



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 55 OF 2018**

**OSN.....APPELLANT**

**VERSUS**

**SBA.....RESPONDENT**

(An appeal from the ruling of Honourable R.O Mbogo (Resident Magistrate)

in Children's Case No. 1232 of 2013 delivered on 4<sup>th</sup> May 2018)

**BETWEEN**

**SBA.....APPLICANT**

**VERSUS**

**OSN.....RESPONDENT**

**JUDGMENT**

**PLEADINGS**

1. On 27<sup>th</sup> February 2018, the Respondent took out a notice to show cause against the Appellant for a total sum of **Kshs. 4,131,585/-**. In a ruling delivered on 4<sup>th</sup> May 2018, the Honourable Magistrate allowed the notice to show cause as was sought.
2. The Appellant, being aggrieved by the said orders, filed the current appeal on 26<sup>th</sup> July 2018 seeking that the ruling of the Learned Magistrate delivered on 4<sup>th</sup> May 2018 be varied and or set aside and the appeal be allowed.
3. The appeal was premised on grounds that:-
  - a. That the Learned Magistrate erred in law and fact in failing to consider the evidence of the Appellant to collaborate the fact that he had made substantial payments towards the child maintenance and medical expenses vide cash and M-pesa payments and instead allowed the whole amount claimed;
  - b. That the Learned Magistrate erred in law and in fact in failing to find that the fact that the amounts claimed by the Respondent were not backed by proper invoices and/or receipts accompanying them;
  - c. The Learned Magistrate erred in law and in fact in failing to consider the Appellant commitment in the child's education and arrived at a wrong decision which is merely intended to impinge and prejudice the best interest of the child;
  - d. The court took into account irrelevant considerations and evidence in arriving at the decision without factoring that decretal amount went beyond the Appellant's financial capacity and against the weight of evidence;
  - e. The Learned Magistrate erred in law and fact by not properly addressing her mind to the submissions on the part of counsel for the Appellant herein and the replying affidavit dated 13<sup>th</sup> March and further affidavit regarding the exorbitant amount claimed thereby the Learned Magistrate reached at a ruling that was manifestly erroneous.
4. The summary of his case was that: he had catered for the child's school fees and maintenance and that what was stated in the notice to

show cause was not true and despite that the Court allowed to the notice to show cause as sought.

5. The appeal is opposed by the Respondent whose case is that: the Appellant had always been in disobedience of the court's orders forcing her to meet the parental obligations towards the minor between **2014 and 2018**. It was her case that the Appellant had been inconsistent with school fees and maintenance payments and on several occasions she sought the court's intervention by way of execution as the minor was always in need of basic living expenses.

### **PROCEDURAL FACTS**

6. On 31<sup>st</sup> May 2018 pending hearing of the appeal, the Appellant informed the Court through Counsel that the child was readmitted in Braeside School pursuant to Children Court order and issuance of warrants of arrest. However, the child sustained knee injury and this Court ordered that the Appellant ensures the child is taken for treatment by 4<sup>th</sup> June 2018 which was complied with.

7. On 4<sup>th</sup> October 2018, the hearing of the appeal was adjourned to allow Appellant to present documents that confirm payments he alleged to have made and therefore reduce the amount payable as the NTSC the subject of the instant appeal.

8. On 25<sup>th</sup> October 2018, parties agreed by consent that the decretal amount was now reduced to **Ksh 3m.** and they would agree on the mode of settling the amount.

9. On 1<sup>st</sup> November 2018, it was agreed that Ksh 500,000/- was to be deposited in Court as part-payment of the decretal amount by the Appellant.

10. On the 22<sup>nd</sup> November 2018, the court ordered **Kshs. 500,000/=** deposited with the Court be released to the Respondent and the Appellant to propose the process of settling the balance of the amount in instalments. I note that the money was deposited on 9<sup>th</sup> November 2018 vide **cheque number 045817**.

11. The parties herein proceeded to argue the appeal orally on 22<sup>nd</sup> November 2018. It was the Appellant's case that they had agreed on the monies owing as being **Kshs. 2,500,000/=**. He sought to settle the same in monthly instalments of Kshs. 50,000/=. The Respondent Counsel reiterated the amount owing as being Kshs. 2,500,000/=.

### **APPEAL**

12. The Appellant's main thrust of appeal was that he made payments pursuant to the Ruling of 28<sup>th</sup> January 2014 in **St Mary's School** which were not acknowledged in the NTSC proceedings. From the proceedings and Ruling of the Trial Court, there is no evidence that was produced to confirm that such payments were made and if so were made by him. The statement of account from St. Mary's School presented in this Court shows payments but it is not confirmed to have been made by the Appellant. Suffice is to state that the parties amicably agreed on the figure due and owing reduced from **Ksh 4,129,915/- to Ksh 3m** which after payment of Ksh 500,000/- in Court the balance comes to **Ksh 2. 5m**.

13. The court is faced with the question of determining the legality of the ruling of Honourable Magistrate R.O Mbogo delivered on 4<sup>th</sup> May 2018. in the **Children's Case No. 1232 of 2013**.

14. The grounds of appeal condensed amount to tabulation of figure of funds due and owing from the Ruling of 28<sup>th</sup> January 2014. It is the duty of this Court to reconsider the evidence tendered before the trial Court and to determine whether the findings made were supported by that evidence. In so doing, the Court has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the Trial court.

15. Secondly, an appellate Court would not interfere with the decision arrived at by the exercise of discretion by lower court unless it is satisfied either that the lower court had misdirected itself in some matter and as a result arrived at the wrong decision, or that it was manifest from the case as a whole that the lower court was clearly wrong in the exercise of its discretion and that, as a result, there was injustice (**CHOITRAM –V- NAZARI [1984]KLR 327**).

16. I have perused through the proceedings I note that the notice to show cause was issued after the Appellant had in defiance of court orders on several occasions failed to comply. During the hearing of the Notice to show cause on 20<sup>th</sup> of April 2018, Respondent argued that the Court had on 28<sup>th</sup> January 2014 issued interim orders requiring the Appellant to pay Kshs 15,000/= medical expenses and school fees and school related expenses. However he only paid Kshs.78,000/= forcing the Respondent to pay the Kshs 247,700/=, the child was forced to move from school to school. It was her case the total fees demanded was **Kshs. 3,798,950/=**. The Respondent on the other hand argued the allegations were false and he had made efforts to have the child readmitted to Braeside on condition he paid Kshs. 500,000/=. The court delivered its ruling where it allowed the notice to show cause on the basis of ruling delivered on 28<sup>th</sup> January 2014, the Appellant had been ordered to provide Kshs. 15,000/= for maintenance, pay school fees and related expenses and take out a medical cover within 2 months of the ruling which orders were never appealed against or review sought.

17. The **Children Act, 2001** was enacted to give effect to the Principles of the UN Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child and makes provision for various aspects of the care, welfare and protection of children and in **Sections 4(2) and (3)** of the Act.

18. Furthermore, the principle of the best interest of the child is upheld by **Article 53 (1) (e) & (2) of the Constitution** that provides that

both parents shall provide for parental care of the child and that a child's best interests are of paramount importance in every matter concerning a child.

19. The Appellant does not contest paternity, he is bound by Ruling of 28<sup>th</sup> January 2014 which the Trial Court considered at great length and the same has not to date been reviewed or appealed against. The Defendant Appellant was ordered to cater for school fees and related expenses and medical cover and pay maintenance of Ksh 15,000/- a month. The tabulation of arrears from **2014-2018** totalled to **Ksh 4,129,935/-** the same was rightly arrived at by the Trial Court.

20. In this Court pending the hearing of the appeal parties amicably confirmed payments made by the Appellant and the amount was now reduced to **Ksh 3m**.

21. The Appellant of his own volition moved the Child from St Mary's School that was cheaper to Braeside School and cannot be heard to complain of the lack of ability to comply with payment of school fees.

22. If his financial circumstances have changed for the worse, cogent evidence was not presented to this Court to consider; saying so does not make it so in the absence of evidence of say termination of employment etc.

#### **DISPOSITION**

**23. Due to the above considerations, I find the Trial Court applied itself to the principles of law and evidence before it and the appeal is upheld to that extent. However, in light of new evidence of payments the Appellant made and as a result the Appellant and Respondent amicably agreed that the decretal amount is now Ksh 3m the Appeal is allowed to reflect the new amount of the decretal amount.**

**24. The Court orders as follows;**

- i. The current appeal is allowed to the extent of reducing decretal amount only as agreed by parties Ksh 3m with costs to the respondent;**
- ii. The Appellant shall settle the balance owing of Ksh 2.5m at monthly instalments of Kshs. 100,000/=;**
- iii. He shall continue to cater for school fees and related expenses and pay Kshs. 15,000/= as maintenance;**
- iv. He shall provide medical cover for the child in default cater for all medical bills if and when they arise as medical costs;**
- v. The Ksh. 500,000/- deposited in Court shall be released to the Respondent and/or through her Counsel forthwith;**
- vi. The Respondent shall cater for the child's food, clothing and shelter;**
- vii. The stay order against Children's Case No. 1232 of 2013 is hereby vacated to allow for the full hearing and determination of the matter;**
- viii. Any party may exercise right of appeal in the Court of appeal.**

**DELIVERED SIGNED & DATED 18<sup>TH</sup> FEBRUARY 2019 IN OPEN COURT**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**COUNSEL FOR APPELLANT**

**COUNSEL FOR RESPONDENT**

**MS JASMINE COURT CLERK.**