



**REPUBLIC OF KENYA**

**IN THE KADHI'S COURT AT ISIOLO**

**DIVORCE CASE NO 30 OF 2018**

**HMM ..... PLAINTIFF / APPLICANT**

**VERSUS**

**SAA ..... DEFENDANT / RESPONDENT**

**RULING**

The Notice to Show cause application for execution of Decree dated 10<sup>th</sup> March,2021 seeks salary attachment of the respondent. This is the second Notice to show course application in this matter. In between, there have been applications for review and another matter between the parties on custody as a result of the issue of children maintenance.

Mr. Jarso for the applicant submitted that the respondent / judgment debtor failed to settle the decree as ordered by court, that he is supposed to pay KES 15,000.00 but continued to pay only 10,000.00 per month. He further submitted that the respondent failed to undertake his parental responsibilities accruing arrears of KES 48,000.00. He urged court to grant salary attachment to save time of parties and court. In the alternative, the respondent to be given custody of three children and applicant remain with custody of the youngest child.

In reply the respondent submitted that he is not aware of any arrears and that he is supposed to pay KES 12,000.00 per month starting July 2021, as the applicant walked out in protest after the ruling was read. He further submitted that he earns a net salary of KES 29,000.00 which he distributes between the applicant, his current family, his father and settlement of bills. He argued that his salary is not adequate which compelled him to drop his master's degree course. He agreed to the applicant's proposal to get custody of three of the children.

There is only one issue for determination in this application namely whether or not the respondent's salary be attached in execution of decree. Initial children maintenance order of KES 10,000 per month, reviewed on 3<sup>rd</sup> January, 2019, directed the respondent to pay KES 12,000.00 per month till June 2021, starting July 2021 he is to pay KES 15,000.00.

Once pronounced and signed, a valid order, unless otherwise reviewed or vacated must be complied to. The fact that the applicant had walked out in protest or anger after delivery of ruling does not change this fact. The respondent is therefore abundantly aware that the maintenance order from February 2019 was KES 12,000.00 He was given leave to continue paying KES 10,000.00 in July 2020 for another four months only due to the pandemic.

I have noted that since judgment was entered in this matter the respondent has never failed from promptly transmitting children maintenance at least KES 10,000.00 every month to the applicant. The court has had opportunity to confirm from his pay slip that he earns a net salary of about KES 29,000.00. He has other responsibilities to his other family and parents. The respondent cannot be said to have completely abdicated his parental responsibilities. He has clearly strived to obey the orders of this court albeit partially.

The prayer for salary attachment, in my considered view, applies to a judgment debtor who has not been settling judgment debt at

all or very irregularly despite demonstrable ability to settle same. It is not the case in this matter. The respondent has demonstrated consistent settlement of children maintenance albeit KES 2,000.00 less. The Qur'an does not put a burden on any person more than his ability. This is particularly true on children maintenance disputes. The **Qur'an at 2.233** provides:

**'...No person shall have a burden laid on him greater than he can bear. No mother shall be treated unfairly on account of her child; nor father on account of his child. And on the (father's) heir is incumbent the like of that (which was incumbent on the father).**

Considering his income, his other responsibilities and the consistency of his settlement of the decree, the court is not satisfied salary attachment is either necessary or helpful. It may be counterproductive not only to the respondent but also the very children the court and parties are clearly eager to protect. Like the secretary of the exchequer's detailed scrutiny in disbursement of funds to the myriad government ministries and departments, in application of the law of execution, the court must delve to discern the peculiar situations and needs of each case to realise the best interests of the children. It cannot be mechanical. The country needs the children to grow up in a stable, caring environment; the father to continue working to generate livelihood for himself and his family; the mother to be adequately assisted to nurture the children. It is the enviable duty of the court to strike a delicate balance between the competing demands of the various units of the family. It is anything but easy.

Accordingly, the prayer for salary attachment is rejected. For avoidance of doubt, the difference and / or balance of the monthly maintenance paid and that decreed forms a liability on the respondent / judgment debtor.

I have not addressed my mind to the issue of review of custody. Arguments on it emanated not from pleadings as required in law but from oral submissions of parties at trial. I do grant parties leave to even orally record consent on the issue in court, if it will help in the finally settling the dispute.

Each party to bear its own cost.

**DATED AND DELIVERED AT ISIOLO ON 13TH APRIL, 2021.**

**HON. ABDULHALIM H. ATHMAN**

**SENIOR PRINCIPAL KADHI**

In the presence of:

Mr. Adano Roba, Court assistant

Mr. Jarso for applicant

Defendant / respondent



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