REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 38 OF 2021

RKC, VDC (Suing through mother and next of friend

MNM .....APPELLANT

VERSUS

CCM ..... RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Oduor Siminyu advocates for the appellant

Atiang, Ngunyi advocate for the respondent

J U D G M E N T

Introduction

This appeal is brought by the appellant against the whole of the ruling of **Hon. Dr. Julie Oseko**, Chief Magistrate, Malindi delivered on 20th April 2021 in **Malindi CCC No. 3 of 2016** whereby she ordered that the respondent herein was at liberty to execute if he has the capacity to do so. Following the above orders, the defendant filed a Notice to Show cause dated 23rd September 2020 seeking enforcement order dated 21st February 2018.

Aggrieved by the ruling, the appellant preferred an appeal against the Respondent on the following grounds as per the amended appeal dated 16th July 2021;

1. THAT the honorable learned Magistrate erred in Law and fact in entertaining the Respondent's Notice to Show Cause application in contravention of the High Court order made in HC Misc. Application No. 12 of 2017 on 17th October 2017 closing the Children's case No. 3 of 2016.

2. THAT the honourable learned magistrate erred in law in failing to find that the applications made by the Respondent and any orders emanating therefrom subsequent to the high court order made on 17th October in HC Misc. Application No. 12 of 2017 were a nullity in law.

3. THAT the honorable learned magistrate erred in law and fact by failing to appreciate that the Appellant herein secured an order of maintenance for Kshs. 30,000 which the Respondent has never complied with before making his own application for maintenance which was a nullity in law in view of the High Court Order made on 17th October 2017 in HC Misc. Application No. 12 of 2017.

4. THAT the honourable learned magistrate erred in law and fact by failing to appreciate that the Appellant had previously secured an order of maintenance for the minors and the same was never set aside or varied by the Respondent before his Application was allowed.

5. THAT the honourable learned magistrate erred in law and fact by failing to appreciate that the Respondent was indebted to the Appellant or factor in the amount if any that was to be deducted from the sum claimed by the Respondent.

6. THAT the honourable learned magistrate failed to appreciate the arguments by the Appellant in her role and contribution and the circumstances of how the alleged amount became due and payable.

7. THAT the honourable learned magistrate failed to appreciate in whose interests the purported amount was due and if the said arrest was going to cause extreme hardships to the appellant.

8. THAT the warrant of arrest issued by the learned magistrate is in contradiction with the findings in the ruling dated 20th April 2021

The factual and procedural history

CCM and **MNM** were married at one time or another as the pleadings are indicative of those facts. Both loving parents at the time sired three children namely **RKC, VDC,** and **SKC.** That spark of love dimmed and finally petition for dissolution of marriage was granted by the Court. Thereafter, as the litigation history shows applications for custody and maintenance of child was lodged before the Children's Court premised as follows: On 14.1.2016 the mother **MDM**. brought an application for custody and maintenance of the children who at the time were particularized as minors. The father **(CCM)** objected to the application by raising a preliminary objection to the reliefs being sought by the biological mother **CNM.**

In consideration of the issues, the session Magistrate decreed as follows:

(a). Interim custody be and is hereby granted to CNM.

(b). The respondent CCM is granted access to the minors but with prior arrangements with the applicant.

(c). The respondent CCM to pay interim maintenance of Kshs.30,000/= pending the hearing and determination of the suit.

Before the ink on orders issues on 8.6.2016 would dry, another application dated 3.10.2016 by CCM. was lodged before another session Magistrate **Hon. Khatambi (SRM)** as she then was seeking production of the minors for a private examination in the presence of the Children Officer. Following that application under Certificate of Urgency, the order so sought ex-parte was granted for compliance on 9.11.2016. In the following month, more specifically on 21.12.2016 a warrant of arrest was issued against **MNM**, for failure to appear in Court to answer a notice to show cause apparently issued by the same Court. The Court then will prove itself on 25.1.2017 as follows:

(1). That the respondent CCM remits a sum of Kshs.30,000/=.

(2). That the outstanding amount be liquidated in equal instalments for a period of 4 months.

(3). That the respondent CCM will have access to the children every Sunday from 10.00 a.m. – 6.00 p.m. effective 29.1.2017.

(4). That the children will be picked from Mombasa Central Police Station every Sunday until parties agree on an alternative pick up point.

(5). That the children's officer report be prepared and filed within 7 days thereof.

At another hearing that took place on 8.2.2017, the following interim orders were made:

(1). That the minors will be picked by the respondent on every Sunday 8.00 a.m. – 4.00 p.m. as agreed.

(2). That the arrears of Kshs.120,000/= to be defrayed in 4 equal monthly instalments in the month of February – May 2017.

(3). That the monthly payment of maintenance to be remitted on or before 2nd day of every month.

(4). That the arrears to be remitted on or before 27th day of every month starting from February 2017.

(5). That the children officer Mombasa to file a children's report and the childrens officer Malindi to liaise with Mombasa office before the meeting day on 17.10.2017.

The respondent filed a notice of application for Court orders before **Weldon J**. seeking adoption of consent order crafted in the following terms:

(a). The custody of the minor children herein be and are hereby granted to the applicant for custody.

(b). This matter be and is hereby marked as settled and file closed.

(c). The advocates will proceed to the Lower Court to close the file in the Lower Court on 10.11.2017.

The respondent **CCM** moved the Court in session to be held on 6.12.2017 for the following orders to be issued:

(1). That the application be deemed as a suit under Section 34 of the Civil Procedure Act.

(2). That the plaintiff/MDM be compelled to pay interim maintenance to a tune of Kshs.30,000/= a month. By order of the Court made on 21.2.2018.

It was decreed that:

(1). The applicant/plaintiff MNM be and hereby compelled to pay interim maintenance to a tune of Kshs.30,000/= per month with effect from the date of this order.

(2). That the costs of this application be provided for with effect from the date of the order on 2.5.2018.

The 1st applicant/plaintiff **CNM** moved the Childrens Court once again under Certificate of Urgency seeking the following orders:

(a). That this honourable Court be pleased to make an order to vary, set aside and or review the orders made on the 22.2.2018 by SRM Nyawiri pending the hearing and determination of the suit.

(b). That the actual custody, care and control of the children aged below (10) ten years be granted to the applicant.

(c). That the respondent/defendant CCM be compelled to comply with the order made on 8.6.2016 and pay all outstanding arrears.

The litigation continues on the same issues and cause of action as evidenced by an application filed by the respondent/defendant to the main suit **CCM** dated on 21.5.2018 in response to an application filed by the applicant/plaintiff **MNM** making reference to jurisdictional competence of the subordinate Court premised on the High Court order of 30.4.2018. Evidence in support of that want of jurisdiction was vide the consent order entered and adopted by **Weldon J.** The trial session Magistrate appreciating the facts and the Law agreed with the adoption respondent/defendant by downing tools for lack of jurisdiction to adjudicate over the subject matter.

In unprecedented scheme of litigation by these two parties under Section 1A, 1B and 3A of the Civil Procedure Act. The respondent, also a constant defendant in the original suit filed notice of motion dated 29.1.2019 asking the Magistrate Court presided over by **Hon. Oseko (CM)** to grant the following orders:

(a). That the appellant MNM, be summoned to appear before Court and show cause why she should not be committed to Civil jail for a period not exceeding 2 years for being in contempt of Court by virtue of disobeying orders of this Court issued on 21.2.2018.

(b). That a warrant of arrest be issued to the Court bailiff with the assistance of the O.C.S. Malindi Police Station to arrest the respondent and have her committed to jail for a term not exceeding the two years. That ensuing orders by the session Magistrate to commit, CNM to Civil jail triggered the orders of this Court dated 17.5.2021 for claims arising out of CMCC No. 3 of 2016.

Simultaneously, an appeal by the appellant/plaintiff questioning the procedural jurisdiction by the Learned trial Magistrate to adjudicate over the motion for contempt of Court.

Appeal

There is no dispute as to the assertions in the Memorandum of Appeal as set out above in respect of the Appeal. It may be noted that the trigger of this Appeal is on whether the requirements to satisfy the Court on notice to show cause had been met as stipulated in the statutory rules.

Submissions of the parties

The appellant submits that in regard to the application dated 18th may 2021, the superior court has no jurisdiction to sit on appeal in respect of its own decision as this offends the provisions of Article 164 (3) of the Constitution and Section 66 of the Civil Procedure Act. They relied on the authorities of **National Bank of Kenya Limited V Ngungu Njau (1997) eKLR** and **Saintam Services (EA) Limited V Rentokil (K) Limited & Another [2019] eKLR.** As regards the appellant's amended appeal, the appellant submits that any and all applications filed in the subordinate court after 17th October 2017 were a nullity including the Notice to Show Cause. That the orders of the high court on the matter ought to have been followed by the subordinate court. On this they relied on the authority of **ENM V SKM [2021] eKLR**. Further, relying on the case of, **Owners of motor vessel Lillian v Caltex Oil (K) Limited [1989]1KLR1** they submitted that the subordinate court had no jurisdiction to entertain any application.

Learned counsel further submitted that the subordinate court did not consider the best interest of the children as per Article 53 (2) of the Constitution and Section 4 (2) & (3). That the respondent failed to convincingly explain to the honourable Court how the appellant's committal to Civil jail by the respondent is in the children's best interest than a vendetta. They cited the authority of **CCM v MNM [2018] eKLR.**

Learned counsel further submitted that the subordinate court had contradicted itself by entertaining the Notice to show cause, after the same court had put an end to the proceedings by closing the file.

Respondents submissions on Appeal

At least four things are apparent from the submissions by the respondent:

> ***(i). Was there a contradiction between the Warrant of Arrest and the findings made in the Ruling dated 20th April, 2021.***
>
> ***(ii). Was the Court in error to entertain the Notice to Show Cause and any other applications after successfully closing the file pursuant to the directions of the High Court in Misc. Application No. 12 of 2017; should the Court find that they are a nullity in Law?***
>
> ***(iii). Were there representations made by the appellant on her role and contribution of the amount and was such representation disregarded?***
>
> ***(iv). Was the respondent indebted to the appellant and to what extent was the said debt?***

Two major criticisms have been made in this context about the ruling of the Court. The first may be regarded as a matter construction and interpretation as to the Warrant of Arrest and the findings made in the Ruling dated 20th April 2021. The second criticism is on whether the trial Court fell in error in determining the notice to show cause without appreciating the principle in **High Court Misc. No. 12 of 2017.** In addition to the two criticisms set above, the respondent drew the attention of the Court to the provisions of Article 53 (1) (e) and (2) of the Constitution and Section 4 (2) (3) of the Childrens Act.

The respondent submitted Notice to show cause is a unique application that does not reopen the suit for litigation but allows for the enforcement of court's own orders. They relied on the authority of **Industrial & Commercial Development Corporation V Onyando & 3 Others [1983] eKLR.** For those reasons the respondent urged the Court to dismiss the Appeal.

Analysis and determination

The jurisdiction of this Court as stated in **Ibrahim Ahmed v Halima Guleti, Mwanza High Court Civil Appeal No. 128 of 1967 [1968] THCD N76 (Cross J on 18 December 1967) (HCT)** falls within the context of the following principles:

> ***(a). The question for a Court of Appeal is whether the decision below is reasonable and can be rationally supported; if so the lower Court decision should be affirmed.***
>
> ***(b). The appeal judge may not in effect try the case de novo, and decide for the party he thinks should win.***
>
> ***(c). When the issue is entirely one of the credibility of witnesses, the weight of evidence is best judged by the Court before whom that evidence is given and not by a tribunal which merely reads a transcript of the evidence.*** **(See Odunga's Digest on Civil Case Law and Procedure pg 469)**

Further in **Bundi Marube v Joseph Onkoba Nyamuro [1983] KLR 403; 1 KAR 507 (Law, JA, Kneller and Hancox, AJJA on 22 February 1983):**

> ***"The Court of Appeal will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."***

Issues for determination

1. ***Whether the Notice to show cause was properly suited before the subordinate court?***
2. ***Whether the orders for Notice to show cause serve the best interest of the children?***
3. ***Whether the Notice to show cause is an affront to the High Court ruling by Weldon J?***

In this matter, I have reviewed the litigation history of what, was once a Children's matter on custody and maintenance. The Court has looked at the substance of the claim and the approaches taken by the parties to resolve in the various forums. Unfortunately, the eight grounds of appeal looked at from an appellate perspective is centered on the notice to show cause against the appellant and consequential orders issued insitu the impugned Ruling. Having set out the general history of the matter certain aspects of the original trial borders in equal measure on infringement of fair trial rights and an abuse of the process.

The difficulty I have with the various applications either before the Magistrate Court's is the dichotomy between a genuine claim for custody and maintenance meant for the best interest of the child and on the other hand the competing interest of the biological mother (herein, - the original plaintiff/applicant) and the biological father (herein – the original defendant/respondent). I dare say that in relation to the trial, the parties conduct has put the fairness of the trial in jeopardy, where it is such that any Judgment in favor of either the father or mother would have to be regarded as unsafe or it amounts as such to an abuse of the process of the Court as to render the proceedings void or irregular.

In **Arrow Nominees Inc v Blakledge {2001} BCC 591 – Para 55 – 56** the Court held as follows regarding past litigation and a trial likely to

give rise to a substantial risk of injustice:

> ***"In this context, a fair trial is a trial which is conducted without undue expenditure of time and money, and with a proper regard to the demands of other litigants upon the finite resources of the Court. The Court does not do justice to other parties to the proceedings in question if it allows its process to be abused, so that the real point in issue becomes subordinated to an investigations into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation, has had on the fairness of the trial itself. A decision to stop the trial in those circumstances is not based on the Court's desire or any perceived need, to punish the party concerned rather, it is a proper and necessary response, where a party has shown that his object is not to have the fair trial which is the Court's function to conduct, but to have a trial the fairness of which he has attempted (and continues to attempt) to compromise. The conventional understanding of fairness so as to encompass not only fairness as between the parties to the case, but also the need to deal with the case expeditiously and without disproportionate expense, and to have account of other litigants who are waiting to have their disputes heard."***

As indicated above in the procedural history the filter mechanism for the substantive hearing and subsequent applications filed one after another specifying certain reliefs are extremely worrying to this Court. It is clear that something must be done to prevent waste of costs, Court's time and prejudice to the parties, cause by the avalanche of motions, which have questionable chances of success.

In my view, the cluster of motions establish a substantial ground to stop the litigation for being susceptible to an abuse of Court judicial process.

In the case of **Public Drug Co v Breyerke Cream Co. 347, Pa 346, 32A 2d 413, 415: Jadesimi v Okotie Eboh [1986] 1NWLR (Pt 16) 264**.

> ***"The situation that may give rise to an abuse of Court process are indeed in exhaustive, it involves situations where the process of Court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of Court process in addition to the above arises in the following situations;- instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action, instituting different actions between the same parties simultaneously in different Court even though on different grounds, where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice, where an application for adjournment is sought by a party to an action to bring another application to Court for leave to raise issue of fact already decided by Court below, where there no iota of Law supporting a Court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action, where a party has adopted the system of forum-shopping in the enforcement of a conceived right, where an appellant files an application at the trial Court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal, where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent. A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process. That abuse of Court process create a factual scenario where appellants are pursuing the same matter by two Court process. In other words, the appellants by the two Court process were involved in some gamble a game of chance to get the best in the judicial process."***

Different considerations may arise when the Court considers exercise of residual discretion to figure out a matter which has been brought in earnesty but whose objective is an abuse of process; if either the plaintiff or the defendant have manipulated or misused the process of the Court to ensure a fair trial is not achieved. For the purposes of this case, the relevant considerations which renders the trial an abuse of the process include:

(a). The forum non conveniens and comity

It hardly to be said that the Magistrate's Court retain the original jurisdiction to hear and determine and make orders for custody and access in relation to a child. Where the Court such an order giving the custody of a child to the father or mother further orders shall follow towards the maintenance of that child on a weekly or other periodic sum as the Court may deem feet. From the record, the proceedings before **Malindi CMCC No. 3 of 2016** was to determine the question in regard to the welfare of the children as the first and paramount consideration and in this respect their upbringing by providing a maintenance wallet. In line with procedural Law, several decisions made by the Magistrate Court at Malindi draw an analogy that the substantive suit was never considered and determined as a primary question. The conduct of the parties in all the circumstance of the case, was to fix the primary jurisdiction before the session Courts to only purpose to hear and determine interlocutory applications. It is equally important to state that the primary jurisdiction identified by the statute Law on custody and maintenance of children is essentially a function of the Magistrates Courts. While the suit was in its infancy the matters to which regard must be within the purview of the Magistrates Courts was principally initiated before the High Court as demonstrated by the Ruling delivered 20.9.2016 by **Chitembwe J.** followed by another decision issued on 18.10.2018 by **Weldon J.** setting out matters to which the Court must have regard for the purposes of the custody and maintenance of the children. In dismissing the motion on contempt to proceedings filed by the respondent **(CCM)** against the appellant **(MNM)** the Judge commented as follows:

> ***"I am of the opinion that parties should be slow in resorting to the Contempt of Court Act where there are other procedures for enforcing Court Orders. In seeking to enforce a monetary decree, for example, I do not see why a decree holder should forego the procedure provided in the Civil Procedure Rules, 2010 and seek to have the Judgment debtor taken through contempt of Court proceedings which are criminal in nature. The impression one gets in such a situation is that the decree holder is driven by ill motive and not the desire to harvest the fruits of the Judgment. In the circumstances of this case, I find that the applicant ought to have resorted to the rules governing execution of decrees as enacted in the Civil Procedure Rules, 2010."***

From the above dominant principle there is no ambiguity in the language of the Court. The sidenote is that the Court considered whether the

parties had taken into account the appropriate venue for execution and enforcement of the decree of the Court as expressly provided for in the explanatory notes in the Civil Procedure Act and Rules. Presumably, the decision was intended to possibly raise the issue of appropriateness of the High Court separately from or together with the matters relevant and under adjudication before the Magistrate's Court. The Court having regard to all the circumstances of the case and several of the factors plainly dismissed the application for want of merit. Therefore, the forum of non conveniens and comity barred the applicant to seek such a relief before the High Court. As such, there was apparent abuse of process descriptive of circumstances attending to such a prosecution by the respondent against the appellant. There is no question the Court came out to protect the integrity, sanctity and fairness of the process. In **Williams v Spautz, Mason CJ, Dawson**, pointed out as follows:

> ***"The first is that the public interest in the administration of justice requires that the Court protect its ability to function as a Court of Law by ensuring that its processes are used fairly by state and citizen alike. The second is that, unless the Court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the Court's processes may lend themselves to oppression and injustice."***

Repeated applications for the purposes of impeaching a party to a Ruling having been made in various forms by the same party can qualify as a vexatious litigation. In the instant case, the record shows parties filing applications against the orders of session Magistrates to the appeals Court without first exhausting the jurisdiction of those Courts is vexatious and an abuse of the judicial Court process. The fundamentals of this claim bears the features of the same parties repeatedly suing one another perhaps with minor variations after that issue has already been ruled on by the same Court. The Court in **A. G v Banker [2000] (1) FLR 759** held as follows:

> ***"The hallmark usually is that the plaintiff sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, thereby imposing on defendants the burden of revisiting claim after claim; that the claimant relies on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, in actions against successive parties who, if they were to be sued at all shall be joined in the same action; that the claimant automatically challenges every adverse decision on appeal, and that the claimant refuses to take any notice of or give effect to order of the Court. The essential vice of habitual and persistent litigation is keeping on and on litigating where earlier litigation has been unsuccessful and where on any rational and objective assessment the time has come to stop."***

As it can be seen from the proceedings there is a detailed and elaborate litigation between the appellant and the respondent in respect of the same subject matter on either custody or enforcement of quantum awarded for the benefit and interest of the children. It has been pointed out that no litigant has any substantive right to trouble the Court with litigation which presents an abuse of its processes. One way, I consider this matter is that I have identified that not even the respondent and biological father in approaching the Court has done so with clean hands. The application of unclean hands to me protects judicial integrity because allowing the respondent to approach the Court with unclean hands to recover in an action in which himself has defaulted in complying with the Court order on maintenance creates doubt as to the justice provided by our judicial system. Thus, the Court must act to protect itself against the respondent to safeguard the sanctity of the legal system which we saw cherish and jealously protect. This principle applied to the instant case, is that the respondent fault is often an important element in the judicial settlement of dispute as well as the appellant's fault. In the seminal case of **Keystone Driller Co. v Gen. Excavator Co. 290 U.S. 240, 244 – 45 [1933]** the Court declared**:**

> ***"That whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the Court will be shut against him in limine; the Court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy."***

By not honoring his obligations in terms of the prayers of maintenance renders him incapable of pursuing his former wife for breach of maintenance. Notwithstanding, the rejection of the renewal application to commit the appellant to Civil jail for contempt of Court before **Weldon J** and subsequent fresh motion to agitate his claim in the fresh notice of motion in respect of the same cause of action before **Hon. Oseko (CM)** clearly demonstrates that he is a vexatious litigant who needs to be stopped to prevent abuse of process. First, the litigant in question went as far as seeking a review on custody of the children who had initially been appropriately granted to the appellate. In this regard, the attempt to move custody of the minors between the father and the mother for purposes of Article 53 of the Constitution and Section 4 of the Children Act broadly interpreted interferes with the scope of the concept of institution of legal proceedings for the best interest and welfare of the child. It shall be lawful for any of the parties to apply to the Court for an order under the Children's Act to review custody orders but such legal proceedings must be from the outset comprise of compelling new evidence and extenuating circumstances. That prima facie such an order be made to cater for the best interest of a child or children. Now I have no doubt in this appeal the word institute legal proceedings for the best interest and welfare of the children of this dissolved marriage is foreign to the parties. It seems to me the construction of Article 53 and Section 4 which invites the parties to argue their case on behalf of the children to occasion their best interest and welfare is pertinently misunderstood in their various abortive attempt to file proceedings against each other. It is through that prism that I view the facts and circumstances of this litigation.

The next question is whether the common consent has performed between the appellant and the respondent on 17th October 2017 before **Korir J** outlawed the primary jurisdiction of the Magistrate's Court. For the purposes of this appeal, I think it should be made clear the position of the Law as it stands in Kenya on consent Judgments. In **Samson Munikah practicing as Munikah & Company Advocates v Wedube Estates Limited Nairobi Civil Appeal No. 126 of 2005**:

> ***"This appeal raises the vexed question: (of) what are the circumstances in which a consent Judgment may be set aside? In Broke Bond Liebig (T) Ltd v Mallya [1975] E.A. 266 the then Court of Appeal for East Africa set out the circumstances in which a Judgment freely entered into by parties to a dispute in Court would be set aside:- The circumstances in which a consent Judgment may be interfered with were considered by this Court in Hirani v Kassan [1952] 19 EACA 131 where the following passage from Section on Judgments and orders, 7th Edition Vol. 1, P.124 was approved: prima facie, any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud of collusion or by an agreement contrary to the policy of the Court or if the consent was given without sufficient material facts, or in general for a reason which would enable the Court to set***

aside an agreement. The compromise agreement was made an order of the Court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the Court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms: they were certainly aware of all material facts and there could have been no mistake or misunderstanding."

There is both statutory basis and necessary prerequisite jurisprudence of limiting interference with consent orders or Judgment unless in those circumstances ordained in the case of **Samson Munikah (supra)**. The jurisdictional requirements were further domiciled in the cases of **Brooke Bond Liebig Ltd v Mallya [1975] EA 266 Law Ag P**:

"A Court cannot interfere with a consent Judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."

Similarly, in **Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd [1982] KLR 485, Harris J** held:

"A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side."

It is only necessary to mention that if a consent has been made between two parties and adopted by the Court in exercise of its jurisdiction in light of all the circumstances of the case, that consent cannot be varied, substituted or interfered with unless on account of the factors mentioned in **Munikah and KCB case (supra).**

The consequence was that neither the appellant nor the respondent sought leave of the Court to entirely apply the review of that consent. The problem I find with this litigation is that the parties proceeded to prosecute various applications seeking specific orders which had been appropriately captured in the text of the consent order before **Korir J.** it is here I find myself differing from the legal counsels on the wide grounds of jurisdiction and in which it was left to the Magistrate's Courts to be guided by the threshold issues in the decisions made by **Chitembwe J** and **Weldon J** respectively. To take up some of the points made in the preceding paragraphs in the High Court decisions the custody and welfare of the children was to be aligned with those appropriate orders made in the High Court. To that extent therefore, there was a rule already in place that the orders made by the High Court should be the minimum required to overcome an injustice on the necessary threshold of the subject matter on custody and maintenance of the children.

As much as in relation to children matters substantially the primary Court does not become functus officio it cannot fail to refer to every relevant factor in the High Court decisions. The Judges reasons particularly in light of the substantial matters on custody, reasonable access and financial support should mirror in any subsequent decisions by the subordinate Courts.

The children's court has powers to issue orders even after judgment, so long as there is still a minor, whose interest must be protected. That the strict rules of procedure do not apply in Children matters. And that the court has powers to make orders from time to time as captured under **Section 114** 'B' of The Children Act, and **Section 87 (4).** The Learned judge in **JNM -vs- JGK (2014) eKLR**, stated that:

"The law does not permit the court to reopen the matter, however, in respect of maintenance, and provision for children, the court does not become functus officio."

I agree with this legal proposition. However, as it appears from the recital of the history of this case a consent order was issued and adopted in the process of the litigation for the purposes of settling matters arising in **CMCC No. 3 of 2016**. In my view come the case of the notice to show cause was in the context of that consent an affront to the jurisdiction of the High Court in which the parties had submitted themselves within the scope of the Children's Act to settle both custody and maintenance issues. On the basis of that consent order there is a direct analogy purposively guided to entail the determination of the outstanding claim. Given that the conditions on the consent have not been satisfied in respect of the High Court order for the appellant and respondent as well I find that all these subsequent applications were brought with the intention of annoying or embarrassing the named defendant/respondent and for collateral purposes.

Whether the orders for Notice to show cause serve the best interest of the children

Best interest of a child.

The law, which is the Constitution, the Children Act and the International instruments on the rights of the child like Convention on the Rights of the child and African Charter speak in one voice concerning the determination of matters involving a child. That voice is loud and clear. Loud enough not to be ignored, clear enough to communicate its intention. And it is that in every matter concerning a child, the best interests of a child are of paramount consideration. This should be the guiding principle to Courts, tribunal and other bodies when considering a matter concerning a child.

Article 53(2) of the Constitution provides,

"A Child's best interests are of paramount importance in every matter concerning the child."

The Children Act has buttressed the Constitutional provision. At Section 4(1) it provides:

> ***"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."***

Convention on the Rights of the child and the African Charter on the Rights of the child have emphasized the Centrality of the best interest of the child. There is no definition of the best interest of the child. The best interest of the child is determined on the circumstances of the case as they specifically relate to the child. The focus must be on the child and what is best for him. Consideration will be guided by the basic rights of the child which are provided under the Constitution, Children Act and International Instrument which have been ratified.

Under Article 53 (1) (e) of the Constitution provides

> ***"Every child has the right - to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not."***

The emphasis is that it is the father and mother who have the responsibility to give their child or children parental care and protection. This is a mandate which the courts has a duty to enforce by compelling the parent to provide for the child.

Under the Children Act safeguards for the rights and welfare of the child are stated at Part 11 of that Constitutional and statutory obligations.

These rights are, survival and best interest of the child, non – discrimination, rights to parental care, right to education, right to religious education, right to health care and other protections for the welfare of the child. These rights cannot be alienated.

Section 6 (1) of the Act provides that;

> ***" A child has a right to live with and to be cared for by his (or her) parents"***

Article 7 of the 1989 Conventions on the rights of the child states that a child shall have a right to live with and be cared for by his or her parents.

This is also echoed at **Article 19 of the African Charter on Rights and Welfare of the Child** which states that -

> ***"Every child is entitled to parental care and protection and shall whenever possible reside with his or her parents***"

Parental responsibility attaches to the right of the child as it is the parent who has the responsibility to ensure that the needs of the child are catered for. The law provides that it is the parent of a child who has parental responsibility, the child has a right to parental responsibility and it is in the best interest of the child that he brought up and cared for by his or her parent. This right can only be denied of it is proved with cogent evidence and valid grounds that the parent is not suitable or is incapable of taking care of the child under Section 76 (1) of the Children Act provides:

> "***Subject to Section 4 where a court is considering whether or not to make one or more orders under this Act with respect to a child it shall not make the order or any other orders unless it considers that doing so would be more beneficial to the welfare of the child than making no order at all"***

Flowing from the foregoing, the questions that so desperately beg for an answer are; what are the best interests of the minors in committing the appellant their mother to civil jail? Wouldn't it be denying them the rights that have been described herein?

Threshold of committing one to civil jail

The right to commit a judgment-debtor to civil Jail is provided for under Section 38 of the Civil Procedure Act, Cap 21, and Laws of Kenya, which provides for powers of the court to enforce execution. It is provided that:

> ***'Subject to such conditions and limitations as may be prescribed, the Court may, on application of decree holder, order execution of the decree –***
>
> ***(a) by delivery of any property specifically decreed,***
>
> ***(b) by attachment and sale, or by sale without attachment of any property,***
>
> ***(c) by attachment of debts***
>
> ***(d) by arrest and detention in prison of any person***
>
> ***(e) by appointing a receiver or***

(f) in such other manner as the nature of relief granted may require.

Provided that where the decree is for payment of money, execution by detention in prison shall not be ordered unless after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons to be recorded in writing is satisfied –

(a) that the judgment-debtor with the object or effect of obstructing or delaying the execution of the decree –

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court or

(ii) has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property.

(b) That the judgment-debtor has or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which by or under any law, or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree, or

(c) That the decree is for a sum of money which the judgment debtor was bound in a fiduciary capacity to account.'

In ***Solomon Muriithi Gitandu & Another vs. Jared Maingi Mburu [2017] eKLR*** the court held that -

'In the case of Braeburn Limited -V- Gachoka and another (2007); it was held inter alia;

"A person is not liable to be committed to civil jail for inability to pay a debt but a dishonest and fraudulent debtor is liable to be punished by way of arrest and committal."

The Court further observed that: -

"Section 38 of the Civil Procedure Act however, provides a limitation of the courts' power to order execution of a decree by way of detention in prison. The section prohibits the court from making an order of execution of any decree for the payment of money unless the judgment-debtor has first been given an opportunity of showing cause why he should not be committed to prison and even where the judgment debtor has been given such notice to show cause, the court must itself be satisfied and give reasons in writing for that."

These limitations are further re-stated under Order 22 rule 31 (1) Civil Procedure Rules. A notice to show cause may be issued requiring the judgment debtor to show cause and where he fails to appear a warrant of arrest is issued. In the case the Court found that the requirement for Notice to Show Cause is mandatory and whether the judgment appears for notice to show cause or under warrant of arrest, it is the duty of the decree holder to satisfy the court that the judgment debtor is not suffering from poverty, or any other sufficient cause and is able to pay the decretal sum or proof the provisions of Order 22 rule 35 Civil Procedure Rules, that is examination of the debtor as to his property.

It has been held severally that no person should be sent to prison for inability to pay a debt. In ***Zippora Wambui Muthara – Milimani BC Cause 19/2010 (unreported) Justice Koome (as she then was)*** *observed as follows:*

"There are several methods of enforcing a civil debt such as attachment of property. The respondent's claim that the debtor has money in the bank, that money can also be garnished. An order of imprisonment in civil jail is meant to punish, humiliate and subject the debtor to shame and indignity due to failure to pay a civil debt. That goes against the international covenant on civil and political rights that guarantees parties' basic freedoms of movement and of pursuing economic cultural development"

In determining the ability of the appellants to pay, the Magistrate was required to take into account her necessary expenses and other commitments which impact on the failure to pay that Judgment debt. The system on assessment for maintenance does not end at that first instance order issued by the Court. On the face of it the social economic circumstances contemplated at the initial assessment may change to render that decision unsustainable. In making a determination whether to commit a debtor to civil jail clearly the provisions under Section 38 on the stringent condition precedent to be qualified before a final order has to be weighed with fundamental rights entrenched in our constitution to the extent that it is reasonable and justifiable to limit those rights in question by virtue of satisfying a money decree of the Court. I accept the goals and aims of Section 38 which provide a mechanism for enforcement of a Judgment debt through committal to civil jail. The question is however, whether that sanction can be extended capriciously or whimsically. I am not sure from the record that the committal to civil jail of the appellant was preceded by a full inquiry into the reasons why she has failed to pay the amount owed in compliance with the dictate of the Ruling of the Court. In my own opinion, that legislative scheme must be broadly inquired into and exhausted by way of cogent evidence by the creditor before any confinement and detention to prison is granted by the Court. So much as the respondent agitates for the committal to civil jail of the appellant before **Weldon J.** in 2017 and thereafter before **Hon. Oseko** 20th April 2021, there is no evidence that lesser remedies of enforcing the debt have been explored before moving a motion to throw his former wife and mother of the children into custodial sentence of imprisonment. The bad news is that this debt is not personally owed to the respondent but one which is rooted in the best interest and welfare of their children. It is in this space that the respondent should not appear as a vital stranger weaponize the appellant with threats of imprisonment in default of satisfying the decree of the Court. The Court in determining the question shall not take into consideration that the claim of the father in respect of the custody or maintenance is superior to that of the mother as this case seems to paint that picture. There may be concerns on the principle of equality and equal responsibilities given the special status

of the mother and the father of the children. The natural result in my view on committal to prison proceedings underpinned on the best interest and welfare of the children might reasonably subject the children to emotional, psychotraumatic warfare. There is a clear tension between the significance of settling a maintenance debt by a parent through committal to civil jail and the whole concept of the welfare of the child. This may seem to justify that this provision as a mode of execution and attachment of the person of Judgment debtor be exercised with caution and safeguards in the Constitution. In the oft-cited case of **Re McGrath {1893} 1 Ch. 143, Lindley L. J.** stated:

> ***"The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of the child is not measured by money only or physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."***

More difficult ones that position has arisen of committing another parent to civil jail is that it might as well produce considerable strains not only to the parent but the welfare of the child. There is therefore a danger in regard to Section 38 the Court paying reasonable attention to the right to enforce the Judgment and its necessity being incompatible to the best interest and welfare of the child or children. Overall in this case, the attribution of great weight to the particular fact of enforcing a maintenance order paradoxically it penalizes the emotion and psychology of the very child it is meant to protect.

The peculiar circumstances of this case is that the parties herein were once husband and wife. The question then would be; how did the said amount accrue to the extent of executing warrants of arrests to commit to civil jail? How did the debt come to be?

The debt here, is not as had been anticipated by Section 38. From the exceptions of the said Section the Respondent has not demonstrated the following;

> ***a) Whether the judgment –debtor with the object or effect of obstructing or delaying the execution of the decree***
>
> ***i)Whether the appellant is likely to abscond or leave the local limits of the jurisdiction of court. To this, I am of the view that the Appellant would have more to lose as that would mean being away from the minors she has so much fought for.***
>
> ***b) whether after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property.***
>
> ***c) that the judgment debtor has since the date of the decree had means to pay the decretal amount.***
>
> ***d) that the decree is for the sum for which the judgment debtor was bound in a fiduciary capacity to account.***

The costs of keeping one in civil jail is Kshs. 60 per day. This translates roughly to Kshs. 10,800 for the six months the appellant should be in civil jail. Other than pay to keep the appellant in civil jail, this would be money channeled towards the welfare of minors. This would appear to me more like of personal scores being settled.

The judgement debt here is that of the appellant not providing her part of maintenance. In an African setting, the man is the head of the family. Who is ordinarily to provide for the family. It is the reason why the Holy book in **Genesis 2:24** states: "Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh."

If I were to allow the Notice to show cause and commit the appellant to civil jail as anticipated by the respondent, that would then mean six months of absence of the appellant from the minors. Not to mention the psychological trauma the minors would face of knowing that their mother was committed to jail. This in my view, does not in any way express the best interests of the minors.

Indeed, the respondent raised a question which flows from the Ruling of this Court suspending the operation of the notice to show cause and consequential orders issued against the appellant. The respondent was concerned with the judicial discretion that widely set aside the decision for the Magistrate's Court. It will be recall that the jurisdiction am asked to exercise is provided for under Section 80 of the Civil Procedure Act and Order 45 (1) of the Civil Procedure Rules. From the record it is clear an attack in respect of that Ruling has not satisfied the criteria within the scope of review as hinged on discovery of new and important matters or evidence, mistake or error on the face of the record or any other sufficient reason. The Court of Appeal in **National Bank of Kenya Ltd v Ndungu Njau**:

> ***"A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the Law and reached an erroneous conclusion of Law. Misconstruing a statute or other provision of Law cannot be a ground for review."***

There are thus these basic requirements that must be met before an applicant can succeed on review of a Ruling, order or Judgment of the Court. Once these hurdles have been passed it is simply probative to grant the orders on review. In my opinion, the categorization of the notice of motion has profiled that the applicant is of a nature that does not meet the threshold for this Court to exercise review jurisdiction.

Weighing one thing with another, doing the best I can on the material before me I regret for having to differ with the respondent submissions on his application and the substantive appeal and with great respect I think this appeal has merit. With the following instructive declaration to abide the entire litigation:

> ***(a). In interpreting and construing the provisions of Section 38 of the Civil Procedure Act on arrest and committal to civil jail as***

a mode to satisfy the Judgment debt the Court of Law shall be required to promote the fundamental rights and freedom based on right to liberty, equality and dignity of the Judgment debtor.

(b). For purposes of this Judgment, imprisonment of the appellant shall be the last resort taking into account the best interest and welfare of the children to both parents.

(c). In terms of procedure, actual notice prior to the original hearing of the notice to show cause shall encompass the values which underlie participation of the children to be affected with that particular negative order of detention of one of their biological parents.

(d). The means to achieve that goal of enforcement of Judgment debtor by committal to civil jail must be fair and reasonable.

(e). If the Judgment debtor herein the appellant proves to the satisfaction of the Court that she lacks such means or financial resources to satisfy the decree no punitive action of imprisonment can be justified as an exercise of discretion by the Magistrate's Court.

(f). The respondent who is the Judgment creditor must satisfy evidentially that he has already exhausted all other lawful means under Section 38 of the Civil Procedure Act and Order 22 of the Civil Procedure Rules on the execution of the Judgment.

(g). In the Court's own wisdom permitting the Judgment creditor/respondent to consign the appellant to prison custody without the justifiable measures under Section 38 would be in a sense an infringement of the Constitution rights of which the appellant is entitled as of right unless limited to a certain extent as expressed under Article 22, 23 & 24 of the Constitution.

(h). Committal to civil jail as a mode of execution under Section 38 of the Civil Procedure Act and Order 22 of the Civil Procedure Rules for a Judgment debtor who has satisfied the Court of his or her inability to satisfy the decree would be contravention of Article 11 & 21 of the International Covenant on Civil and Political Right. Hence the maxim being poor is not a crime or a breach of Civil Law. This convention by virtue of Article 2, 5 & 6 of the constitution domestically forms part of our source of Law to be applied within the category of cases in respect to the indigent debtors.

(i). In the impugned notice to show cause the respondent is vested with the burden of proof to discharge it directly or circumstantially that the appellant has the financial ability to settle the decree and the debt owed but has downrightly and willfully refused to comply to the conditions in the money decree. Unfortunately, no such endorsement on proof of facts to have warranted the residual order of detention against the appellant.

Accordingly, the appeal be and is hereby allowed with costs. Further, the notice of motion on review jurisdiction by the respondent fails for want of merit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF NOVEMBER 2021

……

R. NYAKUNDI

JUDGE