



**DMM v SWM (Appeal E034 of 2023) [2024] KEHC 10781 (KLR)
(Family) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10781 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY
APPEAL E034 OF 2023
H NAMISI, J
SEPTEMBER 19, 2024**

BETWEEN

DMM APPELLANT

AND

SWM RESPONDENT

((Being an Appeal from the Ruling by Hon. G. N. Opakasi (Ms), Principal Magistrate, dated 30 March 2023 delivered in Nairobi Children’s Case No. MCCHCC E004 of 2020))

JUDGMENT

1. The appeal arises from a Notice of Motion dated 10 November 2021 filed in the Children’s court by the Appellant herein seeking the following orders, *inter alia*:
 - i. That pending the hearing and determination of the Application, the court unconditionally discharge the Defendant (Appellant herein) pending the results of the Application as filed;
 - ii. That pending the inter partes hearing and determination of the Application, this Honourable Court be pleased to refrain from making any orders interfering with the freedom and liberty of the Defendant in this matter;
 - iii. That pending the hearing and determination of this Application inter partes, this honourable Court be pleased to conduct an independent inquiry to ascertain the means of the Defendant in accordance with section 121 (3) of the Children Act, 2022;
 - iv. That the warrants issued by this court and emanating from the Notice to Show Cause by the Plaintiff be lifted unconditionally until this Application is heard and determined;



- v. That an order of remission issue against the sums which touch on the reimbursement of costs incurred by the Plaintiff in unilaterally enrolling the minors to a private school beyond the affordability of the Defendant;
- vi. That the Notice to Show Cause by the Plaintiff be dismissed in its entirety;
- vii. That the decree dated 10 February 2021 be varied to conditionally include that costs incurred by the Plaintiff through her unilateral election to admit the minors to a private school outside the means and affordability of the Defendant and outside the ambit of the mediation settlement agreement be borne exclusively by the Plaintiff.

The Application

2. The Application is premised on the numerous grounds on the face of it and supported by an Affidavit sworn by the Appellant. From the grounds on the Application, the bone of contention seems to be a sum of Kshs 74,800/-, the basis of the Notice to Show Cause taken out against the Appellant. The said sum arises out of school fees, which is payable by the Appellant as per a mediation settlement agreement.
3. In his Supporting Affidavit, the Appellant deponed that the said sum of Kshs 74,800/- was sought by the Respondent as school fees following the enrolment of the children at a private school, Dynamite School. It was the Appellant's contention that he was not consulted by the Respondent, who unilaterally decided to enrol the children in a private school. The Appellant stated that he is gainfully employed as a freelance court clerk, sourcing work from different law firms, and earning about Kshs 1,500/- per week. He is, therefore, not able to afford the cost of the private school.
4. To his Supporting Affidavit, the Appellant annexed the Mediation Settlement Agreement. The Agreement lists the Appellant's responsibilities to be school fees and school related expenses, medical expenses, food for the minors when the Appellant has custody and the Appellant's own rent. The Agreement further states that the parties shall agree on the school that the children shall attend subject to affordability by the Appellant.
5. In her Replying Affidavit dated 15 November 2022, the Respondent opposed the Notice of Motion, noting that the Appellant had filed a similar Application dated 1st September 2021, which had been dismissed by the court. It was the Respondent's averment that she had made attempts to consult the Appellant with regard to the choice of school for the children, but the Appellant had been uncooperative. She further stated that for over a year, the Appellant had refused, neglected and/or failed to contribute to the maintenance of the children, thus leaving her to shoulder the entire burden.
6. The Appellant also filed a very lengthy Supplementary Affidavit dated 13 December 2022. In response to the issue of consultation, the Appellant provided a copy of letter dated 7 December 2020 from his Advocates to the Advocates for the Respondent, inquiring on the residence and location of the children so that the Appellant could engage in an exercise of identifying an affordable school for them. It is his averment that there was no response to the letter, which was followed by email dated 26 January 2021. It was only in March 2021 that the Appellant came to learn that the Respondent had made a unilateral decision and enrolled the children in a school.
7. The parties then filed their submissions. In its Ruling, the trial court noted that this is not the first time that the issue of school fees had come up before the court. In the Appellant's application dated 1st September 2021, a similar issue was raised and canvassed in court and the court declined to set aside the warrants of arrest that had been issued, and the application was dismissed. The trial court also noted



that on 30 March 2022, the Appellant had proposed a payment plan to clear the school fees arrears, but later reneged on his promise and stopped paying as agreed.

8. It was the trial court’s observation that from the history of the matter, the Appellant has shown that he is not ready to voluntarily comply with the court orders unless a warrant of arrest issued. The court stated thus:

“It is essential for the defendant to understand that it is the unqualified responsibility of every party to whom a court order has been directed to, to comply with court orders because they are not issued in vain.”

9. Finding no merit in the Appellant’s Application, the trial court dismissed the same.

The Appeal

10. Aggrieved by the said Ruling, the Appellant lodged this appeal on the following grounds:

- i. That the learned Magistrate erred in law and in fact by dismissing the Appellant’s application dated 10 November 2022 without considering the issues for determination raised in the Appellant’s submissions dated 27 January 2023;
- ii. That the learned Magistrate erred in law and fact by arriving at the conclusion that the only issue for determination in the Appellant’s application dated 10 November 2022 was whether it should be dismissed;
- iii. That the learned Magistrate erred in law and fact by failing to hold the Respondent accountable for failing to consider the terms of the mediation agreement that was adopted as an order of the Court on 10 February 2021 indicating that both parties must agree on the school where the minors should attend;
- iv. That the learned Magistrate erred in law and fact by selectively holding that only the Appellant was bound to obey court order because they are not issued in vain while ignoring that the Respondent had equally disobeyed the Court Order dated 10 January 2021 that adopted the mediation settlement agreement;
- v. That the learned Magistrate erred in law and fact by failing to vary the decree dated 10 February 2021 to arrive at an order for remission for the costs incurred by the Respondent through her unilateral decision to admit the minors to a private school outside the means and affordability of the Defendant;
- vi. That the learned Magistrate erred in law and fact by failing to arrive to the finding that the Respondent was equally bound to have obeyed the order dated 10 February 2021 which adopted the mediation settlement agreement between the parties;
- vii. That the learned Magistrate erred in law and fact by failing to conduct an inquiry in accordance with section 121 (3) of the *Children Act*, 2022 to ascertain the means of the Appellant;
- viii. That the learned Magistrate totally ignored the fact that the Appellant had not been belligerent in his parental duties;
- ix. That the learned Magistrate erred in law and fact for condemning the Appellant for being poor;
- x. That the learned Magistrate erred in law and fact by totally ignoring the best interest of the child in dismissing the Appellant’s Application dated 10 November 2023 and refusing to lift the warrants of his arrest which interfere with his liberty to fend for the minors.



11. The appeal was canvassed by way of written submissions.

Analysis and Determination

12. Having read the Record of Appeal, Memorandum of Appeal as well as the respective submissions by the parties, the issue for determination is whether the trial court erred in dismissing the Appellant's Application dated 10 November 2021.
13. The Appellant argued that his earnings were adversely affected by the COVID-19 pandemic as well as the launch of the e-filing system by the Judiciary. He submitted that no inquiry has ever been conducted by the court to ascertain his means prior to the Ruling made on 30 March 2023. I note that the Mediation Settlement Agreement was voluntarily signed by parties and filed in Court on 13 January 2021. The COVID-19 pandemic hit the country in March 2020 and the e-filing platform was launched in July 2020. Both events happened before the voluntary signing of the Mediation Settlement Agreement. Suffice it to say that by the time the Appellant was entering into this agreement, he knew his financial capability.
14. On the issue of consultation, the Appellant had denied ever being consulted by the Respondent with regard to choice of school. He relied on a letter dated 7 December 2020, which he personally delivered to the Advocates for the Respondent. However, I note that there is no stamp on the said letter indicating if or when the said letter was received. The Respondent has also mentioned an email dated 26 January 2021, with no evidence of the same. What is even more surprising is that even after learning of the children's enrolment in a school that the Appellant claims he cannot afford, there were no efforts by the Appellant to propose alternative schools that he can afford.
15. From the foregoing, I am not convinced that the Appellant's arguments are forthright and not merely intended to circumvent the Mediation Settlement Agreement that he voluntarily signed.
16. The Appellant argued that his arrest and detention will not be in the best interests of the children. On the same note, it is in the best interest of the children that the Appellant obeys court orders. As stated by the trial court, orders cannot be made in vain. The Appellant argues that he is being punished for being poor. From the trial court's observation, it would seem that the Appellant has made it a habit of complying with orders arbitrarily. The conduct of the Appellant in this matter betrays him. It does not endear him to equitable remedies.
17. In the circumstances, the Appeal does not succeed and is hereby dismissed. Any interim orders are hereby vacated. This being a children's matter, there are no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 19 DAY OF SEPTEMBER 2024

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

.Ms. Mureithi.....for the Appellant

Ms. Muigai.....for the Respondent

