



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
CIVIL APPEAL NO. 3 OF 2017

S S SAPPELLANT

VERSUS

E M K alias ASYA RESPONDENT

RULING

(An Appeal from the Ruling and Orders of Hon. B. Koech, Senior Resident Magistrate of 23.1.17 in Tononoka Children's Court Cause No. 137 of 2015)

1. The Appeal herein arose from the Ruling and Orders of Senior Resident Magistrate Hon. B. Koech of 23.1.17 in Children's Case No. 137 of 2015 at Tononoka. In the said Ruling, the learned Magistrate made the following orders:

- i) That this Honourable Court is pleased to issue a Garnishee Order Absolute in terms of prayer 2 of the Application.
- ii) That the above order shall be stayed for seven days. However, the funds being held in the bank by the garnishee shall not be released during the pendency of the stay order.
- iii) That the Respondent shall be issued with certified copies of proceedings and ruling dated 23.01.2017.

2. The Appellant, being dissatisfied with the above Orders filed the Appeal herein.

3. The brief background of this case as gleaned from the record is that the parties were married under Islamic law. They have 3 children whose ages in 2015 were given as M, 20 years, N, 15 years and I, 13 years. By his *talak* dated 11.10.14, the Appellant divorced the Respondent. In the said *talak*, the Appellant stated that he will cater for all the needs of his children as their father. In an earlier ruling of 13.10.15, the learned Magistrate issued a maintenance order and directed the Appellant to continue catering for the needs of the children as per his own *talak* letter. It would appear that the Appellant defaulted and a warrant of arrest and notice to show cause was issued whereupon university fees for M were paid. Further default provoked the application dated 19.8.16 which culminated in the impugned orders of 23.01.17.

4. The grounds of appeal are that the learned Magistrate erred in law and fact by:

- i) Attaching and issuing garnishee orders absolute against the Appellant's pension with [particulars

withheld];

- ii) Issuing garnishee orders absolute in absence of an order confirming liability of the Appellant;
- iii) Bestowing full parental responsibility to the Appellant with no contribution by the Respondent;
- iv) Giving orders in favour one child of the Appellant to the detriment of his other children who are undergoing basic education.

5. On 23.2.17 directions were given that the Appeal be disposed of by way of written submissions and both parties filed their respective submissions together with the authorities they relied on. Parties submitted on each of the 4 grounds of Appeal as follows:

Whether the learned Magistrate erred by attaching and issuing garnishee orders absolute against the Appellant's pension with Standard Chartered Bank Limited

6. For the Appellant, it was submitted that the Appellant receives his monthly pension of Kshs. 116,000/= from [particulars withheld] ("the Bank"); that in spite of the learned Magistrate confirming in her ruling that the Appellant receives his pension through one his accounts with the Bank, she went ahead and attached the same pension account. It was further argued that Section 36 of the Retirement Benefits Act prohibits the attachment of the contributions or funds of a member of a retirement benefits scheme. The case of Festus Mburu Nyanjui & 4 Others v Perpetual Wangui Magutu & Another [2015] eKLR was relied upon to support the submission that pension is immune from attachment.

7. For the Respondent, it was submitted that the claim that funds in the accounts were pension funds was an afterthought meant to defeat justice for the children. It was submitted that there was no mention in the lower court that the monies in the 3 accounts held with the Bank were pension funds nor was any document of the existence of a pension placed before the Court. As such, the Court could not have made a finding on whether the said monies were indeed pension funds or not. It was further submitted that even if the Court were to find that the monies in the 3 accounts were pension funds then because this is a matter concerning children, Article 53(2) of the Constitution and Section 4(3) and (4) of the Children Act are applicable and take precedence. It was argued that it would be unfair and unconstitutional for a parent to refuse to pay for his children's upkeep and use the excuse that it is his pension.

8. Relying of the case of S K v R W K [2010] eKLR it was submitted for the Respondent that the learned Magistrate was correct in making enquiry under Section 101 of the Children Act and attaching the funds held in the Appellant's accounts. It was further argued that in the cases of Ann Kajuju Charles v Kenya Commercial Bank Limited [2011] eKLR and C N G v L N [2014] eKLR the Court allowed attachment of pension.

9. I have considered the rival submissions. I have also perused the record which shows that the issue of pension was indeed before the lower Court. On page 23 of the proceedings, Mr. Mwadzogo, learned Counsel for the Appellant stated, **"Garnishee proceedings cannot proceed without the involvement of the bank. The account attached deals with pension. The involvement of the bank is important."** On page 27 of the proceedings, Mr. Wafula, learned Counsel for the Bank stated, **"The last account receives pension from Ken Gen which is Kshs 116,000/- per month."** The learned Magistrate herself stated in her ruling on page 39, **"The defendant earns a pension to a tune of about 100,000 he will be able to cater some of his needs ..."** It is clear from the proceedings that the issue of the funds in the accounts being the Appellant's pension is not an afterthought as submitted on behalf of the Respondent.

10. The Appellant relied on Section 36 of the Retirement Benefits Act No. 3 of 1997 to find fault with the attachment of his accounts. The section provides:

Notwithstanding anything to the contrary contained in any other written law, where a judgement or order against a member of a scheme is made, no execution or attachment or process of any nature shall be issued in respect of the contributions or funds of the member or his employer

except in accordance with the scheme rules and such contributions shall not form part of the assets of the member or of his employer in the event of bankruptcy.

The above provision prohibits the attachment of pension “notwithstanding anything to the contrary contained in any other written law.

11. The Children Act No. 2001, provides at Section 101(5) as follows:

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

(a) ...

(b) ...

(c) issue a warrant for distress on the respondent’s property forthwith or postpone the issue of the warrant until such time as the court may direct, or on such conditions as the court may deem fit and order the attachment of the respondent’s earnings including any pension payable to the defaulter if the court is satisfied that—

(i) the failure to make payment was due to the wilful refusal or culpable neglect of the respondent; and

(ii) the respondent is gainfully employed or is engaged in some business enterprise or undertaking or owns property from which he derives an income

12. My understanding of the above provision is that where the Court is satisfied that a party has failed to make payment of any financial provision under a maintenance or a contribution order, the Court may order the attachment of the party’s earnings including any pension payable to the party. When it comes to enforcement of a maintenance or contribution order against a party in default, Parliament in its wisdom found that in the best interests of the child, nothing is sacred, not even that party’s pension. The Children Act was enacted after the Retirement Benefits Act. Being a latter Act of Parliament, the Children Act takes precedence.

13. Further and perhaps most important, this matter concerns the children of the parties herein. The best interests of the said children are of paramount importance and they supersede the rights and interests of the parties herein. This paramountcy principle is enshrined in Article 45(3) of the Constitution of Kenya, 2010 and the Children Act which provide:

“A child’s best interests are of paramount importance in every matter concerning the child.”

The Children Act at Section 4(2) and (3) provides

(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

14. The record shows that a Notice to Show Cause was issued against the Appellant why execution should not issue for default in paying university fees for the parties' daughter M. As a result of further default, the Respondent filed the application for the garnishee order which was granted prompting the appeal herein. It is my finding that the lower Court being satisfied that the Appellant has failed to make payment of a financial provision under the maintenance order, issued the garnishee order attaching the accounts of the Appellant, all in the best interests of the children herein.

Whether issuing garnishee orders absolute in absence of an order confirming liability of the Appellant

15. For the Appellant, it was submitted that at the time garnishee proceedings were instituted, on 19.8.16 demanding payment of Kshs. 2,209,550.00, there was no Court order requiring the Appellant to pay the said sum to the Respondent or to any other person. In the absence of a specific Court order as required in law, the learned Magistrate erred in issuing the orders. It was further submitted that an order requiring the Appellant to continue maintaining his children is not sufficient to justify the grant of a garnishee order for a specific amount of money. The Appellant had as directed by the learned Magistrate filed a tabulation showing that he was not indebted to the Respondent which tabulation was not considered in the ruling.

16. For the Respondent, it was submitted that the Appellant was ordered by the Children's Court to cater for all the needs of the children as he had always done and as per the *talak* he had issued to the Respondent. He defaulted in payment of the initial amount and a warrant of arrest was issued. He proceeded to pay upon issuance of a notice to show cause. It was argued that an order of the Court existed as defined in Section 2 of the Civil Procedure Act. The Appellant had complied with the order previously upon notice to show cause and cannot now turn around and deny the existence of the decree.

17. Having perused the record, I do find that there was indeed an order by the learned Magistrate of 13.10.15 which states in part:

“The Defendant therefore has the responsibility to provide for his children. He is from the records clearly a man of means. He cannot now turn away from his family. Therefore it is in the best interests of the children to have the status quo maintained as the parties resolve their issues. The defendant should therefore continue catering for the children's needs as per talak letter made by the defendant himself on 11.10.14.

18. A maintenance order such as the one issued by the learned Magistrate is continuous in nature requiring periodical payments according to the needs of the children. Section 101(5) of the Children Act provides that where a party fails to make payment of any financial provision under a maintenance order, the Court may proceed to enforce the order. In the instant case, it is clear that the Appellant defaulted in making payment of a financial provision under the maintenance order as directed by the Court and only did so after a warrant of arrest and notice to show cause were issued. Thereafter, there was further default prompting the application for garnishee orders. It is my finding that the maintenance order of 13.10.15 was and still is in force. The Appellant failed to make payment of financial provision under the maintenance order and the Court, on application by the Respondent, issued the garnishee orders to enforce the previous orders, as provided for in Section 101 of the Children Act.

Whether the learned Magistrate erred in bestowing full parental responsibility to the Appellant with no contribution by the Respondent;

19. The Appellant wonders why having stated in the ruling that the needs of the first child who is at Sunway University were to be met by her parents the learned Magistrate then allows the Respondent to seek reimbursement from the Appellant for what she used on the child. He also wonders what the contribution of the Respondent is towards the children. For the Respondent, it was submitted that matter before the Court was the execution process. The issue of parental responsibility had already been made on interim basis and an appeal filed. The Appellant stated clearly in his *talak* that he would cater for all the

needs of the children as he had always done. He cannot therefore be heard to raise the issue at this execution stage. I do agree with the Respondent that the issue before this Court is the execution process. The Application dated 19.8.16 was for enforcement and execution of the maintenance orders made by the Children's Court. The Appeal herein is in respect of the garnishee orders made to enforce the maintenance order. The issues of parental responsibility and the contribution of the Respondent towards the maintenance of the children are not at present before this Court.

Whether the learned Magistrate erred by giving orders in favour one child to the detriment of other children who are undergoing basic education

20. On this ground, it was submitted for the Appellant that the basis for extending parental responsibility was that M was in her last year at the university. After interrogation of facts however it became clear that the Court was misled and the resources of the Appellant are now overstretched in taking care of a single child to the detriment of the other children. For the Respondent, it was argued that the garnishee orders were issued in respect of all the children and not just one child. It is the view of this Court that the matter before the Court is the appeal against garnishee orders issued to enforce the previous orders of the lower Court. The appeal is not against the maintenance orders. The fairness or otherwise of the maintenance orders ought to be canvassed and determined in an appeal against the maintenance orders and not in the Appeal herein.

21. Having evaluated the evidence and the law relevant in this matter in totality, I find no reason to interfere with the decision of the learned Magistrate. The Appeal herein lacks merit and the same is hereby dismissed with costs to the Respondent.

22. Before I conclude however, I wish to state that the matter herein concerns children. Children cannot wait. Any delay in determining questions relating to children is likely to be prejudicial to their welfare. It is a general principle that proceedings relating to children must be determined expeditiously to avoid occasioning prejudice to the children on account of delay. Section 76(2) of the Children Act provides:

“In any proceedings in which an issue on the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child.”

The filing of the instant Appeal has resulted in the delay of the trial Court proceedings which in my view is prejudicial to the welfare of the children herein. The best interests of the children would have been better served by having the matter heard and determined expeditiously in the trial Court. Parties are directed to take urgent steps to have the matter listed for hearing without further delay.

DATED, SIGNED and DELIVERED in MOMBASA this 16th June 2017

M. THANDE

JUDGE

In the presence of: -

..... **for the Appellant**

..... **for the Respondent**

..... **Court Assistant**