



**IWM v DKNN (Civil Appeal E014 of 2023)
[2024] KEHC 12061 (KLR) (8 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12061 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E014 OF 2023
RM MWONGO, J
OCTOBER 8, 2024**

BETWEEN

IWM APPLICANT

AND

DKNN RESPONDENT

RULING

Background

1. The Applicant and the Respondent are the parents of the minors TRN and JWN. The applicant sued the Respondent in the lower court for maintenance. Two of her Application's dated 23.1.2013 and 15.11.2023 in that suit were dismissed by the court. Ultimately the lower court, in a judgment dated 6th February 2023 ordered that the Respondent pay Kshs. 10,000/= monthly maintenance to applicant with effect from 10th February 2023.
2. Dissatisfied, with the dismissal of her applications the Applicant/Appellant filed the present appeal which is ongoing. In the meantime, the Respondent failed to pay the monthly maintenance amount regularly as ordered.
3. Consequently, on 30th August 2023, the Applicant filed the present application which seeks that:
 1. The Honourable court be pleased to commit the Respondent herein to prison for disobeying the lower court orders given on 6/2/2023.
 2. In the alternative the Honourable Court be pleased to order that the respondent to pay Kshs 50,000/=being the money for maintenance for the past 5 months and it be deposited in the KCB Bank Account Number;1295xxxxxx bearing the names of IM.
4. The application is founded on the grounds on the face of the application and upon the affidavit of IM, where she avers substantially that:



1. A Judgment was issued in my favour.
2. The respondent was present and was ordered by court to pay Kshs. 10,000/=per month.
3. Up to now the respondent has defaulted paying for 5 months despite reminder.
4. I have come to court so that court can help me in asking him to obey the court order or have him put in jail for disobeying the orders.
5. In response the Respondent filed a Replying Affidavit with the following major averments:
 1. That the lower court issued a judgment on 6th February, 2023 where I was ordered to be paying monthly upkeep of Kenya Shillings Ten Thousand (Kshs.10.000/=).
 2. That so far from the date when judgment was issued I have managed to pay a sum of Kenya Shillings Forty-One Thousand (Kshs. 41,000/=)
 3. That both the Defendant and I are currently not in gainful employment a fact that is known to both the court and evidenced in the court records, therefore my inability to pay the monthly upkeep towards the minors has not been intentional or contemptuous of court orders. This primarily owes to lack of funds.
 4. That in the recent months my biological mother has been ailing and I have been tasked with the responsibilities of taking care of her treatment and medication and therefore
 5. since I am the only family member available, I have been by her side taking care of her medical needs more so during and after surgery.
 6. That owing to unemployment I currently engage in odd jobs where I get meagre earnings just enough to sustain myself and pay bills and the extra, I give the mother so as to assist her taking care of our children.
 7. That I am aware that the Appellant lives with her parents and they provide her with all her needs geared to herself and the children.
 8. That we can have a consent recorded on how to pay the accumulated arrears Kshs 50,000/=.
 9. That the plaintiff has continued to deny me access to the children.
6. The applicant on 8th December, 2023 deposed to a supplementary affidavit with the following major averments:
 1. That so far, the money the respondent has not paid for maintenance is Kshs 52,000/= which is a huge sum and is going to increase every new month.
 2. That I am taking care of the minor's school fees, food, medical and shelter yet I am not working or financially stable but I have to since I am their mother.
 3. That the lower court did consider all the evidence and sentiments made by the respondent and his financial ability to maintain his children and hence the court's decision to order he pays Kshs 10,000/=
 4. That it beats logic how the respondent claims to be taking care of his mother's hospital bills but cannot take care of his own kid's hospital bills and maintain them yet he is their biological dad.



5. That even so the hospital bills attached by the respondent are for March this year and we are in December no plausible reason has been given for failure to pay for the other months.
 6. That even prior to the court order since 2021 the respondent has never provided for the minors.
 7. That I have an ailing father and uncle who I have been taking care of and I am therefore been strained financially.
 8. That the respondent is not an only child he has siblings who are wealthy and are staying outside the country in Italy and others working in Nairobi who are capable of taking care of their parents' hospital bills when he is taking care of his kids.
 9. That there is a parcel of land Thika/Munyu/xxxx that we bought together during our marriage and since it has the respondent's name the said land can be sold and the money be used to cater for the maintenance of the children and their education expenses since both of us are not financially stable.
7. Parties filed written submission as directed by the court.

Applicant 's Submissions

8. The Applicant submits that disobeying of Court Orders undermines the very foundation of the rule of law and also undermines the authority and dignity of the courts. The respondent has confirmed he is aware of the Court Orders and so is his advocate therefore there should be no excuse as to why he is not obeying the orders.
9. In their supplementary affidavit dated 8/12/2023, she attached a title deed for land parcel Number Thika/Munyu/xxxx. She argues that if the respondent is completely unable to maintain his children, then they propose that the parcel of land sold be and the proceeds go towards maintaining the two children JW and TRN and meeting their expenses because he claims he is not in gainful employment.
10. The Applicant points out that no appeal has been preferred by the respondent in regards to the payment of Ksh. 10,000. This means that he was satisfied with the court's judgment. She further submits that she is also struggling to meet the children's needs and seeks court intervention noting that in children matter, their best interest is paramount.

Respondent's Submissions

11. The respondent acknowledges that judgment was issued by the lower court on 6th February, 2023 and he was ordered to pay Kshs.10.000/=per month as child maintenance. He says he complied with the said orders up until he experienced a minor setback when his mother got ill and he fell into arrears. However, to date he has since resumed his monthly repayments
12. The Respondent submits that the maintenance payment has been shouldered by the Respondent and his siblings and there is no indication that the Respondent considers his mother more important than his own children. Despite having no stable income, he is balancing all his financial responsibilities to the best of his abilities and trying to care for his loved once despite his meagre resources.
13. He submits that he is not in gainful employment and he is currently engaged in odd jobs to make ends meet. At all material times, the Respondent has been a loving father to the minors herein and whatever he gets he apportions a part of the money towards the maintenance of the minors. The Respondent has paid and continues to pay maintenance in excess of Kshs.60.000/= from when this instant application



was filed. He is willing to clear any arrears he has in terms of maintenance as he has the best interests of the minors herein.

14. The Respondent's argues that the instant application is motivated by malice since committing the Respondent to civil jail is not in the best interest of the minors, and he will not be able to provide if committed to civil jail. The Respondent states that he who comes to equity must come with clean hands and he who seeks equity must do equity.
15. In addition, he submits that the Appellant has denied his access of the minors herein since on or about November 2022 making her equally in contempt of the said orders that she is alleging the Respondent is in contempt of. He cites Section 11 (6) of the Children Act 2022 states

“Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with the parent or parents on a regular basis, unless it is shown to the satisfaction of the court that such contact is not in the best interest of the child.”
16. He submits that Section 11 of the Children's Act 2022 demands that every child has a right to parental care and protection. Further that a parent is defined under section 2 as a mother and father or any person who is conferred parental rights by law. In this instant case, he argues the grandparents are being used to frustrate the Respondent owing to their superior resources and the Respondent needs protection from by Honourable court. He prays that he be allowed to participate not only in the financial provisions for the minors but also but also in the decisions for the best interests of the minors owing to the parents current financial, emotional, economic and social status.
17. He argues that the Appellant has evidently chosen to live above her means. She has averred that she is not in gainful employment and if her parents are struggling to meet the minors school fees and school related expenses, it is in the best interest of the minors to have them moved to a public school and/or a reasonable school which both parents can agree.
18. Section 13(1) of the Children Act provides that "every child has the right to free and compulsory basic education in accordance as fortified by Article 53 (1)(b) of the Constitution.”
19. The respondent submits that the both our constitution and the law demand that only the parents of a child are legally supposed to take care of their child(ren) and if they are unable for one reason or another are unable to provide their child(ren)with education the government has provided compulsory basic education.

Issue for Determination

20. There is only one issue for determination whether the respondent should be committed to civil jail.

Analysis and Determination

21. I have for clarity, set out in detail the background and circumstances of this application. In the application, the applicant seeks to have the respondent committed to prison for disobeying the Court Orders given on 6/2/2023 by the lower court.
22. In the alternative the applicant has asked for an order that the respondent to pay ksh.52,000/= being the maintenance fee for the past 5 months deposited in the KCB Bank Account No.1295xxxxxx bearing the names of IM.



23. From the available information the applicant has been left with a burden of taking care of all the needs of the children; paying school fees for the children, medical, shelter, food. The respondent despite the fact that he is working on and off has not contributed to the payment of the bills.
24. However, the respondent has stated in his replying affidavit states that he is taking care of his mother's medical bills and therefore can't afford maintaining his children. The respondent also says he is not in gainful employment, although he contradicts himself by stating he is able to afford his mother's hospital bills which are Kshs 905,394/=.
25. The Respondent's seeks that the instant application is motivated by malice as committing the Respondent to civil jail is not in the best interest of the minors since he will not be able to provide for them if at all he is committed to civil jail.
26. In *DMM v RMM* [2018] eKLR Kamau J held:
- “Indeed, civil jail ought not to be used to threaten or coerce a judgment debtor into paying a decretal sum. It is a drastic execution procedure and must be used sparingly and as a last resort. This is because a judgment debtor who serves the maximum period of six (6) months incarceration in a civil jail for a civil debt cannot be arrested and detained again under the same execution proceedings. Further, as has been provided in Section 42 (2) of the *Civil Procedure Act*, the Appellant could not be re-arrested in execution of which he was detained in prison.”
27. The respondent deposed that the applicant has denied him access of the minors herein since on or about November 2022, also rendering her in contempt of the said orders. However, the respondent has made no application for contempt.
- 28 Section 11 (6) of the *Children Act* 2022 states
- “Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with the parent or parents on a regular basis, unless it is shown to the satisfaction of the court that such contact is not in the best interest of the child.”
29. The respondent deposed that they can have a consent recorded on how to pay the accumulated arrears Kshs 50,000/=. Section 11 of the Children's Act 2022 demands that every child has a right to parental cares and protection further a parent is defined under section 2 as a mother and father or any person who is conferred parental rights by law.
30. In *MOA v HAO* [2021] eKLR Onyengo J 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 interests of a child principle or as a ground to settle scores out of marital differences.”
31. The court notes that Section 13(1) of the *Children Act* provides that "every child has the right to free and compulsory basic education in accordance as fortified by Article 53 (1)(b) of *the Constitution*.”
32. In light of the above, the respondent must show some seriousness with regard to the duty to pay maintenance.



33. In the case of SAK v ZDNP (2019) eKLR the Court held that:

“The duties referred to above include inter alia the duty of a parent to maintain the child and in particular to provide him with food, shelter, clothing, medical care, education and guidance. Parental responsibility falls on both parents and no parent has a superior right or claim against the other in exercise of parental responsibility.”

34. In this case, it will not be in the best interest of the child to commit the respondent to civil jail for failure to provide his share of child support. He has shown his willingness to enter into a consent on the payment of the child maintenance arrears. In MOA v HAO [2021] eKLR

“It will not be in the best interests of the child that the primary giver be committed to civil jail for non-compliance of that order or be subjected to unfair treatment. It is in the best interests of the child that the mother shows love to the child by contributing towards her welfare as well.”

Conclusion and Determination

35. Ultimately, the court is of the view that the respondent be given a last chance to comply with the court order. He is ordered to pay Ksh.60,000/= being maintenance arrears, forthwith, and in any event no later than 14 days from the date hereof.

36. In the event that the respondent does not comply with the above order for payment of arrears, he shall be arrested and be liable to incarceration in civil jail.

37. Further, the respondent is hereby directed to pay a monthly maintenance amount of not less than 7,000/= per month until he is able to clear all arrears.

38. Orders accordingly.

DATED AT KERUGOYA THIS 8TH DAY OF OCTOBER 2024

R. MWONGO

JUDGE

Delivered in the presence of:

1. Makazi for Applicant
2. Karuga for Respondent
3. Murage, Court Assistant

