



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 4 OF 2016

SMW.....APPELANT

VERSUS

JNN.....RESPONDENT

(An Appeal from the ruling and order of the Resident Magistrate, Hon. M.A Otundo

dated the 10th day of December 2015 in the Children's Case No. 606 of 2006

at Milimani Law Courts, Nairobi)

RULING

BACKGROUND

On 24th November 2006, the Respondent sued the Appellant for financial contribution towards the maintenance of their two sons who were minors at the Children Court in **Case No. 606 of 2006**. The Respondent filed a notice to show cause dated 30th September 2015 seeking that the Appellant be committed to civil jail for failure to pay school fees for the child of Kshs.84,453.00 at [Particulars withheld] University and Technology.

By a ruling dated 10th December 2015, the learned Resident Magistrate stated that the Notice to Show Cause had been prematurely brought before the court.

The Trial Court ordered the Appellant to pay school fees at [Particulars withheld] University of Agriculture and Technology for the child. The child was however directed to pursue other opportunities of financing like the higher education loan board, should he so succeed the Appellant was expected to top up the unpaid fees.

APPEAL

Being dissatisfied with the ruling and order, the Appellant filed a Memorandum of Appeal dated 8th January 2016 on grounds:-

(a) that the Learned Resident Magistrate erred in law and had no jurisdiction to rule on an issue which had not been ventilated before her by parties;

(b) that the Learned Magistrate erred in law and in fact in straying from the only issue that she had allowed the parties to address her on i.e the Notice to show cause why the Appellant should not be committed to civil jail , which she found was premature and went on to make orders on the issue of funding further education of KWM without giving the Appellant an opportunity to be heard thereon;

(c) that the Learned Resident Magistrate erred in law and in fact in ruling that the said KWM then aged 20 years was a minor or child for the purposes of her ruling; and

(d) that the Learned Resident Magistrate failed to appreciate that the respondent's application had no basis in law as she had

locus standi to prosecute the notice of motion on behalf of the child before the honourable court and the same should have been struck out as null and void or on abuse of the process of the honourable court.

The Appellant prayed that the appeal be allowed and the orders of the honourable Court dated 10th December 2015 be set aside.

a) The Respondent did not file a response to the Appeal;

b) The Appellant filed his submissions on 16th July 2018. It was his submissions that the subordinate court had decided on an issue she had not been addressed on despite the Appellant's protest. He submitted that he had been condemned unheard contrary to principles of natural justice.

c) 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.

d) 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 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*).

SUBMISSIONS

The Appellant filed submissions on 16th July 2018. It is not confirmed from the Court record that the Respondent was served with the record of appeal filed on 22nd November 2017. Hence no appearance by Respondent or representative, no pleadings and /or submissions have been filed by Respondent.

DETERMINATION

I have perused through the proceedings and the ruling dated the 10th December 2015, I note that the Respondent did indeed file a notice to show cause seeking that the Appellant be committed to civil jail for failure to pay school fees for the child of Kshs. 84, 453.00 at [Particulars withheld] University and Technology. The application was heard on 7th December 2015, it was the Applicant's case that it was at the best interest of the child the Appellant be compelled to provide for the minor having done so for the past 3 years. It was Appellant's case that the Respondent had not produced any document from the school to show any arrears.

The trial court laid basis on **Section 76(1) of the Children's Act 2010** that give the court the discretion to make any order in the best interest of the child, in the instance case the child be allowed to continue with his studies. I further note that the trial court had taken note of the judgement entered on 25th October 2012, where the Appellant was ordered to provide for the education needs of the minor.

This Court's record confirms that the Appellant/Applicant filed under certificate of urgency an application for stay of execution of the Trial Court orders of 10th December 2015 pending hearing and determination of the appeal. This Court a Ruling of 16th August 2016, declined to grant stay of execution orders on the following grounds;

a) The record of appeal was not filed at the time hence there was no appeal;

b) No memorandum of appeal was filed with the application;

c) No certified copies of the orders appealed against were filed with the application;

d) This Court in relying on contents of affidavits held that Article 53 of COK2010 and Section 4 of Children Act 2001 made best interests and welfare of the child paramount;

e) Article 22(2) COK2010 and Section 28 of Children Act allowed the Respondent to file application on behalf of their son for school fees and school expenses to be paid by the Appellant inspite of having attained 18 years but had admission from [Particulars withheld] University;

f) Section 91(b) of Children Act 2001 allowed the Court to extend child support for one over 18 years in suitable circumstances as in the instant case;

g) The right to natural justice is not withheld from the Appellant as he had/has opportunity to file application for review of orders and/or ought to have attached the memorandum of appeal and/or record of appeal;

h) The Appellant may also appeal this Court's Ruling of 16th August 2016.

The belated filing of the Record of appeal after the Ruling of 16th August 2016 is an abuse of the Court process; irregularly taking a second bite at the cherry and finally; the rights, interests and welfare of the child is paramount to the interests of other parties.

The Trial Court the ruling was not in any way prejudicial, taking note of the best interest of the child and the fact that the Appellant has been

providing for his education needs, as earlier indicated in my ruling dated 16th August 2016; the trial court did not heap the responsibility to pay university fees wholly on the Appellant but as a joint effort so that the child may also pursue other avenues to obtain funds and not miss a chance of obtaining university education. It is for these reasons that I find that the appellant's appeal lacks merit and dismiss it with costs to the respondent.

DELIVERED SIGNED & DATED IN OPEN COURT ON 5TH FEBRUARY 2019.

M.W MUIGAI

JUDGE

IN THE PRESENCE OF;

.....**FOR APPELLANT**

.....**FOR RESPONDENT**

COURT CLERK - JASMINE