



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 107 OF 2015

RWK.....APPELLANT/APPLICANT

-VERSUS-

AMA.....RESPONDENT

RULING

1. Before this court for determination is a Notice to show cause dated 2nd May, 2018. The Applicant made an application to the court seeking that the Respondent's salary be attached in execution of the decree of this court. The decree emanates from a judgment delivered on 13th October, 2016 in which the court adjusted the child maintenance awarded in the Kadhi's Court at Nairobi from Kshs. 25,000/- to Kshs. 40,000/- per month. The court further directed that the Respondent continue to provide medical cover for the minor and pay school fees for the minor in a school to be agreed by the parties.
2. On 31st May, 2018 the Respondent filed a replying affidavit sworn by himself on 30th May, 2018 in which he deposed that he has fully complied with the judgment of the court and has never neglected his responsibilities as portrayed by the Applicant. He asserted that transport does not form part of school fees and it should therefore be catered for by the Applicant in the spirit of equal parental responsibility. He stated that he is unable to raise funds to cater for additional costs such as school transport as he is no longer employed.
3. In reply to the Respondent's averments, the Applicant filed a replying affidavit on 7th June, 2018 in which she deposed that the Respondent is fully responsible for financial maintenance of the minor. She asked the court to put the Respondent to strict proof on his employment status and diminished capacity to fully provide for the minor's needs.
4. The matter came up for directions on 26th July, 2018 during which time the Court directed that the Notice to show cause be disposed of by way of written submissions.
5. The Applicant in person filed written submissions dated 9th August, 2018 and supplementary written submissions dated 11th February, 2019 in support of her case. It is the Applicant's submission that her application for execution of the decree of court against the Respondent was in compliance with **Order 22** of the **Civil Procedure Rules 2010**.
6. It is the Applicant's submission that in addition to the minor's school fees, the Respondent should also cater for incidental costs as per the fee structure being transport charges, caution money, activity fee, personal accident cover, school diary and progress book. The Applicant asserted that commuting to and from school is an incidental cost to getting an education.
7. The Applicant contended that whereas the Respondent had taken out a medical cover for the minor, the cover was depleted during the minor's admission to hospital. She urged that the Respondent is under an obligation to pay the shortfall arising from the minor's hospital admission.
8. The Applicant recognized the need for equal parental responsibility over the minor, and asserted that as the custodial parent, she has continued to provide the minor with parental care and protection which are of both a financial and non-financial nature. She asserted that the Respondent's contribution on the other hand is limited to only financial contributions, and urged that under Islamic law, the financial responsibility of maintenance lies squarely on the father of the child according to his means. That the Respondent's argument of equality of the Muslim father and Muslim mother to financially provide for the minor is inconsistent with **Article 24(4)** of the **Constitution**.
9. The Applicant contended that the Respondent has failed to provide proof of his alleged diminished earning capacity to adequately provide for the minor. She urged that it is an elementary principle of law that he who alleges must prove, and without proof therefore, the Respondent's claims that he is unemployed and struggling to meet his current parental obligations to the minor are without basis.

10. In her supplementary submissions, the Applicant sought to update her application for execution of decree dated 23rd April, 2018 in furtherance of which the subject Notice to show cause was filed. It is the Applicant's case that since filing the application, the amount due from the Respondent has risen from Kshs. 44,780/- to Kshs. 78,361/- due to the minor's medical charges, outstanding school transport charges, graduation package fees and school personal accident cover.
11. The Applicant contended that the Respondent has not fulfilled his obligations as per the court's decree and not sufficiently proven that what he agreed to do was beyond his means. The Applicant urged that the appeal was decided upon with the reliance of Islamic law and that under Islamic law, the financial responsibility of maintenance lies on the father of the child according to his means.
12. In opposition, learned Counsel Mr. Ndege filed written submissions dated 28th September, 2018 and further written submissions dated 28th February, 2019 on behalf of the Respondent in which he urged the court to dismiss the present application with costs stating that it is unmerited, a non-starter and an abuse of the court process. Counsel contended that the Respondent has fully complied with the judgment of this court delivered on 13th October, 2016 to the letter.
13. Mr. Ndege asserted that the Respondent has taken out an insurance cover for the minor with AAR Insurance Company Limited with a maximum limit of Kshs. 750,000/- for inpatient and Kshs. 50,000/- for outpatient. That the hospital bill incurred during the minor's admission to hospital was within the limits of the sum insured and the Applicant's claim for Kshs. 15,000/- is therefore unreasonable and unfair. Further that the Respondent has been paying the minor's school fees religiously in accordance with the judgment of 13th October, 2016 and pays a sum of Kshs. 40,000/- monthly towards the minor's upkeep.
14. It is Mr. Ndege's submission that the transport charges of the minor to and from her place of abode with the Applicant is not part and parcel of school fees. That the school documents relied upon by the Applicant to wit the school invoice dated 5th February, 2018 demonstrates this by categorizing school fees separately from other charges. Counsel urged that the judgment delivered on 13th October, 2016 by this court ordered the Respondent to pay school fees for the minor but did not indicate that the Respondent shall pay other related expenses.
15. Mr. Ndege submitted that the Constitution envisages equal parental responsibility and the court should therefore not burden the Respondent any further by requiring him to pay extra monies. That the Respondent's actions go beyond the threshold of equality contemplated by aforesaid
16. Mr. Ndege contended that if at all the Applicant wanted to amend her application, she should have done so formally and not by way of filing supplementary written submissions. I note that while the Respondent submitted that there was no oral application made at all by the Applicant on 31st January, 2019 to effect amendment of the Notice to show cause, the pleadings demonstrate that on the said 31st January, 2019 the court granted the Applicant leave to file supplementary submissions to reflect the change in the figures she had initially quoted.
17. Mr. Ndege urged that the Respondent has religiously abided by the orders in the judgment delivered by this court on 31st May, 2018 and as such, the Applicant's present application is unmerited, frivolous, scandalous and vexatious and ought to be dismissed with costs.
18. This is a matter concerning a child, and for this reason, the child's interests and welfare are of paramount importance as provided for under **Article 53(2)** of the **Constitution** and **section 4(3)** of the **Children Act No. 8 of 2001**.
19. In the judgment delivered by this court on 13th October, 2016 in an appeal filed against the judgment of the Kadhi's Court, this Court directed the Respondent to pay child maintenance of Kshs. 40,000/- per month, provide medical cover for the minor and pay school fees in a school to be agreed by the parties.
20. From the affidavits and submissions filed by the parties, the court gathers that the Respondent was part of the decision to have the minor attend [Particulars Withheld] Academy and he agreed to the terms of fees charged by the school. A copy of the admission letter of the school is annexed to the Applicant's replying affidavit of 5th June, 2018 and marked "RWK 1".
21. According to the admission letter for the year 2018, the term fees which was to be paid in full before the child could be admitted to Pre-Primary 2 was Kshs. 67,050/-. The payments for the personal accident cover, school diary and school progress book which are paid once a year were included in the computation of the total fees payable for the first term. Also included in the sum total was caution money which is payable once.
22. On the issue of the medical cover, I note that whereas the Respondent took out a medical cover for the minor, the cover has various limitations. The cover allows for a bed limit of Kshs. 6,000/- daily, and requires that at the time of discharge the member submits a valid NHIF card and the rebate reflected on the bill. The Applicant indicated in her replying affidavit of 5th June, 2018 that the NHIF rebate for each night the child spent in the Pediatrics General Ward at Aga Khan University Hospital is Kshs. 4,000/-.
23. I am satisfied that the sum that the Applicant is claiming as refund from the Respondent for the medical charges incurred by the minor is warranted. This is because whereas the Respondent took out a medical cover for the minor in line with the judgment of 13th October, 2016, the cost of the minor's admission and treatment was not fully catered for by the cover. This saw the Applicant pay a sum of Kshs. 15,000/- out of pocket to cater for the deficit.
24. I note however that while the Applicant claims an additional sum of Kshs. 4,381/- for medical charges incurred by the child on 1st July, 2018, she has not attached any documentary evidence in support of her claims.
25. From the arguments made by the Respondent in his affidavits and submissions, I am not convinced that the Respondent's financial

circumstances have changed such that he cannot cater for the incidental costs such as personal accident cover which is payable once a year and is classified by the school under term fees. I note that the Respondent's claims that he is no longer in employment and thus even struggling to pay maintenance and school fees of the minor were not supported by cogent evidence.

26. I am alive to the fact that in determining the appeal, this court applied Islamic law which places the responsibility of maintenance on the father of the child. This does not however imply that a child should be subjected to suffering by placing the responsibility of maintenance solely on the father of such a child, if the earnings cannot sustain the needs of the child. It is absurd to interpret this to mean that the mother of the child cannot chip in to cater for any financial needs of the child at all. In the instant case, the Respondent has other children over whom he is responsible.

27. The quantum of maintenance and school fees payable is dependent on the available means of a party on whom such responsibility is placed. In the instant case, I note that the Respondent took out a medical cover for the subject child according to his means and has continuously paid child maintenance of Kshs. 40,000/- monthly besides paying the child's school fees.

28. Bearing in mind that orders of maintenance, like all other orders of court, must pass the test of practical enforcement, and guided by the principle of the best interest of the child, I find that in the present case, it is prudent to order that the Applicant should cater for the transport charges of the child. With regard to the additional charges incurred during the minor's hospital admission, I find that a refund is not warranted. Having taken the child to a hospital whose room charges exceeded that indicated in the medical cover, it was upon the Applicant to cater for the additional costs incurred and which were not catered for by the medical cover provided by the Respondent.

29. In my considered view and based on the foregoing, I conclude that it is in the best interest of the subject child for the court to order as follows:

- i) The Applicant shall cater for the minor's school transport charges.
- ii) The Respondent shall continue to:
 - (a) Pay child maintenance of Kshs. 40,000/- monthly.
 - (b) Provide medical cover for the minor according to his means.
 - (c) Pay school fees and other incidental costs classified under yearly payments on the fee structure to wit activity fee, school diary, school progress book and personal accident cover.

It is so ordered.

SIGNED DATED and DELIVERED in open court this 18th day of June, 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Applicant in Person.

In the presence ofAdvocate for the Respondent.