



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 23 OF 2019

IN THE MATTER OF IMM AND CNM (MINORS)

TMM.....APPLICANT

VERSUS

JMM.....RESPONDENT

RULING

1. This ruling is in respect to two applications both of which were filed by the Applicant herein. The first application is dated 21st February, 2019 and is supported by an affidavit sworn by the Applicant on the same day. The second application is dated 7th March, 2019 and is supported by an affidavit sworn by the Applicant on the same day.

2. In the first application, the Applicant sought for orders that: there be stay of execution of the warrants of arrest and consequential orders of the Children's Court pending the *inter partes* hearing and determination of the application; the school fees demanded by the Respondent for the education of the two minors was unilaterally imposed, excessive to the Applicant and not in *tandem* with the terms of the Decree of Court issued on 18th December, 2018; in the alternative, the application dated 29th January, 2019 be heard *de novo* before another Magistrate other than Ms. M. W. Kibe and the Court issue directions for compliance with the Decree of Court issued on 18th December, 2018.

3. The application is based on the grounds that the Respondent has exaggerated the terms of the Decree of Court and imposed exorbitant and unconscionable terms of fees payment for the two minors, in disregard of the Applicant's means thereby frustrating the Applicant's compliance with the decree. That it is illogical and against the wider principle of administration of justice for the Applicant to be compelled into paying fees that he cannot afford.

4. In the second application, the Applicant sought his release from civil jail pending the hearing of the main application on the ground that the issuance of warrants of arrest and a committal order against him was not in the best interest of the children herein. On 25th March, 2019 this Court granted a conditional stay of the proceedings of the lower court in Children's Case No. 711 of 2008. I will therefore not belabor the second application as it is now spent.

5. The Respondent swore a replying affidavit on 4th March, 2019 in which she opposed the application in totality stating that it is an abuse of the court process and a tactic aimed at delaying and defeating justice to the prejudice of the minors herein.

6. According to the Respondent, the schools in which the minors are enrolled are reputable, distinguished and well performing schools whose fees are equivalent to those in which they were previously enrolled. That the schools are within the Applicant's means and ability as he has been paying an equivalent amount for the past eight (8) years. The Respondent urged that in spite of this, the Applicant has continuously refused to cater for the school fees of the minors as ordered by the Children's Court.

7. The Respondent contends that the Applicant has never challenged the judgment of the lower court since its delivery, which implies that he was in agreement with the decision. Further that the Applicant never challenged or contested the issue of school fees in the lower court during the hearing of the Children's case.

8. The Respondent admitted that consultation and consensus is key in determining choice of school for the minors but stated that the Applicant had adamantly rejected a meeting. She accused the Applicant of punishing and frustrating the minors at her expense since she was granted custody of the minors. She urged the Court to dismiss the application with costs, stating that it is an attempt by the Applicant to delay execution and compliance with the orders of the Children's Court.

9. On 28th March, 2019 the Applicant filed a supplementary affidavit sworn by himself on 27th March, 2019 in which he deposed that he did not appeal against the decision of the Children's Court because the court had granted him the discretion to choose where the children should school according to his means. He asserted that the Respondent transferred the minor CNN from [Particulars withheld] where he had cleared

the year's school fees, and even disobeyed the order of the Children's Court of 6th March, 2018 directing her to return the minor to the school. He urged that it is in the best interest of the minors that the court allow the application as filed.

10. Learned Counsel Mr. Mapesa filed written submissions dated 26th April, 2019 on behalf of the Applicant in which he urged the court to allow the application dated 21st February, 2019 stating that the orders sought therein are in the best interest of the minors. Counsel further stated that the Applicant is entitled to the cost of the application for having served an undeserved jail term of fourteen (14) days.

11. Opposing the application, learned Counsel Mr. Mwaura filed written submissions dated 26th April, 2019 on behalf of the Respondent in which he submitted that the present application is filed in bad faith and is merely a delay tactic aimed at defeating justice, and to punish and humiliate the minors without just cause or reason.

12. Two issues come to the fore upon perusal of the grounds of the application, the affidavits filed in support and in reply and the submissions filed by the Counsels on record. The first is whether the execution of the orders of the lower court by arrest and committal to civil jail is in line with the Decree of the Children's Court and the second is whether the Applicant is deserving of the exercise of this court's discretion in his favour.

13. The Children's Court issued a judgment in relation to the parties hereto on 22nd November, 2018 and a decree was extracted on 18th December, 2018. The relevant part of the decree which deals with parental responsibility in terms of maintenance of the minors is at paragraph four (4) which provides thus:

“4. THAT parental responsibility in terms of maintenance shall be shared in the following terms.

i. The Defendant/father shall pay school fees and provide related expenses for both minors until they complete their tertiary education.

ii. He will also provide for the medical expenses through a medical cover for both parties.

iii. He will also provide clothing at Kshs. 10,000/- per quarter of each year to be remitted at the end of the 3rd month of each quarter.

iv. The Plaintiff/mother shall provide for shelter and food expenses when the children are at home.”

14. In determining whether execution of the decree by arrest and detention in civil jail is warranted, it is important to reaffirm that a child's father and mother, whether they are married to each other or not, have equal parental responsibility over the child as spelled out under **Article 53** of the **Constitution 2010** and **section 24** of the **Children Act No. 8 of 2001**. Neither the father nor the mother of the child has a superior right or claim against the other in the exercise of their parental responsibility.

15. An order for the enforcement of maintenance and contribution orders with regard to children can be made by the court upon application by any person under **section 101** of the **Children Act**. Prior to making such an order, the court may hold an enquiry as to the means, income, assets and liabilities of the Respondent as stipulated under **section 101(4)**.

16. It was Mr. Mapesa's contention that the Applicant was committed to civil jail without sufficient inquiry as to his income, means, assets and liabilities against the provisions of **section 101(4)** of the **Children Act**. Further that the issuance of the warrant of arrest and committal order was made without certainty that the Applicant had willfully neglected to make the requisite payment without reasonable cause as required under **section 101(7)(a)** of the **Children Act**.

17. Whereas **section 101(7)** of the **Children Act** empowers the court to issue a warrant for imprisonment against a Respondent, the section further provides that such warrant shall not issue unless it is satisfied that the Respondent has persistently and willfully refused and neglected to comply with the orders; an order of attachment of earning would be inappropriate; the Respondent is present at the hearing and the default was due to the Respondent's willful refusal or culpable neglect. The ruling of the Children's Court dated 5th March, 2019 demonstrates that the Court satisfied itself as to the requirements of **section 101(7)** before issuing a warrant of imprisonment against the Applicant.

18. Even though the Children's Court took note of the Applicant's outcry that he could not afford to pay the decretal sum, the court went ahead to state that he had failed to make a commitment to pay part of the monies or to propose how the sum would be settled and concluded that the Applicant had willfully refused to pay the school fees of the minors.

19. In his submissions, Mr. Mapesa stated that the Applicant's income is not sufficient for him to solely cater for the education of the children in their present schools and referred to the Applicant's affidavit of means dated 27th March, 2019. Counsel asserted that the Applicant and the Respondent should both provide for the children's education and other basic needs according to the available means.

20. Mr. Mapesa urged that whereas the Children's Court directed the Applicant to pay school fees and related expenses, the Court granted the Applicant the right to decide the quantum of school expenses according to his means. That in any event, the Respondent has an equal responsibility to maintain the children, and should therefore contribute towards the children's school fees having unilaterally transferred the children to other schools.

21. In his affidavit of means filed on 8th April, 2019, the Applicant deposed that he can only afford to pay for each child a yearly sum of Kshs. 40,000/- towards their school fees. He stated that farming is his only source of income and that he has no other assets or properties. He

engages in agri-business in which he rears cattle and goats and earns an average of Kshs. 1,000/- daily from the sale of milk. His monthly expenses towards food, utility bills and veterinary services total to approximately Kshs. 40,000/-. He urged that while he previously earned an average of Kshs. 3,000,000/- monthly from operating a flower sales business, known as [Particulars withheld], the business, together with the operating capital of Kshs. 6,000,000/-, was taken over by the Respondent in the year 2014.

22. In her affidavit of means filed on 8th April, 2019, the Respondent deposed that she is in the business of selling fresh flowers locally which earns her a monthly income ranging between Kshs. 80,000/- and Kshs. 100,000/-. She incurs the sum of Kshs. 70,000/- to cater for her monthly expenses. The balance from her salary goes towards meeting the needs and expenses of the minors as directed by the court, and offsetting a personal loan for which she pays Kshs. 10,000/- monthly. She expressed her willingness to continue catering for the needs of the minors as directed by the Children’s Court in its judgment.

23. Mr. Mapesa submitted that while invoking its supervisory jurisdiction, this Court can order for equal and shared parental responsibility in line with the **Article 53(1)(e)** of the **Constitution** and referred to the case of **JKW vs. MAA [2015] eKLR** to buttress his point. Counsel urged the Court to direct that the matter of execution be heard *de novo* before a different magistrate in the Children’s Court stating that this will be in the best interest of the children.

24. It is the Respondent’s argument that the fees in the current schools of the minors have surpassed the previous fees by a minimal amount. The difference is Kshs. 1,000/- for IMM, the male minor and Kshs. 10,000/- for CNM the female minor. What is curious however is that the Respondent transferred the minors to their current schools regardless of the order of the Children’s Court made on 6th March, 2018 that the female minor go back to her previous boarding school and the male minor remain in his school. This is in spite of the fact that the Applicant had cleared the full fees of the female minor at her previous school.

25. From the pleadings and submissions, the Court gathers that even though the Applicant surrendered the flower business to the Respondent, he has for the past eight (8) years continuously paid the school fees and maintained the minors in all ways, all by himself. It is also not disputed that in those eight (8) years, the Respondent did not contribute a cent towards the school fees or maintenance of the minors.

26. It appears that at present, the Applicant does not have sufficient funds to pay the school fees in the sums he used to pay. In the oral address to the Court in an attempt to establish the underlying problem, the Applicant stated that his current wife has been subsidizing household expenses and paying part of his school fees obligations. The Applicant has however expressed his willingness to continue paying the school fees and proposed a sum of Kshs. 40,000/- per annum for each minor. The Applicant was also making arrangements to transfer the minors to affordable schools. Annexed to the Applicant’s supplementary affidavit is a fee structure for a school the Applicant sourced for the male minor in which the fees payable is Kshs. 40,435/- per annum. I note that the Applicant had, during the pendency of this suit, paid a sum of Kshs. 15,000/- towards the school fees of the male minor and a sum of Kshs. 25,000/- towards the school fees of the female minor.

27. Bearing in mind that neither the father nor the mother of a child has a superior right or claim against the other in the exercise of parental responsibility, and that **Article 53** of the **Constitution 2010** and **section 24** of the **Children Act No. 8 of 2001** envision equal parental responsibility of parents over a child, I find that the orders of the Children’s Court are oppressive upon the Applicant. It is evident that the apportionment of maintenance was not pegged on any concrete evidence of the earnings of the parents. This is in light of the fact that the Respondent operates a flower sales business and enjoys a stable income which appears to be better than that of the Applicant.

28. I am satisfied that the Applicant is deserving of the exercise of the discretion of this Court in his favour. It is clear from the evidence adduced in this Court that the Children’s court failed to critically analyze the earnings of each of the parents in this case. In **HWN vs. GKC Children Appeal No. 3 of 2018, [2018] eKLR** Ndung’u J observed that orders of maintenance, like all other orders of court, should not be given in vain. Such orders must pass the test of practical enforcement. It behoves the court to call for and analyze with circumspection the earnings of the parents on the one hand and the needs of the children on the other. This is especially important in a case such as this one where there is an indication that the Applicant has another family.

29. Of importance in this matter is the best interest of the children which is paramount. In determining the application therefore, it is upon this Court to give directions which benefit the children and ensure the least disruption in their lives. While both the Constitution and the Children Act envisage equal parental responsibility, sharing of parental responsibility should not be arbitrary.

30. In the premise therefore and in the interest of justice, I remit this case back to the Children’s Court to be presided over by any other magistrate other than Hon. M. W. Kibe. The Children’s Court shall conduct a proper inquiry and assessment into the financial ability of each parent to arrive at reasonable contributions from both parents without overburdening any of the parents. The Court shall also consider the mode of execution. I note that in the instant case, execution of the decree by arrest and committal to civil jail of the Applicant has not so far served the best interest of the subject minors in any manner and is therefore stayed pending the re-assessment by the Children’s Court. Each party shall bear their own costs.

SIGNED DATED and DELIVERED in open court this 4th day of June, 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicant.

In the presence ofAdvocate for the Respondent.