



**HR v NJAC (Divorce Cause 206 of 2014)  
[2023] KEHC 2216 (KLR) (Family) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 2216 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
DIVORCE CAUSE 206 OF 2014  
MA ODERO, J  
FEBRUARY 10, 2023**

**BETWEEN**

**HR ..... PETITIONER**

**AND**

**NJAC ..... RESPONDENT**

**RULING**

1. Before this court is the Notice of Motion dated September 7, 2021 by which the Applicant HR seeks the following orders:-

- “1. Spent
- 2. Spent
- 3. Spent
- 4. That this Honourable court do review and vary the Ruling of July 29, 2021 to the extent that the order on maintenance be reviewed to reflect a fair share of responsibilities between the parties.
- 5. That this Honourable court do review and vary the Ruling of 29<sup>th</sup> July 2021, to the extent that there be a review on the maintenance amount to be remitted to the Respondent monthly to enable the Petitioner provide for the children without any form of hardship.
- 6. That this Honourable court be pleased to order any further orders that it may deem fit to grant.



7. That the cost of this application be in the cause.”
2. The application was premised upon article 53 of *the Constitution*, section 1A, 1B, 3A, 5, 63 (e ) and 80 of the *Civil Procedure Act* (cap 21, Laws of Kenya), sections 4, 98, 99 and 100 of the *Children Act*, order 45 rule 1 of the *Civil Procedure Rules* and all enabling provisions of the law and was supported by the Affidavit of even date sworn by the Applicant.
3. The respondent Njah opposed the application through her Replying Affidavit dated October 13, 2021. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 8<sup>th</sup> December 2021 whilst the Respondent relied upon his written submissions dated 28<sup>th</sup> February 2022.

## **Background**

4. The Applicant and the Respondent got married to each other on 27<sup>th</sup> February 2005. The couple later divorced vide a decree absolute dated 22<sup>nd</sup> September 2015. The parties have two (2) children together namely:-
  - (i) DR born on 27<sup>th</sup> February 2006.
  - (ii) DR born on 26<sup>th</sup> October 2009.
5. Vide a Judgement delivered in the Childrens Court on 19<sup>th</sup> June 2015 the Respondent was granted actual custody care and control of the minors whilst the Applicant was granted access.
6. On 27<sup>th</sup> February 2020 the Respondent filed a chamber summons seeking orders of maintenance at the rate of USD 3100 per month.
7. The matter was heard by Hon Lady Justice S.N. Mutuku who in a ruling dated 29<sup>th</sup> July 2021 made the following orders:-
  - “(a) The applicant shall provide housing, food and other incidentals as may be necessary.
  - (b) The Respondent shall pay school fees and other school related expenses, medical cover and continue paying USD 3,500 as he was doing earlier.”
8. Being dissatisfied by this Ruling the Applicant has sought a stay of the same as well as a review of the amount which he is required to pay as monthly maintenance.
9. The Applicant avers that though he had earlier been sending an amount of USD 3,500 to Respondent to cater for housing food, medical cover clothing and fuel, his business has suffered a down turn due to the recent COVID – 19 pandemic, thus making it impossible for him to continue remitting USD 3,500 monthly. The Applicant filed an Affidavit of Means dated 7<sup>th</sup> September 2021 indicating that his current income is USD 5,200 of which USD 2,422 goes towards payments of the childrens school fees.
10. As stated earlier the Respondent opposed the application. She averred that the Applicant threatened to stop providing the monthly maintenance unless she signed an agreement granting him full custody of the children when they attain the age of fourteen (14) years old.
11. The Respondent further averred that she is unable to take up employment because one of the minors is autistic. That the monthly expenses for herself and the children amounts to Kshs.518,000. The Respondent urges the court to dismiss the application in its entirety.



## Analysis and Determination

12. I have carefully considered the application before this court, the reply filed thereto as well as the written submission filed by both parties. The two issues for determination are:-
- (a) Whether a stay of the Judgement delivered on 29<sup>th</sup> July 2021 ought to be granted.
  - (b) Whether the judgment of 29<sup>th</sup> July 2021 should be granted.
- (a) Stay
13. The Applicant had prayed to have the judgement delivered by Lady Justice Mutuku on 29<sup>th</sup> July 2021 stayed. However prayer (2) seeking to have the filed judgement stayed pending the hearing and determination of this application is now spent.

## Review of the Judgement

14. In the judgment delivered on 29<sup>th</sup> July 2021, the High Court directed that the Applicant provide for school fees, and school related expenses, medical cover as well as a monthly payment of USD 3,500. The Applicant takes no issue with the orders made save for the order requiring him to pay USD 3500 monthly. He asked that it be reviewed on grounds that he is no longer able to afford this monthly payment of USD3,500.
15. The grounds upon which a judgement or order can be reviewed are set out in order 45 rule 1 of the [Civil Procedure Rules](#) which provides as follows:-
- “ Any person considering himself aggrieved
- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
  - b. by a decree or order from which no appeal is hereby allowed,
- and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not with his knowledge or could not be produced by at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay.
16. The court cannot close its eyes to the fact that the orders in question were made regarding the welfare and education of minors. It is trite how that in all matters concerning children courts are obliged to give priority to the best interest of the child. Article 53 (2) of [the Constitution](#) of Kenya 2010 provides that:-
- “ A child’s best interest are of paramount importance in every matter concerning the child.”
17. Similarly, section 8(1) of the Children’s Act 2022 provides that:
- 8.(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—
- (a) the best interests of the child shall be the primary consideration
  - (b) .....



(C) .....” (own emphasis)

18. Section 119 of the [Children Act, 2022](#) grants courts the power to vary orders of maintenance as follows:-

“ 119 in relation to an order made under section 116, the Court may –

- a. impose such conditions as the Court deems fit;
- b. vary, modify or discharge any order made under section 116 with respect to making of any financial provision, by altering the schedule of payments or by increasing or diminishing the amount payable; or
- c. temporarily suspend the order as to the whole or any part of the money paid and subsequently revive it wholly or in part as the Court deems fit.”

19. At all times, the best interest of the child must be the primary consideration and not the inconvenience occasioned by the maintenance. In [JMM v GMM & 2 others \(Children suing through their mother and next friend ZMK\)](#) it was stated that:

“ it is important to note that at all times the primary consideration is not the hardship occasioned by the maintenance order or any other consideration but the best interest of the child...”

20. In light of the provisions of order 45 rule (1) of the [Civil Procedure](#) a review of any order or decree may only be granted in the following circumstances:-

- (i) where there is a mistake or error apparent on the face of the record.
- (ii) where new and important evidence has come to light.
- (iii) for any other sufficient reason.

21. In this case there has been no allegation of an error on the face of the record.

22. The Applicant claims there has been a change of his circumstances. That he is no longer able to pay the amount of USD 3,500 as his business was negatively affected during the Covid–19 Pandemic.

23. The duty to maintain the minors is the joint responsibility of both parents. In as much as equal parental responsibility is promoted the court recognize the fact that equal parental responsibility may not equate to equal or similar contributions.

24. In EMM –vs – MOO [2016] eKLR the court held that:-

“ 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”

25. Whilst the parents may not have equal financial capacity one parent ought not be overburdened with the cost of maintaining the minors.

26. The Applicant avers that his business has suffered a down turn due to the Covid Pandemic. This pandemic affected the entire world and court takes judicial notice of the fact that several businesses and livelihoods were negatively impacted.



27. I have carefully perused the judgement of my learned sister. The Respondent (Mother was ordered to cater for housing food and other incidentals whilst the Applicant (Father) was directed to pay school fees, all educational costs, medical cover as well as monthly maintenance of USD 3,500.
28. The orders made by the trial court covered all aspect of his children's welfare i.e. education, food, shelter and medical care. The only outstanding expenses would be for entertainment and other miscellaneous costs. In my view, these would not consume USD 3500 per month for two (2) young children.
29. Given the earnings of the applicant as indicated in his Affidavit of means dated 7<sup>th</sup> September 2021 I am inclined to review the monthly amount payable by the Applicant from USD 3500 to USD 2,800 per month. All other aspects of the orders made on 29<sup>th</sup> July 2021 to remain intact. It is so ordered. This being a family matter each side will bear its own costs.

**Dated in Nairobi this 10<sup>th</sup> day of February, 2023.**

.....

**MAUREEN A. ODERO**

**JUDGE**

