wish to state at this point that the best interest of children is paramount in all children matters and not the personal interest of parents. This court expects both parents herein to work in harmony to ensure that the best interest of the minor is achieved.

### **Conclusion**

35. From the forgoing therefore this court allows the Application on the following terms:
  1. The Respondent to pay the outstanding school fees balance and all auxiliary school expenses for the minor at Rophine Field Junior School, Utawala in Nairobi to enable the minor resume school within 14 days from the date of this Ruling.
  2. The Respondent to pay half of the rent amounting to Kshs. 12,500 per month.
  3. The Respondent to refund the Applicant all the amount of rent she has paid since November, 2022 when the judgment of the lower court was delivered at the rate of Kshs. 12,500 per month.
  4. The rest of the orders as issued on 29<sup>th</sup> January, 2024 will remain in place.
  5. In case of default execution proceedings to issue against the Respondent
  6. The Applicant is awarded costs of this Application.
36. It is so ordered.

**T.A ODERA**

**JUDGE**

**10.7.24**

Delivered Virtually Via Teams Platform In The Presence Of:

Miss Nyaenya hold brief for Mr. Bosire Gichana for the respondent

Applicant: Absent

Court Assistant: Oigo

