



**SM v PEN (Civil Appeal 123 of 2019) [2024] KEHC 10169 (KLR) (9 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10169 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 123 OF 2019  
TW OUYA, J  
AUGUST 9, 2024**

**BETWEEN**

**SM ..... APPELLANT**

**AND**

**PEN ..... RESPONDENT**

*(Being an appeal from the order of the Senior Principal Magistrate Hon. T. Nyangena dated 2nd August 2019 in Kiambu children's case No. 27 of 2016 in the matter of SM and SM (minors))*

**RULING**

**Background**

1. This Appeal arises from an order of the Senior principal magistrate Hon. Hon Nyangena dated 2<sup>nd</sup> August, 2019 for maintenance. The Applicant filed an Amended Memorandum of Appeal dated 29<sup>th</sup> May,2020 appealing against the above order.
2. The genesis of this matter arose from an ex-parte application dated 23<sup>rd</sup> December 2016 under certificate of urgency by the Respondent against the Appellant seeking maintenance orders which were granted on 18<sup>th</sup> January 2017. The Applicant filed an application dated 24<sup>th</sup> January,2017 seeking to set aside the above maintenance order. The Respondent also filed a contempt of court application dated 28th March, 2017.
3. On 31<sup>st</sup> May 2017 matter was mentioned before Hon. Atambo who issued orders for payment of kshs.6,100 and 5,000 rent, minor's food and school fees as per the school fees structure. Parties were directed to appear before court on 28<sup>th</sup> June 2017.
4. The applications dated 24<sup>th</sup> January,2017 and 28<sup>th</sup> March, 2017 were canvassed together by way of written submissions and determined vide Order dated 22<sup>nd</sup> November, 2017. Orders included payment of 15,000 per month each plus addition of 30,000 per month each to clear outstanding arrears. He



- was also ordered to pay total of 98,230 lumpsum arrears and directed to file a replying Affidavit to the application and a defense within 14 days. The above can also be referred to as a scheme of settlement.
5. On the basis of the above, the respondent filed a notice to show cause (committal to civil jail) and an order issued 22<sup>nd</sup> November 2017.
  6. The Appellant filed an application seeking to set aside the Notice to Show cause order of 22<sup>nd</sup> November 2017 and prayed for an order for DNA Testing. These were also canvassed together by written Submissions and determined vide order dated 29<sup>th</sup> August 2018.
  7. The Appellant was committed to civil jail for failing to honor scheme of settlement based on the above determination. He moved to court by filing an application dated 2<sup>nd</sup> August 2019 seeking stay of execution of the order committing him to civil jail. The Court granted an order for the release of the Applicant upon payment of half of the amount in arrears which was calculated at kshs. 413,000.
  8. On 13<sup>th</sup> August,2019 the Appellant filed a memorandum of Appeal and an Application under Certificate of urgency to the High Court. The Application was then heard inter-partes and determined vide Ruling dated 12<sup>th</sup> May, 2020. The High Court noted that the appellant made an error in paragraphs 9 &10; that the MOA was made against subsequent enforcement order of 2<sup>nd</sup> August,2019 but the grounds were challenging the substantive orders of maintenance made between 2017 and 2018 without leave.
  9. The Appellant was then granted leave to amend the MOA within 90 days in default of which the appeal would be struck out.
  10. The Appellant was dissatisfied with the ruling made on 2<sup>nd</sup> August, 2019 directing him to pay half of the amount in arrears and filed an Amended MOA dated 27<sup>th</sup> May,2019.

### **Submissions**

11. I have read the pleadings and submissions by the parties herein. In the Appellant's submissions he argues that the court made an error by failing to inquire into his ability as per the requirements of sections 104 and 4(2)(3) of the Children Act before making an order against him. He states that he is in fact a retired jobless police officer and that his pension cannot be subject of execution. He submits that he may incur substantial loss if the Lower Court order is enforced against him.
12. The Appellant argues that the Lower Court made an error of fact and law by making a finding without proof that the Appellant's retirement income could be attached.
13. He also argues that the Lower Court erred in law and fact in failing to establish the paternity of the minor SM as it was on record that the Respondent had moved into cohabitation with the child and that the parties cohabited for a period of two years.
14. The Appellant also argues that the order was made by court ex-parte, without evidential basis and proof of the Appellants responsibility or proof that he was the father of the child.
15. The Respondent in her submissions has focused on the chronology of events leading to the Amended Memorandum of Appeal and the order appealed against and does not address the issues raised by the Appellant. The respondent is of the view that the issues raised by the Appellant are for the substantive suit and not for the Order appealed against. In effect, the Respondent does not appear to oppose the Application save for the grounds that touch on the substantive suit.



## Issues for Determination

16. Taking into account the parties arguments through pleadings and submissions, this court has identified the following issues for determination:
  - i. Whether the applicant's application in the Trial Court was merited in law.
  - ii. Whether the trial court established the Appellant's ability to maintain the minors before issuing the orders for maintenance against him.
  - iii. Whether the Court made a final decision against the Appellant at an interlocutory stage
17. This court notes that the High Court granted stay of execution of the order for commission to civil jail and allowed the Appellant to file Appeal out of time and his appeal then was deemed as filed. The Appellant subsequently obtained orders and filed an amended Memorandum of Appeal. The Order appealed against was payment of half of the outstanding decretal sum of kshs.413,000 after failing to take the child to School. The Order read:

“Upon considering the Application dated 2<sup>nd</sup> August 2019, I order the applicant to be let free upon paying half of the amount in Arrears”
18. As demonstrated above, this case has been protracted from the year 2017 when ex-parte interim orders were made against the Appellant for child maintenance. The parties have been in and out of court with the appellant under imminent possibility of being committed to jail for failure to comply. Notable, is the order dated 31<sup>st</sup> May 2017 by Hon. Atambo for payment of kshs.6,100 and 5,000 rent, minor's food and school fees as per the school fees structure. It is not clear whether the order was recurrent or just a one-off payment; And, Order dated 22<sup>nd</sup> November, 2017 which included payment of 15,000 per month each plus addition of 30,000 per month each to clear outstanding arrears. He was also ordered to pay total of 98,230 lumpsum arrears. The orders appealed against were for the enforcement of the above and of earlier orders of the Children Court.
19. An application by the appellant to the High Court dated 27<sup>th</sup> May 2020 was disposed by Ruling dated 19<sup>th</sup> April, 2021 granting the following orders:
  - a. Leave to Appeal out of time and memorandum filed on 20<sup>th</sup> May 2020 be deemed as filed
  - b. The Order of 2<sup>nd</sup> August 2019 issued by Kiambu Children's Court Case no.27 of 2017 is hereby stayed pending the hearing of this appeal
  - c. The cost of the notice of motion dated 27<sup>th</sup> May 2020 shall abide with this appealPursuant to the above, it is apparent that the order appealed against was an enforcement of earlier orders of the Children Court.
20. The issues raised by the Appellant are triable issues which ought to have been addressed by the trial court. It is imperative for a court before making maintenance orders to inquire into the means of the party against whom the order is to be issued. It is clear from the record that this was not done and that the orders were made based on the calculations tabled before court by the Respondent. It is noteworthy that throughout the proceedings, the Appellant recurrently made a plea of inability but this was not acted upon.
21. On the other hand, the Respondent mentions that she is a casual laborer but there is no clear indication as to whether a formal inquiry was made into her ability thus the possibility of her contribution to minor's support was excluded.



22. The appellant has continuously raised an issue of paternity of one of the children. One of the orders issued in the course of the proceedings was the order for the DNA testing. Whether or not and how the issue was dealt with is not clear from the record. This is not to say that the Appellant had no parental responsibility over the child but that he also raised the issue of the period of cohabitation with the Respondent which ought to be addressed through trial.
23. The matter was initiated by way of notice motion where the Respondent sought and obtained ex-parte orders against the Appellant on an interlocutory basis for the purposes of meeting the minors' immediate needs. However, the Appellant's failure and/or inability to comply has caused the matter to take the dimension of the enforcement of the interlocutory orders thereby neglecting the substance upon which the suit is hinged. The Appellant is therefore subject to committal to civil jail without the main suit ever being heard.
24. I have mentioned above that the permanence and/or recurrent nature of some of the orders could also not be ascertained.

## The Law

In the case of *SMW v EWM* [2019] eKLR the High Court at Nyeri set aside ex-parte maintenance orders of the Lower Court against the Appellant on the basis that court made the award without any basis or enquiry into the appellant's ability but simply on the basis of what the respondent had said. The court also failed to take into consideration the Respondent's contribution to the maintenance of the minors considering that responsibility for minors is to be shared. The court made the following findings:

1. The first point of stop should have been the social inquiry report. S.76 of the *Children Act* clearly lays out the 'welfare first'. The principles laid out there provide for the court an objective checklist which can be investigated through a request for a social inquiry report from the Department of Children Services. Through this report the court would be provided with an independent analysis of the state of the child or children as at the time the matter is being litigated. It would also bring on board the voices of the children to be heard above the cantakary that is their parent's disagreement. The report would give the status quo of the welfare of the children, and the status of each parent through a home visit, if necessary, school visit. The court would also get a glimpse of the underlying issues which the warring parents would have an opportunity bring on board giving the court the chance to interrogate the necessity for psycho-social support and any other appropriate s. 114 orders.
2. The parties have an obligation to supply to the court an affidavit of means. It is expected that each of them funds for themselves in one way or the other even as they live separately. This is information that is verifiable and would be of assistance in determining what each of the parents will provide, by arriving at a balanced distribution of the duties of the parents to maintain the children.
3. The parents know the needs of their children. They are obligated in the affidavit of means to set out the specific needs of the children and how each parent intends to meet his/her share of the needs.
4. Decisions on maintenance for children should not be made arbitrarily. A mere statement that "the children are suffering" is not sufficient to warrant the arrest of the



other parent. Compulsion to carry out parental responsibilities must come as a last resort hence

5. Every effort ought to have been made to have the parents undertake ADR and other alternatives methods as required by article 159 (2) of the *Constitution*. It is one way of ensuring that the subsisting environment is not poisoned against the children's right to interact with each of their parents.
25. This is an old matter which needs to be dispensed with so that the litigants can get justice without undue delay taking into account the welfare of the child/children who are at the center of the dispute.
26. It is notable that the Appellant despite, having filed an amended Memorandum of Appeal has made submissions touching on substantive issues. This court has taken time to trace the origin of the matter from an ex-parte application dated 23<sup>rd</sup> December 2016 under certificate of urgency by the Respondent against the Appellant seeking maintenance orders which were granted on 18<sup>th</sup> January 2017 up to the enforcement order by Hon. Nyangena dated 2<sup>nd</sup> August 2019 which is the subject of this appeal. What stands out is that the issues raised by the Appellant are triable as pointed out in paragraphs 21 to 24 above which should best be resolved through a full trial.

### **Determination**

27. This court takes into account that matrimonial matters touching on child maintenance are delicate and need to be handled with due care and with the best interest of the child in mind in addition to the principle of equality of parties/parents before the law and exploration of alternative dispute resolution mechanisms. The court does not fault the Trial court in any way save that the issues raised by the Appellant are weighty, triable and can be addressed through a full trial. The court therefore holds that:
  - i. The appeal touches on matters intertwined with previous orders and cannot be addressed in isolation.
  - ii. The trial court did not enquire into the Appellants financial ability before making the maintenance orders
  - iii. The Trial court did not take into account the Respondents contribution before making the maintenance orders
  - iv. The issue of paternity of one of the children, parental responsibility vis a viz the period of cohabitation of the parties was not established.
  - v. The original orders leading to the enforcement orders by Hon. Nyangena were made *ex-parte* and are prejudicial to the Appellant.

### **Orders**

28. I therefore order as follows:
  - i. Orders by Hon Nyangena issued on 19<sup>th</sup> August 2019 and all attendant orders are hereby set aside.
  - ii. This matter to be placed before the trial court on a priority basis for full hearing.
  - iii. Both parties to file before court affidavit of income for consideration by the court.



- iv. The Children Officer to avail to the trial court a social inquiry report on the welfare of the children based on the check list under s.76 of the [children Act](#) including a home visit for each of the parents.
- v. The order for the Children Officer's Report to be extracted and served on the County Children Services Co-Ordinator, Kiambu to avail the report on or before 18<sup>th</sup> september2024.
- vi. Mention before DR Kiambu High Courts on 18<sup>th</sup> September 2024 for compliance.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9<sup>TH</sup> DAY OF AUGUST 2024**

ROA 14 days.

**HON. T. W. OUYA**

**JUDGE**

In the presence of:-

Jepkemboi holding brief for Kirwa for the Respondent

No Appearance for the Appellant

Court assistant Martin Korir

