



REPUBLIC OF KENYA



**KENYA LAW**  
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**JMM v DNK (Civil Appeal E087 of 2022)  
[2024] KEHC 16652 (KLR) (5 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 16652 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CIVIL APPEAL E087 OF 2022  
JL TAMAR, J  
NOVEMBER 5, 2024**

**BETWEEN**

**JMM ..... APPELLANT**

**AND**

**DNK ..... RESPONDENT**

*(Being an appeal from the ruling of the Hon. J Kamau (SRM)  
Delivered on 18th day of may 2022 in children case no 1 of 2018)*

**RULING**

**Background**

1. The respondent commenced the suit before the magistrate court by a plaint dated 14<sup>th</sup> march 2018 and filed on 15<sup>th</sup> march 2018 seeking for orders among others the maintenance of the minors, payment of school fees, issuance of comprehensive medical cover for the children, legal and actual custody of the children and with reasonable access to the appellant.
2. The parties were heard before the magistrate court and a judgement delivered on 15<sup>th</sup> October 2018 in which the court made the following orders;
  - i. That it shall be the duty of the defendant (appellant herein) to pay school fees and other related expenses for the minors and clear the fees arrears pending
  - ii. In light of the minors' medical condition, the defendant is hereby ordered to secure them a comprehensive medical cover with a private service provider in addition to that provided by NHIF.
  - iii. That bearing in mind the earning capacity of the parents, the defendant shall pay the plaintiff maintenance of ksh. 35,000per month to be paid by the 5<sup>th</sup> of every month by way of cheque in the plaintiff's name being funds to cater for food, entertainment, water and electricity charges



- iv. That it shall be the duty of the plaintiff to provide shelter and clothing for the minor and also cater for the cost of the house help.
  - v. That the parties shall jointly share the legal custody the details of which were given by the court
  - vi. That each party to bear own cost.
3. Almost a year later, the plaintiff (respondent) filed a Notice of Motion application dated 16<sup>th</sup> September 2019 seeking the variation of the orders given on 15<sup>th</sup> October 2018 as it relates to the payment of ksh 35,000 as monthly maintenance and sought an upward variation of ksh 70,000 to adequately cater for the needs of the minors as the defendant situation had improved. The plaintiff also sought among other prayers additional payments to cater for the children holiday trips.
  4. After hearing both parties, the court agreed with the plaintiff and varied the earlier order and directed the defendant to pay ksh. 40,000 per month which amount shall increase by 10% per annum from 15<sup>th</sup> October 2019.
  5. Not one to left behind, the defendant filed an application dated 21<sup>st</sup> September 2021 seeking orders of review and/or setting aside of the orders of the court dated 15<sup>th</sup> October 2018 ant its subsequent one issued on 18<sup>th</sup> November 2019 on the grounds that the defendant had taken early retirement due to Covid-19 restrictions and having retired he could not be able to comply with the orders issued by the court as he depended on his monthly salary.
  6. The court found no merit in the said application and dismissed the same with no order as to cost vide ruling delivered on 18<sup>th</sup> May 2022. The appellant/defendant filed an application dated 7<sup>th</sup> November 2022 almost six months later seeking for an order of stay of execution of the impugned decision delivered on 18<sup>th</sup> may 2022 and leave to appeal out of time.
  7. The application was heard by this court and by a ruling dated 19<sup>th</sup> October 2023, My Sister Justice S.N. Mutuku declined to stay execution of the orders of the lower court and directed the applicant to continue making payment for maintenance as ordered by the court until the intended appeal is heard and determined on merit. The applicant was also directed to file and serve the record of appeal within 60 days of the said ruling.
  8. I have set out the background to this matter above as it appears to me that parties herein had filed countless applications and making various allegations against each other almost convoluting the issues at hand.

### **The Appeal**

9. The fact of the matter is that the court below had by a decision dated 15<sup>th</sup> October 2018 and which was later varied on 18<sup>th</sup> November 2019, and after hearing both parties and their legal representatives ordered the appellant to make monthly payments as maintenance of the two minors which decision the appellant was dissatisfied with and filed for review or setting aside. The review or setting aside application was dismissed hence this appeal. I must point out that the appeal herein is against a ruling in an interlocutory application dated 21<sup>st</sup> September 2021 and not an appeal against the judgement of the magistrate court dated 15<sup>th</sup> October 2018. The appellant had indeed filed an appeal against the entire judgement of the magistrate court vide Civil Appel No 37 of 2018, which appeal was subsequently withdrawn and marked as such by Justice E.C Mwita on 21<sup>st</sup> April 2021.
10. The grounds of appeal as enumerated in the memorandum of appeal are as follows;



- a. That the learned magistrate grossly misdirected himself by denying the appellants counsel on record to prosecute, canvass and/or ventilate on the appellant Notice of Motion dated 21<sup>st</sup> September 2021
  - b. That the learned magistrate erred in law and in fact by failing to appreciate that the appellant had lost his job and therefore he had lost his earning capacity and would not be able to sustain the monthly maintenance that he had been ordered to pay to the respondent.
  - c. That the learned magistrate erred in law and in fact by dismissing off hand the appellant application dated 21<sup>st</sup> September 2021 wherein he had prayed for an order of review and/or setting aside the orders of the said trial court dated 15<sup>th</sup> October 2018, and 18<sup>th</sup> November 2019 and substitute them with an order for payment of maintenance that the appellant would be able to sustain following his forced retirement.
  - d. That the learned magistrate erred in law and in fact by making a finding that the appellant had deliberately failed to comply with the orders on 18<sup>th</sup> November 2019 whereas it was because the appellant had lost his earning capacity following is early retirement
  - e. That the learned magistrate erred in law and in fact by ordering the appellant to continue paying school fees for the children and also meet their education needs, yet he does not have the means with which to do so
  - f. That learned magistrate erred in law and in fact in making the orders of 18<sup>th</sup> may 2022 without taking into considerations that the respondent had equal parental responsibility in taking care of the children.
  - g. That the learned magistrate erred in law and in fact in failing to give the appellant adequate time to file an appeal against his ruling.
11. As regards the ground that the appellant was denied an opportunity to prosecute the notice of motion dated 21<sup>st</sup> September 2021, I observe that the same was file under certificate of urgency and the court gave directions on 22<sup>nd</sup> September 2021, directing that the same be served for inter-parties hearing on 6<sup>th</sup> October 2021. On the day the matter was scheduled for inter-parties hearing, the applicant told the court that he had not served the respondent with the application despite clear court direction bearing in mind that the application was filed under cover of urgency. The court further ordered that the application be served and schedule the matter for hearing on 27<sup>th</sup> October 2021 when on that day the respondent confirmed service and sought time to file her responses. The matter was severally adjourned largely on account of the absence and/or unpreparedness of the applicant who also mid-way had to change counsel. Seeing that the applicant was not keen on prosecuting the application, and the respondent having filed her response, to that applicant's application, the court on 11<sup>th</sup> may 2021 reserved a date for ruling of the applicant application dated 21<sup>st</sup> September 2021 notwithstanding the fact that parties had not advanced their oral or in written arguments.
  12. It is therefore clear to the court that the applicant had been given sufficient time to prosecute and/or canvass the application for review and/or setting aside the orders of the magistrate court. Since the application had been filed, and respondent to, the court was perfectly entitled to make a determination based on the court filings and that the same was not dismissed off hand as alleged. The court determination of the application dated 21<sup>st</sup> September 2021 was on merit after considering both



the applicant's application and the respondent replying affidavit dated 5<sup>th</sup> January 2019. The court rendered herself thus;

- i. the defendant has explained that the main reason for these prayers is because since he retired, he is only able to provide ksh.10,000 which is from his pension and that he is not able to renew the medical cover of the children”

13. The court further went to state that;

- a. Annexures were provided to show that the defendant has since conspired with one Josphine K Mutisya to transfer his properties that attract rental income to avoid meeting his obligations”

14. The magistrate court in conclusion upheld the decision made on 18<sup>th</sup> November 2019 and directed the applicant to continue paying maintenance including the months not paid and further directed the plaintiff/respondent to provide the court with her affidavit of means to enable that court make a determination on the joint responsibility on taking care of the children.

15. This in my view was in response to applicant contention that his income has considerably diminished on account of early and/or forced retirement. The purpose of seeking for the respondent's affidavits of means was to consider what the court called “joint responsibility in taking care of the children.”

16. I do not find any fault in the ruling of the learned magistrate dated 18<sup>th</sup> may 2022 dismissing the appellants application for review. The court had given the applicant ample time to prosecute the application and in any event the grounds for review by the applicants were considered in the ruling of the learned magistrate.

17. In the circumstance, the appeal against the ruling of the court dated 18<sup>th</sup> May 2022, is hereby dismissed. This being a children case, the Respondent is directed to file her affidavit of means as ordered by the court on 18<sup>th</sup> may 2022 within 14 days of today's order to enable the magistrate court to make further and/or other order taking into account, the ascertainable means of the respondent in relation to the financial ability of the appellant. In the meantime, the appellant shall continue complying with the court order as is currently in force.

**DATED AND DELIVERED AT KAJIADO THIS 5<sup>TH</sup> DAY OF NOVEMBER 2024.**

**JOHN. T. LOLWATAN**

**JUDGE**

