



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 70 OF 2018**

**AKM.....APPELLANT**

**AND**

**BKO.....RESPONDENT**

*(Appeal from the ruling and order of the Children's Court at Nairobi by Hon. G. B. Gitonga delivered on the 20<sup>th</sup> November, 2017 in Children Case No. 708 of 2013)*

**JUDGMENT**

1. The genesis of this appeal is an application by the appellant then an applicant filed in the lower court seeking inter alia for rent maintenance, school fees and school related expenses from the respondent. On 22<sup>nd</sup> and 23<sup>rd</sup> May 2013 respectively the trial court ordered the Respondent to pay school fees, school related expenses and rent.

2. Thereafter the parties have been in and out of court, with the Appellant seeking to enforce court orders which the Respondent would only comply with when threatened with execution and on his part the respondent has been seeking to have the said orders reviewed.

3. The Respondent filed three applications seeking for review. The first application was dated 1<sup>st</sup> October 2013. Same was dismissed and an order for attachment of the Respondent's salary made. The second application was filed on 1<sup>st</sup> of November 2013 it was equally declined. The third application was filed on the 29<sup>th</sup> of October, 2016 as a result of a ruling on a notice to show cause filed by the appellant and where the court found the respondent guilty of non-payment of a sum of Kshs 796,000/- and ordered for a warrant of arrest to issue.

4. The third application sought for the following orders:

- **Lifting, suspension and/or discharge of the Defendant (now Respondent) from warrant of arrest issued against him pursuant to a court order of 7<sup>th</sup> September 2016.**
- **Review, variation and/or setting aside of the court order of 7<sup>th</sup> September, 2016.**
- **Review, variation and setting aside of orders of May 2016.**
- **For a child assessment order in respect of the minors.**
- **Orders of access.**

5. In his ruling the trial magistrate declined to review vary and/or set aside its previous orders, however without any prompting by either side the court *suo moto* invoked **Section 101(5)(b)** of the **Children's Act**, made an order of remission of all the arrears at the time, which amount was in excess of Kshs.700,000/- for the reason that the trial court wanted the parties to focus on the future, the court went further to lift the warrant of arrest.

6. Grounds of Appeal include the trial court's decision to invoke **Section 101 5(b) of the Children's Act** without prior notice to the Appellant as by law required, failing to give the Appellant an opportunity to make representation before the court arrived at the said decision, failure by the trial court to restrict itself to the pleadings before it, issuing of contradictory orders, and failing to consider the best interest of the children and the hardship and dilemma faced by the Appellant.

7. Based on the above the Appellant sought to have the ruling of the lower court dated 20<sup>th</sup> November, 2017 set aside, the warrant of arrest issued on 24<sup>th</sup> October, 2016 reinstated, the order of revision quashed and costs.

8. Having considered the submissions and record of appeal I am of the view that the following issues are for consideration ;

- a. Whether the court erred by *suo moto* invoking Section 101 5 (b) of the Children’s Act.
- b. Whether or not the court erred by failing to give notice of its intention to the appellant and allowing her to make representations?
- c. Whether to reverse the said order, direct payments and/or reinstate the warrants of arrest.

9. **Section 101** of the Children’s Act deals with enforcement of maintenance and contribution orders. The section in its entirety lays emphasis on the involvement of the party claiming and the one owing and investigations before a decision is arrived at. In this instance the court did not make any enquiry as to the inability of the respondent to pay the sums ordered. And though satisfied that the sums due and owing remained unpaid and declining to vary orders in force the court disregarded the provisions of the law to wit;

**101 (4) Prior to the making of an order under this section, the court may hold an enquiry as to the means of the respondent who shall, whenever possible, be present and where such enquiry is held the court may direct that-**

- (a) enquiries be made as to the means of the respondent by such person as the court may direct; or**
- (b) the respondent’s income, assets and liabilities be searched to establish such information as the court may require to make an order under this section; or**
- (c) a statement of means from the respondent’s employer, or auditors or from such other person as the court shall direct, be availed to court.**

**(5) where the court is satisfied that the respondent has failed to make payment of any financial provision under a maintenance order or contribution order, the court may-**

- (a).....**
- (b) order the remission of arrears, but the court shall not make an order of the nature without prior notice to the child, or the person or institution as the case may be, in favour of whom the maintenance order or contribution order has been made and without allowing them a reasonable opportunity to make representation**”.(emphasize added)

10. Since the respondent did not plead inability to pay the arrears but had simply denied being in arrears, the court having found that he did indeed owe the monies, there was no basis for the court on its motion to invoke the section. Indeed, the conduct of the respondent militated against the orders made in his favour.

Further the court failed to put the appellant on notice or give an opportunity to her to make representations. The court certainly erred in this regard.

11. Considering the facts of the case, including the fact that the appellant was seriously ill and one of the two children had a terminal illness, the trial court in my view was insensitive and failed to take into account pertinent and important matters.

12. For the reasons above the appeal herein succeeds, to the extent that;

- i. The remission order is hereby quashed
- ii. The order lifting the warrant of arrest is set aside; and
- iii. The warrant of arrest against the respondent reinstated.

13. Further the court directs that the matter do proceed to full hearing before another magistrate.

14. Costs of the appeal to the appellant.

**DATED, SIGNED and DELIVERED at NAIROBI this 17<sup>TH</sup> DAY OF OCTOBER, 2019.**

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**ALI-ARONI**

**JUDGE**