Strathmore University

Law School

PARENTAL RESPONSIBILITY; AN INTERROGATION OF THE KENYAN LEGAL SYSTEM REGARDING ENFORCEMENT OF CHILD SUPPORT ORDERS

Dissertation submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore University Law School

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Declaration

I, MICHAEL KINOTI MARETE, do hereby declare that this research proposal is my original work and to the best of my knowledge and belief, it has not been previously, in its entirety or part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

Date: 30th January 2025

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: 

Mr. Chacha Odera

Date: 30th January 2025

ABSTRACT

A critical examination of the enforcement of child support orders in Kenya, with a particular focus on the legal obligations of parents under the Children Act 2022 and Article 53 of the Constitution of Kenya. The Constitution of Kenya aims to protect all citizens, with a special emphasis on the rights and welfare of children, recognizing them as a vulnerable segment of society that requires additional safeguards. Maintenance of children is a fundamental responsibility of parents, as mandated by law, and this duty must not be neglected or left unfulfilled.

Despite the strong legal framework, there is a significant gap in the effective enforcement of child support obligations, especially in cases involving single-parent families. This gap has detrimental effects on the welfare of children, contrary to the principles enshrined in both national and international law. Kenya has ratified important international instruments such as the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of the Child, both of which reinforce the obligation of the state to ensure that children's rights, including the right to maintenance, are upheld.

Using a doctrinal methodology, this study analyses the existing legal provisions and their practical application, revealing the disparities in the protection of children due to the lack of a robust enforcement framework. The research is grounded in the best interest of the child principle and the theory of conformity of law, which together underscore the necessity of aligning legal practices with the rights and needs of children.

The aim of this paper is to expose the inconsistencies and inadequacies in the current child support enforcement mechanisms in Kenya, which contribute to the insufficient protection of children. It argues for the establishment of a comprehensive enforcement framework that ensures child maintenance obligations are consistently met. By proposing this framework, the study seeks to create a sustainable legal mechanism that upholds the welfare of children, minimising the need for repetitive court interventions and ensuring that parental responsibilities are not abandoned. Ultimately, the research aspires to contribute to the strengthening of Kenya's legal system in a way that better protects its youngest and most vulnerable citizens.

LIST OF ABBREVIATIONS, CASES AND LEGAL INSTRUMENTS

LIST OF ABBREVIATIONS

AU-African Union

ACRWC- African Charter on the rights and Welfare of the Child

CRC- Convention on the Rights of the Child

PR- Parental Responsibility

SCSMA- Subordinate Courts (Separation and Maintenance) Act

CYPA- Children and Young Persons Act

PRA- Parental Responsibility Agreement

LIST OF CASES

I. NK v AL [2022] e KLR- Family appeal No. 29 of 2019
II. Mutheu Agatha Khimulu v Raheem Mehdi Aziz Azad & 4 Others (Petition No. E003 of 2022)
III. SAD v EOO [2021] e KLR- family division civil appeal No. 78 of 2021
IV. Teachers Service Commission v Kenya Union of Teachers & 2 Others (2013) eKLR,
V. Hadkinson v Hadkinson (1952) ALL ER
VI. Econet Wireless Kenya Ltd v Minister for information of Kenya & another (2005) eKLR
VII. Katsuri ltd v Kapurchand Depar Shali (2016) eKLR
VIII. JKW v AWM (2018) eKLR
IX. M v S (2008) KLR 271.
X. Satpal Kaur Singh Rihal Vs Surinder Singh Rihal (2005) eKLR.
XI. Local Authorities Pension Trust Registered Trustees v CAO & 2 Others of 2016
XII. PKM v ANM (2020) eKLR
XIII. AHM v AWM (2023) eKLR.
XIV. EM v AM (2020) eKLR.
XV. MAK v RMAA & 4 Others (2023) KESC21(KLR)
XVI. Bannatyne v Bannatyne & Commission for gender equality, 2002, Constitutional court of South Africa.

LIST OF LEGAL INSTRUMENTS

I. African Charter on the rights and Welfare of the Child
II. Convention on the Rights of the Child
III. Constitution of Kenya
IV. Children Act
V. Maintenance Order Enforcement Act
VI. Subordinate Courts (Separation and Maintenance) Act
VII. Children and Young persons Act

CHAPTER 1: INTRODUCTION

1.1 Background

The family is considered as one of, if not the most important foundation of society and law.[1] The core objective of Article 53 of the Constitution of Kenya 2010 and the Children Act 2022 is to ensure that children are catered for and their best interests prioritised in matters concerning children.[2] The Constitution defines what 'parental responsibility' entails as the "*right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child*,"[3] and the Children Act further defines it under Part III, as " *all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child*."[4] Of the provisions outlined, parents may only be held liable as a result of neglect of their legal duties, responsibilities and obligations, of which constitute child support.[5] Child support is defined as the sum of money the non-custodial parent pays to the custodian parent for the benefit of the child.[6] The centre of focus thus is not the parent but the child. The best interest principle of the child is the main consideration as enumerated in ***Mutheu Agatha Khimulu v Raheem Mehdi Aziz Azad & 4 Others***.[7]

Further in protecting children, the Kenyan Constitution and Children Act are not the only source of protection. There exists the Convention on the Rights of the Child (CRC) which addresses the rights of the Child universally and was ratified by Kenya in 1990. It equally underscores that in all actions concerning children, the best interest of the child shall be paramount consideration.[8] Regionally, the African Charter on the Rights and Welfare of the Child (ACRWC) which came into force for all AU member states. Moreover, the 1959 Declaration of the Rights of the Child

[1] Article 45, The Constitution of Kenya (2010).
[2] Article 53 (2), The Constitution of Kenya (2010).
[3] Article 53(1)(e), The Constitution of Kenya (2010).
[4] Section 31, The Children Act (No. 29 of 2022).
[5] Armstrong A, "Maintenance Payments for Child Support in Southern Africa: using Law to Promote Family Planning", Studies in Family Planning 1992; Vol. 23, No.4, 217
[6] Cambridge Academic Content Dictionary.
[7] *Mutheu Agatha Khimulu v Raheem Mehdi Aziz Azad & 4 Others* (2022) eKLR.
[8] Article 3(1), Convention on the Rights of the Child.

(DRC) at paragraph 2 further reiterates the principle of the best interests of the child as of great importance.

The protection of children by many parents today has deteriorated in comparison to traditional African, and in particular Kenyan societies where there existed a collective moral obligation, which is a sense of duty, toward the upbringing of children into becoming morally upright people to sustain the community.[9] In an analysis of the postcolonial family in Kenya, it has been opined that the family and state are mutually dependent governance institutions, with an interconnectedness that is inseverable.[10] A discrepancy results in unwanted consequences evident in recent research demonstrating that juvenile crime is linked to neglectful or abusive parenting.[11] Alarming statistics show that the number of households headed by a single parent in 2009 was 25%, this has increased drastically to 40% as of 2019.[12] The situation has aroused public attention with even family lawyers stating that there is a lot of covert single parenting.[13] Moreover, 45% of children in Kenya live without their biological parents whilst 22% live with their mothers although their fathers are alive.[14] It has been demonstrated that various challenges are related to single-parent families including less healthy lives, increase in school dropout rates, higher propensity for property among others.[15] These are all contrary to the obligations of the State. To this extent the State has a duty to try and correct this.

The law regulates behaviour, promotes human dignity, pursues justice, and is a tool that maintains order in society by enhancing harmony.[16] However, on many occasions, one encounters a situation where a child is used as a pawn, to punish the other parent. Be it a man

[9] Ominde ES, K' Odhiambo KA, Gunga SO, Analysis of praxis of African communalism: A model of ethical values in primary school curriculum in Kenya, Journal of Educational Research in Developing Areas (JEREDA) Vol.1.Issue3, 280.
[10] Kangara S, 'Beyond bed and bread: Making the African State through marriage law reform- Constitutive and transformative influences of Anglo-American legal thought' 3 Comparative Law Review, 2012, 4.
[11] Amondi G.L, Parental Responsibility towards a Child in Kenya,37 *see* Juvenile Justice: Some Recent Developments, Briefing Paper No. 5/99, by Honor Figgis, *see also* Goss BM, Identity; beyond the tradition and McWorld Neoliberalism, 2013
[12] Kenyan National Housing and population census (KNHPC)2019
[13] Kahongeh J, Gender Wars: how single parenting is changing the face of family, June 2022, https://nation.africa/kenya/news/how-single-parenting-is-changing-the-face-of-family-3836566
[14] Mungai C, 'Single parenthood 'crisis' is here with us but it is not what you think', https://www.standardmedia.co.ke/article/2001228992/single-parenthood-crisis-is-here-with-us-but-it-is-not-what-you-think
[15] Kirby J, Single parent families in Poverty, journal of marriage and family, 2010, 55, p 23-58
[16] Jenks E, 'The function of law in society' 5 Journal of Comparative Legislation and International Law 4, 1923, 170

trying to get custody of the child to punish the mother or vice versa, or a child born of wedlock is neglected by the father, and even more surprisingly by the mother This systemic failure necessitates the development of a robust framework to enforce parental responsibility and ensure compliance with child support orders. Accordingly, this proposed dissertation aims to highlight these critical issues and advocate for legal and policy reforms to address parental neglect, particularly in cases of separation, ensuring that the best interests of the child remain the foremost consideration.

1.2 Problem Statement

The prevailing reality in Kenyan families has seen a rise in single parent households and the neglect of children from one or both parents. For some parents upon divorce or separation, there are court orders for child support, however, there is a hindrance in ensuring that the orders are complied with.[17] There is an absence of enforcement guidelines pertaining to child support such that the best interest of the child is often questioned in relation to the court orders. The very purpose of law is to be predictable and consistent, but more importantly enforceable.[18] The law regarding child support appears not to be effectively enforced albeit the laws and court orders in place.

Therein lies the problem, enforcement of the orders made for the benefit of the child appear difficult and ignored with the consequences not outlined. This paper will be an appraisal of the enforcement of child support in Kenya and the improvements that can be made.

1.3 Research Objectives

I. To examine the current framework that is being utilised to enforce such orders and how this reflects on obligations of the best interest of the child.
II. To examine how the courts have dealt with child support cases in Kenya and the consequences of court decisions in realising child support.
III. To investigate how enforcement is carried out with respect to child support and have been applied in the UK and South Africa.

[17] *NK v AL [2022] e KLR*; *SAD v EOO [2021] e KLR*
[18] McNeilly FS, The Enforceability of law, Nous, Vol.2, No. 1 (Feb 1968), 47

IV. Assess and provide a way forward on enforcement of child support in Kenya by drawing lessons from other jurisdictions.

1.4. Research Questions

I. What is the current framework with regards to enforcement of child support and what are its shortcomings?
II. In building a case for an enforcement framework, how have the Kenyan courts dealt with child support cases and what impact do their decisions have in the fulfilling of the duty?
III. How has the UK and South Africa ensured enforcement of child support in their jurisdictions?
IV. Which lessons can Kenya borrow from the enforcement mechanisms in the UK and South Africa? Would these lessons be useful in Kenya?

1.5. Hypothesis

Inadequate enforcement mechanisms regarding child support in Kenya has led to many children suffering, contrary to the best interest principle the courts uphold. The decisions by the courts though sound, are often ignored with no recourse to the aggrieved party rather than to run to the court for further orders.[19] The study seeks to build a case for a regulatory framework dedicated to the enforcement of child support orders in Kenya through proposal of consequences not merely criminal in nature but that would ensure parents with these orders comply with them. The reason for this being that with a system in place, the best interests of the child with regards to their support and upbringing will be achieved.

1.6 Justification

Addressing the issue of child maintenance enforcement is crucial in ensuring the well-being of children and upholding the responsibilities of parents, The absence of a clear and effective legal framework to address enforcement raises concerns. Establishing a robust system will clarify key responsibilities such as under which legal institution should oversee enforcement- judiciary or

[19] *SAD v EOO* (2021) eKLR.

another body- the obligations of non-compliant parents and the avenues available for custodial parents seeking redress. Devoid of such a system, enforcement remains fragmented and heavily reliant on judicial interpretation and individual efforts which may not always yield effective outcomes.

Although this topic has gathered some traction in other jurisdictions like in England, Germany, France, Greece,[20] Lesotho, Botswana,[21] just to name a few, there is none within the Kenyan jurisdiction. Predicated on the lack of contribution towards this topic in Kenya, there is a need to create a legal foundation for this sensitive issue in law. This study shall discuss the plausibility of establishing far ranging enforcement mechanisms to ensure child support is fulfilled in an area left predominantly to the courts and the aggrieved parties to fill. This analysis will be important in demonstrating how the current regime is not as effective in enforcing child support as against adopting other systems. Ultimately this paper proposes the improvement of enforcement mechanism related to child support for proper fulfilment of PR by parents. Further, such mechanisms will enhance Kenya's efforts in abiding by the best interest principle obligated to children.

The findings of this study will be beneficial to multiple stakeholders. Researchers focusing on family law and social justice will find key insights into enforcement challenges and potential solutions, Policy makers will benefit by gaining clearer understanding of the legislative gaps and recommendations for improving child support, lawmakers will be furnished with proposal to draft effective legislation that promotes the welfare of children and enforced PR. Lastly, judges, will benefit form the finding by gaining clearer frameworks and unique enforcement mechanisms that could be applied ultimately leading to more consistent and effective outcomes.

1.7 Theoretical Framework

RESPONSIBILITY FOR NEEDS THEORY

Parental Emphases: Parental Role theory. - Parental responsibility theory.

[20] Xanthaki H, "The Judiciary-Based System of Child support in Germany, France and Greece: An Effective Suggestion?"
[21] Armstrong A, Maintenance Payments for Child Support in Southern Africa: Using Law to Promote Family Planning, Studies in Family Planning Volume 23, No.4, July/August 1992.

Parental responsibility is defined as all the duties, rights, powers, responsibilities and authority which b law a parent of a child has in relation to the child and their property.[22] But how did this come about and why is it important a concept in understanding and underscoring child maintenance?

Parents have always been held responsible for the behaviour and development of their children, but recent years have seen a cultural shift in the way child rearing is conceptualized and targeted by policy makers.[23] In the past, intimate family relationships tended to be viewed as personal, private, and outside the remit of state intervention, however this is not the case contemporarily. As an evolving society, parenting is no longer accepted as a mere bond, rather some of the responsibilities are shouldered upon by others, this being the public.[24] The question thus becomes, why is this the case? To answer this, Joseph Millum assesses how one acquires parental responsibility and, in his analysis, offers an explanation as to why the sudden change. He references a tension in ascribing parental duties and more general principles for ascribing responsibility based on voluntarism where some onerously argue that biological fathers' duties are less onerous than previously thought, or their powers to refuse these duties are more extensive, or both.[25] On the other hand others opt for the traditional position on responsibility by denouncing the assumption that special responsibilities can only be acquired by voluntary action and accorded moral weight.[26]

Parental responsibilities are obligations that a person has toward a specific child or children, making them unique rather than general. According to the voluntarist view, these special responsibilities arise from a voluntary action taken by the parent. The most logical place to find this voluntary action is in the actions that contributed to the child's existence. This "responsibility for needs" theory of how parental responsibilities originate has two appealing aspects. First, it connects parental responsibilities to a broader principle of responsibility:

[22] Section 31, The Children Act (No. 29 of 2022).
[23] Gillies V, Perspectives on Parenting Responsibility: Contextualizing Values and Practices, Journal of law and society, volume 35, number 1, March 2008, 95
[24] Spencer H, "Herbert Spencer on Parental Responsibility." Population and Development Review, vol. 7, no. 3, 1981, pp. 519–26. JSTOR, https://doi.org/10.2307/1972563 ,Accessed 8 Sept. 2024
[25] Millum, J. "How Do We Acquire Parental Responsibilities?" Social Theory and Practice, vol. 34, no. 1, 2008, 71–93. JSTOR, http://www.jstor.org/stable/23562109 Accessed 8 Sept. 2024.
[26] McMahan, J, The Ethics of killing: Problems at the Margins of Life (New York: Oxford University Press, 2002), 374.

parental duties are simply a specific example of the general duty to help those whom we have made needy. Second, it offers a more cohesive explanation by addressing both how parental responsibilities are acquired and what they entail. Additionally, the idea that these responsibilities involve meeting the child's needs aligns with common intuitions about what it means to be a responsible parent.[27]

This theory is therefore necessary in interpreting why child support is a necessity that must be fulfilled with dire consequences for parents who not only fail to perform this duty which is contrary to their natural and artificial duties but also risks the safety, health and welfare of the child.

CONFORMITY OF LAW

The conformity of law theory under the command theory posited by Hobbes and Austin has brough about various discussions on whether laws require a command to be abided by.[28] According to Austin's theory of law, all law is a command with the distinguishing factor between a law and a wish being the power and purpose of the party commanding to inflict an evil or pain in case the desire is to be disregarded.[29] This has however brought about discussions regarding whether enforceability is the appropriate term vis-à-vis operability as a necessary condition to the existence of law.[30] The discussions seem against Austin, however, stronger arguments have been made with the use of Hobbes, leviathan understanding of the command theory in the broader context of the relationship between enforcement and politics.[31] Under this point of view, it appears that the notion of enforceability stands.

In understanding the arguments under this theory, there is a breakdown of the theory into, conformity of law whereby there is a high degree of conformity such that there are few breaches of the law. This includes not merely the threat of sanctions, rather that other measures of deterrence are present.[32] There is however an oversimplification by Austin regarding the

[27] Millum, J. "How Do We Acquire Parental Responsibilities?" Social Theory and Practice, vol. 34, no. 1, 2008, 71–93. JSTOR, http://www.jstor.org/stable/23562109 Accessed 8 Sept. 2024
[28] McNeilly FS, The Enforceability of law, 47
[29] Austin J, The Province of Jurisprudence Determined and The uses of the Study of Jurisprudence: with an introduction by H.L.A. Hart, I, Hackett Publishing Company Inc, 14.
[30] Woozley AD, The Existence of Rules, Noûs, Vol.1, No. 1 (March, 1967), 64
[31] McNeilly FS, The Enforceability of law, 47
[32] McNeilly FS, The Enforceability of law, 48

character of a political society.[33] Keeping in mind the influence of a political society there is the need for developed legal systems, the use of established official agencies to ensure not only conformity but a high-degree of conformity.[34] Force and other extremes should be as a last resort.

The theory advanced by Hobbes and Austin is relevant to this study on the issue of child support enforcement, given that it is evident that there is no assessment to measure conformity to the laws and orders of the court regarding child support. PR is taken lightly and agencies and other alternative enforcement mechanism are either not in place or do not function optimally. This paper does not seek to contribute to the debate on the command theory and conformity of law, rather to appreciate the principles laid out in the understanding of the theory and to juxtapose them with the current framework on child support in Kenya. The child support enforcement mechanisms do not meet the principles required to ensure conformity with the law.

1.8. Literature Review

PR is known to many to be of a moral obligation or a societal issue more than a legal issue, however despite this, the State has a mandate to ensure that children are protected according to the best interest principle.[35] This principle codified in law is evident in the CRC,[36] the constitution of Kenya,[37] and the Children Act.[38] The importance of PR as provided by law has been commented by various authors, inspecting this responsibility from various angles. This part of the Chapter pays tribute to scholars who have written on PR and flows into the topic of child support. By presenting the work on PR in Kenya, it is evident that the Kenyan jurisdiction has little to say regarding child support and enforcement, requiring an outlook into the works of other Jurisdictions regarding the matter.

The best interests of the child have been interpreted to mean in light of the discussion on parental rights and duties over their child(ren) by Sikuta MD in her paper on “Parental Responsibility and

[33] Austin J, The Province of Jurisprudence Determined and The uses of the Study of Jurisprudence: with an introduction by H.L.A. Hart, 14
[34] McNeilly FS, The Enforceability of law, 49
[35] Mutheu Agatha Khimulu v Raheem Mehdi Aziz Azad & 4 Others (Petition No. E003 of 2022)
[36] Article 3(1), Convention on the Rights of the Child
[37] Article 53(1)(e), The Constitution of Kenya (2010).
[38] Section 31, The Children Act (No. 29 of 2022).

Child Maintenance in Kenya: The Role of the Children's Court", that the principle, simply entails "considering a child before a decision affecting his/her life is made"[39], as the overarching theme of the law in Kenya. In this regard, she posits that the aim of the law is to ensure that children who are the vulnerable in society are protected, placing the duty not only on the State but specifically on the parents. This duty by the State and Parents is provided for in the ACRWC, to supplement the CRC as stated by Anchut.[40] Anchut in her paper, underscores the State as the overall authority with the mandate to ensure PR and cater for the children has the duty to assist parents and other persons responsible for the care of the child in cases of need.[41] The state clearly has an essential role to play regarding PR and by extensions child support.

That notwithstanding other authors have echoed that PR is firstly the responsibility of the parent and the State is only there to assist. The "primary responsibility" of raising the child is on the parents and thus acts as a safeguard for the states.[42] This interpretation by Gose in his paper "The African Charter on the Rights and Welfare of the Child, An assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child" on the wording by the CRC is materially different than provided by the ACRWC under article 20 where he is of the view that the ACRWC is more encompassing taking into account the African culture regarding families which often includes the community and extended family.[43] This is only more emphasised by the State regarding the family as the basic unit and therefore is the first point of contact, and the state playing a supporting role, of which should apply without exception ensure the child's survival and development.[44]

The State and Parents, lens is not the only point of view by which PR has been discussed by scholars. Assessing PR from a different point of view, Roger Kennedy in his piece "Parental

[39] Sikuta MD, Parental Responsibility and Child Maintenance in Kenya: The Role of the Children's Court,https://www.academia.edu/31644993/Parental_Responsibility_and_Child_Maintenance_in_Kenya_The_Role_of_the_Childrens_Court, 7
[40] Anchut PY, Balancing parental responsibility and state obligation in fulfilling the socio-economic rights of children under the African Charter on the rights and welfare of the Child, 31 October 2003,19
[41] Anchut PY, Balancing parental responsibility and state obligation in fulfilling the socio-economic rights of children under the African Charter on the rights and welfare of the Child, 35
[42] Article 20(1), Charter
[43] Gose M, The African Charter on the Rights and Welfare of the Child, An assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child, July 2002,14-16
[44] Lloyd A, 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of experts: Raising the gauntlet, 2002, 10 International Journal of Children's Rights,179

Responsibility" views the topic from the angle of disordered parents and the evolution of family life throughout the years. This is important for this study as it takes into account the evolution of families and its effects, to which this study advocates for regulations of enforcement of child support accounting for the changing nature of families in Kenya. Kennedy is of the view that parental responsibilities are the duties and responsibilities by law that a parent has on the child.[45] In his view the current family life is plagued with many parents shifting their responsibilities in the raising of their children and this can be extrapolated to not just other professionals but the State as well. Kennedy illuminates six pointers for consideration in the assessment of PR which include; adequate provision of physical care, consistency of behaviour and functioning, capacity to empathise with the child, capacity for trust, historical factors and behavioural criteria.[46] This is necessary as evidence of the considerations that ought to be accounted for in child support and have been realised.[47]

Amondi Gloria in her paper "Parental Responsibility towards a child in Kenya", interrogates the term PR and the best interest principle from the lens of the negative effects neglect of such duties has on the child. Beginning with an interesting approach, she defines when childhood begins and ends, demonstrating the negative effects of lack of PR such as the linkage with juvenile crime.[48]This outlook from the negative perspective influenced the research into this topic and the advocacy for formed the inspiration behind this study and motivated the thought process into advocating for a legal framework that holds liable, parents who neglect their duties and responsibilities towards their children. It however became evident that the problem stems from the dealings with child support from an implementing point of view, shifting focus into the enforcement issues.

While there is no literary work on this in Kenya, the following scholars have contributed to this topic based on other jurisdictions. Beginning close to home, in Africa, Alice Armstrong in "Maintenance Payments for Child Support in Southern Africa: Using Law to promote Family

[45] Kennedy R, Parental Responsibility, Psychiatrie Bulletin(\W\). 15, 129-132, https://doi.org/10.1192/pb.15.3.129 Published online by Cambridge University Press,129
[46] Kennedy R, Parental Responsibility, 130-131
[47] NK v AL [2022] e KLR
[48] Amondi G.L, Parental Responsibility towards a Child in Kenya, https://www.academia.edu/33195731/Parental_Responsibility_towards_a_Child_in_Kenya, 35-37

Planning", she paints the problem this paper seeks to address in the Kenyan jurisdiction as one common to many other countries. She presents some of the legal and practical constraints facing (mainly) women who attempt to enforce their child support payments such as the duty to support being inscribed in law, however the enforcement mechanisms whether criminal or civil are not adequate.[49] She underscores that in all countries maintenance orders may be enforced like civil judgements and failure to pay may result in conviction of an offense liable to imprisonment, like in the Kenyan Jurisdiction. But herein lies the difficulty, imprisonment as a consequence does not benefit the child, as the parent in custody is most likely unable to pay while in prison.[50] Although recognising the importance of having criminal proceedings as a further consequence, the primary aim of the best interest of the child would however not be achieved. She outlines other more effective mechanisms for enforcement, such as garnishee orders requiring employers to make the payments directly up to a specific amount. This constitutes the basis of the assertion that other mechanisms should be put in place in the Kenyan jurisdiction as per the law to ensure that enforcement of Child support orders are complied with. This also supports the conformity of law theory this study is predicated upon.

In other Jurisdictions, Helen Xanthaki, has analysed the payment of child support from a judiciary based-system and the problems plaguing such systems. This is in particular to the UK with the Child Support Agency (CSA). In her analysis, she echoes the perspective that other mechanisms are necessary aside criminal proceedings to ensure compliance and payment of child support.[51] She posits that failure of child support payments does not lie with an inherent radical inadequacy of the legal framework under which it is sought.[52] This is concurred with even by Alice Armstrong, however other mechanism ought to be in place, such as in Xanthaki's paper, the need for education amidst proper legislative constructions to ensure parents fulfil their obligations.

[49] Armstrong A, "Maintenance Payments for Child Support in Southern Africa: using Law to Promote Family Planning",219
[50] Armstrong A, "Maintenance Payments for Child Support in Southern Africa: using Law to Promote Family Planning",219
[51] Xanthaki H, "The Judiciary-Based system of Child Support in Germany, France and Greece: An effective Suggestion?", 17
[52] Xanthaki H, "The Judiciary-Based system of Child Support in Germany, France and Greece: An effective Suggestion?", 19

1.9. Contribution

This study aims to highlight the shortcomings in Kenya's current child support enforcement mechanisms, which undermine the protection of children. It advocates for the creation of a robust enforcement framework to ensure consistent fulfilment of child maintenance obligations. By proposing this framework, the study seeks to establish a sustainable legal mechanism that safeguards children's welfare, reduces the need for repeated court interventions, and ensures parental responsibilities are upheld. Ultimately, the research endeavours to strengthen Kenya's legal system to better protect its most vulnerable citizens.

1.10. Research Methodology

The dissertation will to a large extent be doctrinal. This will be a desk-based study collecting data qualitatively. This design has been selected as the optimal approach to ensure the maximal utilisation of available resources while adhering to the constraints of the allotted time frame. In conducting this research, analysis will be grounded in nuance literary interpretations alongside a comprehensive assessment of pertinent legal content.

Reference will be made to relevant provisions of the Constitution and Acts of parliament and other legislation. These will be essential in answering the questions outlined. Additionally, this research will be informed by secondary materials such as journals, articles, reports, dissertations and other internet sources available.

1.11. Limitations of the Study

Pursuant to time, monetary and confidentiality of Children cases, there was difficulty in finding cases on the electronic Kenya Law Report pertaining to Maintenance orders.

Secondly, this paper is confined to a purely doctrinal methodology and therefore no field work has been carried out to determine the causes for the shortcomings in the maintenance issues of children.

1.12. Chapter Breakdown

Chapter One forms an introduction to the study, discussing the Children Act and the Constitution in relation to PR and child support. Additionally, there is the reference to other relevant legislations pertaining to child support. Research objectives, research questions and a literature review of scholarly work also constitute this chapter, with a hypothesis attempting to respond to the problem through development of enforcement regulations.

Chapter two will unpack the potential reasons for the lack of adequate enforcement rules related to child maintenance. This Chapter will involve digging into the child support system and why the existing laws without clear rules for enforcement for the same was decided as the best cause of action. It Shall further attempt to understand the rationale behind the framing of the Children Act and the Maintenance Order Enforcement Act.

Chapter three shall delve deeper into the rationale for the current framework and the rationale behind the existing laws and how they were aimed at achieving the best interest Principle. It will involve an examination of the impact of the current regime, highlighting the flaws.

Chapter four will analyse the situations in the UK and South Africa jurisdictions to see how child support is enforced in such jurisdictions. Further the lessons that can be drawn would be highlighted with a breakdown these mechanisms in light of the Kenyan jurisdiction. It shall assess the viability of these mechanism being brought to Kenya and how best to implement them.

Chapter five will conclude the study by providing a conclusion and recommendations.

CHAPTER 2: KENYA'S LEGAL CHILD SUPPORT FRAMEWORK

2.1.Introduction

The concept of child maintenance is fundamental to the protection and promotion of children's rights, ensuring that their basic needs are met regardless of their parents' marital or financial circumstances. In Kenya, the legal framework governing child maintenance has evolved over the years, reflecting both international obligations and domestic realities. Rooted in the principles enshrined in the Constitution of Kenya, 2010 and operationalized through statutes such as the Children Act and the Marriage Act, the legal regime is designed to safeguard the welfare and best interests of the child. However, the implementation of these laws has faced significant challenges, including inconsistencies in judicial interpretation and cultural norms that sometimes undermine the equal responsibility of parents.

This chapter critically examines the legislative provisions and judicial approaches that shape the enforcement of child maintenance in Kenya. It begins with an exploration of the constitutional and statutory foundations of child maintenance, analysing key sections and their intended impact on ensuring adequate support for children. By scrutinizing both the letter and spirit of the law, this chapter aims to unravel the effectiveness of Kenya's legal framework in guaranteeing the rights of children to a decent standard of living, thereby laying the groundwork for the subsequent analysis of potential reforms and improvements. Several laws govern this area of law, including the Constitution of Kenya, the Children Act, and the Matrimonial Causes Act.

2.2.Historical Legislative framework

Prior to the enactment of the 2010 Constitution and the Children's Act, child maintenance was governed by various legislation including, the ***Subordinate Courts (Separation and Maintenance) Act***, (hereafter referred to as SCSMA) and the ***Children and Young persons Act***, (hereafter referred to as CYPA) just to name a few. These laws were enacted for the protection of children and to cater to their welfare.

In the SCSMA, men, who had applications made against them had the duty to provide for children he was legally liable to maintain.[53] This included, in addition to children of the marriage, any child of the wife born before such marriage (whether such child is legitimate or illegitimate) until such child attains the age of sixteen years or until the death of its mother,

[53] Section 3(4), Subordinate Courts (Separation and Maintenance) Act (CAP 153, 2012) (Repealed).

whichever event first occurs.[54] Additionally, in cases where a maintenance order application was adjourned for more than a week, the court could issue an interim order requiring the husband to pay a reasonable weekly amount for the wife and any children in her custody.[55] This payment was to continue until the final decision, but could not last longer than three months. Such an interim order could be enforced as if it were a final court order. The rationale evident from this was for the court process to not delay the protection of the mother and the child.

Pertaining to enforceability, any sum ordered under the SCSMA was recoverable as a civil debt. If a person failed to comply with a non-monetary court order, they could face imprisonment until they rectified the situation.[56] However, the total period of imprisonment for non-compliance could not exceed six months.[57]Moreover, where a woman had died, committed adultery, or was absent from Kenya, the Attorney-General could apply to the court regarding the custody and maintenance of her children.[58] The Attorney-General could seek an order directing the husband to pay for the children's maintenance if the husband was legally responsible.

Under the CYPA, any and every court dealing with a minor was to have regard for the his or her welfare and in a proper case, take steps for removing them from undesirable conditions as well as securing adequate provision for their maintenance, education and training.[59] To this extent, the best interest of the child principle remained prevalent in legislation. Further, the Act provided for the care of children including juveniles. This was in the form of trust whereby the child has been removed from the care of a person.[60] These acts, despite their outlook regarding the care of children as well as being in accordance with the best interest of the child principle, were not in a consolidated manner. Tere were various different legislations pertaining to the care of children resulting in a flurry of actions being required to approach the court. This birthed the need and creation of the Children's Act to consolidate matters pertaining to children. The Children's Act comprehensively dealt with all matter relating to children and embodied the principle to the

[54] Section 3(4), Subordinate Courts (Separation and Maintenance) Act (CAP 153, 2012) (Repealed).
[55] Section 10, Subordinate Courts (Separation and Maintenance) Act (CAP 153, 2012) (Repealed).
[56] Section 11(2), Subordinate Courts (Separation and Maintenance) Act (CAP 153, 2012) (Repealed).
[57] Section 11(2), Subordinate Courts (Separation and Maintenance) Act (CAP 153, 2012) (Repealed).
[58] Section 12(2), Subordinate Courts (Separation and Maintenance) Act (CAP 153, 2012) (Repealed).
[59] Section 14, Children and Young Persons Act (CAP 141) Repealed).
[60] Section 27, Children and Young Persons Act (CAP 141) Repealed).

extent that it accommodated even more scenarios than originally foreseen in the older pieces of legislation.

2.3.Contemporary Legislative Framework

2.3.11. The Constitution of Kenya 2010

The Constitution makes a strong case for the protection and promotion of the welfare of children inclusive of parental care and protection.[61] The Bill of Rights provides for these rights. It supports the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace. It promotes social progress and better the standards for all.[62]

Article 53 (1)(e) provides that every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, regardless of whether they are married to each other or not.[63] This provision demonstrates the high level of protection afforded to children in Kenya. Issues between the parents should not act as a bar to providing for the child, yet this is not always the case in practice. Further, the constitution provides in in Article 53 (2) that in matters concerning children, the child's best interest is of paramount importance.[64] This principle is of immense significance in determining child maintenance and support orders in the event of separation of the parents. This is due to the children being not to blame for the separation and is cognizant of the vulnerable nature of children who require support from their parents in their earlier years for growth and survival.

2.3.3. The Children Act, 2022

The Children Act is the primary law regulating child welfare inclusive of their maintenance and support from parents. It encompasses various provisions enumerating the responsibility of parents in general as well as their responsibilities when it comes to maintenance of the child.

Section 31 provides for the definition of parental responsibility to be all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child

[61] Article 53 (1), The Constitution of Kenya (2010).
[62] Chapter 4, The Constitution of Kenya (2010).
[63] Article 53 (1)(e), The Constitution of Kenya (2010).
[64] Article 53 (2), The Constitution of Kenya (2010).

and the child's property in a manner consistent with the evolving capacities of the child.[65] This extends to the provision of basic necessities such as nutrition, shelter, education and medical care. Parents are also responsible for protecting the child from neglect, abuse and discrimination.[66] Moreover, this section clarifies that a person with care and control over a child should act in the best interest of the child regardless of whether they have formal parental responsibility.[67] This is in all circumstances and for the purpose of safeguarding or promoting the child's welfare.[68]

Section 32 of the Act establishes that parents have equal responsibility over their child, despite the circumstances in which the child was born be it within or outside wedlock.[69] It further always provides that both parents or the person who has parental responsibility have the duties, powers and responsibilities as prescribed in the Act or any other law. Additionally, they are under a duty not to act in any way that contravenes any order of a court of competent jurisdiction made with respect to the child under the Children Act or any other written law.[70] This section is paramount to this study as it explicitly stipulates that parents are to obey all orders of the court, as well as act in accordance with not just the court's rulings but the act especially in applying the best interest principle. Furthermore, it prohibits a person (in this case the parents) from transferring parental responsibility to another person permanently.[71] Therefore, the liability of parental responsibility lies strictly with the parent even in cases where in their absence they appoint another person to exercise his/her rights.

Maintenance orders are defined as an order issued by a court directing a specified person to make such periodic or lump sum payment for the maintenance of the child on such terms as the court may consider appropriate.[72] Section 111 provides for the court's power to make maintenance orders for a child whether an application is made or not in the instance of making a guardian or custody order. This may be extended for persons who have attained the age of eighteen provided

[65] Section 31(1), The Children Act (No. 29 of 2022).
[66] Section 31(2) (a) & (b), The Children Act (No. 29 of 2022).
[67] Section 31(4), The Children Act (No. 29 of 2022).
[68] Brian Sang YK., "Child law in Kenya under the Children Act,2022: A legal Appraisal of Its Legislative Advances.", JADR & sustainability Vol.2(2) (2024), 253.
[69] Section 32(1), The Children Act (No. 29 of 2022).
[70] Section 32(3), The Children Act (No. 29 of 2022).
[71] Section 32(6), The Children Act (No. 29 of 2022).
[72] Section 2, The Children Act (No. 29 of 2022).

that with the leave of the court, they fall within specific circumstances such as having special needs, still involved in education just to name a few.[73] These orders can be made to step-parents or presumptive guardians, and be paid to persons who are not the applicant based on fulfilling the criteria's provided under sections 114 and 115 of the Act respectively.

Section 116 defines the period for which the maintenance order requires financial provision, which is from the date of the application or when the court orders. It shall remain in force until the child's eighteenth birthday, subject to the exceptions outlined by section 111.

Section 121 provides for the enforcement framework for maintenance orders. Any person, including a child, who is the beneficiary of a maintenance order made under Section 111, has the right to apply to the court for enforcement of the order and recovery of any due sums. This right can be exercised if the person responsible for the payment has failed to comply with any provision of the order or has defaulted on any specified payment.[74] This provision ensures that beneficiaries are empowered to seek legal recourse when the maintenance obligations are not fulfilled.

According to Section 121(2), unless otherwise directed by the court, the respondent must be served with a notice of proceedings under this section and may be summoned or arrested on a warrant issued by the court. This guarantees that the respondent is made aware of the enforcement action and is given an opportunity to appear before the court. Before making an enforcement order, the court is permitted to conduct an inquiry into the financial status of the respondent. The court may direct inquiries into the respondent's income, assets, and liabilities, and can request financial statements from the respondent's employer or other relevant parties, ensuring the court has accurate information for informed decision-making.[75]

If the court is satisfied that the respondent has wilfully neglected or failed to make the required payments, Section 121(4) grants the court several powers. First, the court may order the immediate payment of any arrears, either as a lump sum or in instalments within a specified period. Alternatively, the court may forgive the arrears, provided the beneficiaries are given

[73] Section 111 (1) & (2), The Children Act (No. 29 of 2022).
[74] Section 121, The Children Act (No. 29 of 2022).
[75] Section 121 (3), The Children Act (No. 29 of 2022).

notice and an opportunity to object. Furthermore, the court can issue a warrant to seize the respondent's property or attach their earnings, including pensions, provided the failure to pay is due to wilful refusal or neglect. The attachment of earnings is limited to a maximum of 45% of the respondent's annual income in a 12-month period, unless special circumstances justify a higher percentage.

The court may also order the detention, attachment, or inspection of the respondent's property, or set aside any transfers made to evade maintenance obligations. This includes authorizing the resale of property to cover maintenance arrears and future payments. Additionally, the court can issue injunctions to prevent the respondent from disposing of, wasting, or damaging their property.[76] Before exercising these powers, however, the court must be convinced that the respondent has either wilfully concealed information about their income or intends to obstruct the execution of the order by disposing of or hiding property, or by leaving the court's jurisdiction.

If the respondent persistently refuses to make payments without reasonable cause, the court is allowed to issue a warrant for their imprisonment for up to 30 days. Imprisonment is considered only when attachment of earnings is inappropriate and the refusal to pay is deemed wilful.[77] The court may postpone issuing the warrant, giving the respondent an additional opportunity to comply, but any subsequent warrant cannot be issued without providing further notice to the respondent.

Finally, Section 121(8) gives the court the power to vary, modify, or discharge any enforcement order in response to changing circumstances or new information. This ensures that the orders remain fair and appropriate.[78] This provision emphasizes a balanced approach, allowing beneficiaries to seek enforcement while ensuring that respondents are given due process and an opportunity to present their case.

2.3.3. The Directorate of Children's Services

The Directorate of Children's Services (DCS), anchored on the Children Act 2022, safeguards the rights and welfare of children through establishment, provision, promotion, coordination and

[76] Section 121 (5), The Children Act (No. 29 of 2022).
[77] Section 121 (6), The Children Act (No. 29 of 2022).
[78] Section 121 (8), The Children Act (No. 29 of 2022).

supervision of services and facilities designed to advance protection and the wellbeing of children and their families.[79]The Directorate equipped with eight regional, forty-seven (47) County, and Three hundred and twenty (320) Sub County offices countrywide ought to provide essential services to children. Child protection volunteers also support child protection in villages.

The Directorate manages Statutory Institutions for Children, including Fourteen (14) Remand Homes, five (5) Rescue Children 's Centres, Nine (9) Rehabilitation Schools two (2) Reception and Classification Centres, Six (6) Child Protection Centres and One (1) Child – Helpline 116.
In addition, the Directorate is tasked with rescuing and sheltering victims of trafficking and harmful cultural practices. It also maintains comprehensive records and data to support the management of children's services in Kenya. To further assist the judicial process, the Directorate ensures the execution of court orders related to children's care by supporting social and administrative arrangements. This is essential especially for orders related to community service and essentially also for child maintenance Alternative family care is offered through care reform programs, while the Presidential Secondary School Bursary (PSSB) Program provides financial support to orphans and vulnerable children across all 290 constituencies. Moreover, the Directorate secures accommodation for children in need of refuge, including those who are abandoned or not in proper custody.

[79] Ministry of Labour and Social Protection: Directorate of Children's Services, https://www.socialprotection.go.ke/directorates.

CHAPTER 3: JUDICIAL APPROACHES TO CHILD MAINTENANCE IN KENYA

3.1.Introduction

The Kenyan legal system, through its courts, plays a pivotal role in upholding the rights of children, particularly with respect to enforcing child maintenance obligations. This chapter aims to critically interrogate the ways in which Kenyan courts have historically and contemporarily handled cases involving child maintenance, examining both the legal approaches adopted and the effectiveness of the enforcement mechanisms employed. Despite the presence of legislative provisions and judicial precedents that emphasize the best interests of the child, numerous challenges and nuances continue to complicate the consistent enforcement of maintenance orders.

This chapter delves into the judicial methodologies applied in enforcing maintenance orders and assesses the mechanisms utilized when non-compliance arises. From traditional civil enforcement processes, such as garnishee orders, to criminal penalties aimed at compelling payment, this chapter evaluates the range of options available to Kenyan courts and their relative success or failure in securing compliance. There are nuanced dynamics that influence judicial discretion in child maintenance cases, recognizing the complex interplay of legal, social, and economic factors that judges may consider when ruling on matters of enforcement. Judicial responses often vary significantly depending on contextual factors, including the socio-economic status of the parents.

This analysis of Kenyan case law aims to provide insights into both the successes and limitations of the current judicial framework governing child maintenance. In doing so, it highlights the need for a more robust and streamlined enforcement system, that prioritizes the best interests of the child and minimizes the burden on custodial parents to repeatedly pursue court interventions.

3.2.Judicial methodologies in enforcing maintenance orders

The judicial arm is constitutionally mandated to enforce its orders to maintain the rule of law and uphold the rights and welfare of those who rely on court directives for protection and support.[80] In cases concerning child maintenance, courts bear a heightened responsibility to ensure that their orders are not merely symbolic but actively enforced to protect the best interests of the child. In the achievement of this objective, there are various methodologies adopted such as contempt of court proceedings in the evaluation of defaulted child maintenance orders which have a quasi-criminal nature, garnishee proceedings and jail term orders to compel the non-compliant parent in the case to fulfil their court-mandated obligations.

3.2.1 Contempt of Court Actions

This is the unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey the order unless and until the order is discharged.[81] It is with this backdrop that a person can be found to be in contempt of court, where they fail to fulfil their child maintenance obligations. In the Court of Appeal case of ***Gillab Chand Pupatlal Shah & Another,*** cited in ***Econet Wireless Kenya,*** the court emphasized that maintaining the rule of law and order requires it to take a firm stance against deliberate disobedience of its orders. The court will not condone such actions or passively observe; instead, it is committed to fulfilling its duty by dealing decisively with those who defy its authority.[82] This is especially the case in matters of children in conjunction with the best interests of the child.

When arriving at determining whether a non-compliant parent is in contempt of court, the case of ***SAD v EOO*** enumerates the various considerations that are accounted for and the factors the judges consider. The requirements are that [**a**] the terms of the order are clear and unambiguous and binding on the defendant, **[b**] that the defendant has knowledge of or proper notice of the terms of the order, [**c**] the defendant has acted in breach of the order and [**d]** the defendant's conduct is deliberate.[83] From the wording of the test, this is conjunctive in nature and allows for the judges, particularly in cases of enforcing child maintenance orders to hold parents

[80] Teachers Service Commission v Kenya Union of Teachers & 2 Others (2013) eKLR*, cited* in the case of SAD v EOO (2021)
[81] Hadkinson v Hadkinson (1952) ALL ER
[82] Econet Wireless Kenya Ltd v Minister for information of Kenya & another (2005) eKLR
[83] SAD v EOO (2021), 15

responsible. Parents are mandated to be responsible for their children and since the test accounts for *mens rea* and *actus reus* considerations, judges are able to properly determine whether the defendant is indeed acting responsibly or not.

Contempt of court actions are quasi-criminal.[84] It is for this reason that courts require a higher standard of proof, not a balance of probability, rather almost but not exactly beyond reasonable doubt.[85] In the specific case of ***SAD v EOO***, the case considered whether the defendant was indeed in contempt of court for failure to comply with the maintenance orders. Applying the facts to the legal test, the learned Judge found that the respondent's actions in disobeying valid court orders were deliberate and therefore could only be deemed contemptuous.[86]

While the thought process of the judge was sound and indeed accurate, it was intimated that the execution of orders was not done immediately, or "on the first instance", and herein lies a challenge. Often, courts are approached only after contrary behaviour has been condoned, leaving them in a difficult position to remedy the situation. In such cases, their ability to act may be limited, as seen in this instance where the Judge had to refer the appellant to the Children's Court for enforcement as it ought to have through the issuance of a notice to show cause at the first instance. This was similar in the case of **JKW v AWM**.[87]

In the above case, the dispute was centred on the maintenance of two children. The respondent who was the appellant sought interim custody and maintenance amounting to Kshs. 178000 per month. The appellant did not appear at the hearing of the initial application, resulting in the trial court to grant the maintenance request. Subsequently, the appellant filed to set aside the maintenance order, however delays were occasioned. The respondent filed a notice to show cause arguing for failure to comply with the order, seeking committal to civil jail. During the enforcement proceedings the trial magistrate accounting for a change in circumstances reviewed and reduced the monthly maintenance order to Kshs. 50,000. Both parties appealed to the High Court. At the high court it was held that while the trial court had the authority to vary maintenance orders under Sections 99 and 101(5)(b) of the Children's Act, such variations must follow a fair hearing with input from all affected parties. The court criticized the trial magistrate

[84] SAD v EOO (2021), 16
[85] Katsuri ltd v Kapurchand Depar Shali (2016) eKLR
[86] SAD v EOO (2021), 20
[87] JKW v AWM (2018) eKLR

for reducing the maintenance amount without adequately hearing the Respondent and failing to address the accumulated arrears of Kshs. 1,246,000. The High Court remanded the matter to the lower court for rehearing, emphasizing the need to resolve maintenance disputes considering the best interests of the child, as outlined in Section 4 of the Children's Act.[88]

From the above two cases, critical questions arise: Do the parents genuinely prioritize the best interests of the child? Does the court provide alternative mechanisms for enforcing orders that avoid repeated litigation, especially when procedural errors can delay addressing the child's essential needs? The consequences of improper procedure can be severe, as illustrated in ***M v S***.[89] In this case, a subordinate court issued an order barring the appellant from taking the child, who was at the centre of a custody dispute, out of the jurisdiction. The appellant disobeyed the order and took the child to Uganda, prompting the respondent to initiate committal proceedings. Although the High Court granted the committal and ordered the return of the child to Kenya, the Court of Appeal dismissed the case on procedural grounds, citing the improper combination of the application for leave and the application for committal. This procedural oversight undermined the enforcement of the order, leaving the child's welfare compromised. These issues underscore the need for a robust legal framework to effectively enforce maintenance orders, ensuring timely and just resolutions.

3.2.2 Jail term orders

Akin to other areas of law, offences often come with a consequence. In cases of wilful neglect or refusal to comply with maintenance orders, courts sometimes impose jail terms to compel compliance. The case of ***Satpal Kaur Singh Rihal Vs Surinder Singh Rihal*** is a good example of how jail terms are often used in child maintenance cases. In the case, the respondent, though served with the court order, failed to comply beyond a few initial payments. He cited unemployment and reliance on family support as reasons for non-payment. However, the court dismissed these excuses, emphasizing the respondent's legal duty to fulfil the maintenance order. With the powers vested, the judge ordered the defendant to clear the outstanding arrears within 14 days, failure of which he would serve a six-month jail term.[90] This underscored the

[88] JKW v AWM (2018) eKLR.
[89] M v S (2008) KLR 271.
[90] Satpal Kaur Singh Rihal Vs Surinder Singh Rihal (2005) eKLR.

seriousness with which courts ensure that the best interests of the child are catered for. However, the conundrum arrives whereby, the parent is unable to pay the outstanding balance and ends up in civil jail. Whilst the threat or committal to civil jail serves as an adequate deterrent, there appears to be no consideration as to how the parent ought to produce the required funds whilst in a jail cell. Further, civil jail detainment cannot exceed 6 months, nor can he be rearrested for the same offence.[91]This raises queries as to the effectiveness of the methodology to ensure that maintenance orders are complied with for the duration required by the court and circumstances. It appears civil jail will serve no useful purpose but only show vindictiveness.[92]

Further, the query that persists is, what is the stance on this with respect to the impact on the children in question and their needs? This has garnered some debate with some schools of thought arguing that on the one hand, incarceration of persons for nonpayment of child maintenance is wrong and counterproductive.[93]The argument stems from how this can disproportionately affect low-income noncustodial parents who are more likely than not just as poor or poorer than the mother and children owed child support. They posit that incarceration means the parent is not working and earning money and having a record only results in lowering the job prospects available. On the other hand, others argue that jail terms for nonpayment are not enough as some may go to lengths to ensure that they do not meet their obligations and therefore children ought not to be short-changed due to the recalcitrant parent. My personal views on the subject anchor towards analysing the specific circumstances of the case, but herein lies the problem with the arguments above. The child is not at the centre of the decision rather holding the parent individually liable. The focus rather than the best interests of the child and how their needs can be fulfilled are glossed over with focus centred on the principals of justice and individual responsibility.[94]

Some of the effects of incarceration on the child and the parents include a weakened bond between the noncustodial parent and his or her children and family and a high probability that the individual will ultimately be re-incarcerated for nonpayment of child support or other

[91] Section 42 (1) (2), Civil Procedure Act.
[92] Mbugua v Mbugua (1992) KLR 448, *cited in* Satpal Kaur Singh Rihal (supra).
[93] Solomon-Fears.C, Smith.M.A, Berry. C, Child Support Enforcement: Incarceration as the last resort penalty for nonpayment of Support, CRS, March 2, 2012, 2.
[94] Robertson.O, The impact of parental imprisonment on children, Quaker United Nations Office, April 2007,7.

infractions.[95] Additionally, this could only result in an increment of costs for visitation of the parent by the child. However, away from the financial implications, there are other issues at play such as the mental effect on the child throughout the process. The child seeing the non-compliant parent in prison, or being told that the reason for being in prison is due to the parent neglecting the child's needs and all these have a compounding effect on the child's psyche.[96] With all these factors at play it would be beneficial to the child who's interests are paramount for alternatives to be present such as mandatory employment programs where those that unemployed are trained and the income they generate as a result directly goes to child maintenance, or having payment plans that are favourable and strictly adhered to or, community service with compensation of which a percentage is directly contributed to the child maintenance or even incentive based compliance programs whereby those who meet obligations are allowed certain flexibilities in relation to the child. These avenues will be further discussed in subsequent chapters in more detail to ascertain their applicability.

3.2.3 Garnishee orders

Garnishee orders against a person, involve removing the non-compliant parent from being the direct person to pay for or fulfil the conditions of the maintenance order by the court. This is an effective method of ensuring compliance with such orders owing to the fact that the court mandates the amount determined to be directly sent to the "child". In the case of ***Local Authorities Pension Trust Registered Trustees v CAO & 2 Others*** of 2016, attachment of property and garnishee orders were utilized to enforce child maintenance obligations. The Children's Court had issued maintenance orders requiring the respondent to support his children, which he failed to comply with. In response, the appellant sought to enforce these payments through a notice to show cause, prompting the court to attach a portion of the respondent's retirement benefits to cover the maintenance costs.

Despite legal protections for pension funds under the Retirement Benefits Act,[97] the court prioritized the best interests of the child, overriding the act's protections to secure maintenance funds. The court emphasized that children's needs were paramount and justified the attachment

[95] Child Support Enforcement: Incarceration as the last resort penalty for nonpayment of Support, CRS, March 2, 2012, 2
[96] Robertson.O, The impact of parental imprisonment on children, Quaker United Nations Office, April 2007,37.
[97] Section 36, Retirement Benefits Act (1997).

of a portion of the respondent's benefits to fulfil his parental duty. This case underscores how courts can employ attachment and garnishee orders to ensure compliance with child maintenance orders, prioritizing children's welfare even over statutory protections of certain assets. Despite the ability of the court to issue such orders to enhance compliance, a clear shortcoming arises whereby the defaulting parent has no direct source of income or is unemployed, and therefore the courts cannot remove the non-compliant parent from being the "middleman" to ensure payments. How then should the best interests of the child be fulfilled? Whilst the case of ***PKM v ANM*** stipulates from judicial developments that there is equal responsibility of both parents to meet the needs of children,[98] and further in the case of ***AHM v AWM***, the court found that the appellant cannot just sit back and claim that she has no means to provide for the children. The court must consider what efforts has she made as the mother of the children to seek employment or to seek out income-generating activities to provide for her children. [99]As such each parent must pull their weight in ensuring that the needs of their child/children are taken care of. The Respondent cannot be condemned to bear the greater burden of providing for the children, this does not prevent the respondents from being entirely absolved and it is the responsibility of the higher-earning parent to shoulder most of the responsibility. This is often difficult where the parent has no direct source of income and therefore compelling the fulfilment of obligations becomes more challenging.

Other challenges in relation to this method of compliance, includes cases of parents who deliberately try to reduce their liability by hiding their assets or misrepresenting their financial capacity to the courts. This could be perpetuated through the moving of assets to other parties or other means of hiding assets and without the knowledge of the other parent, the order remains constant, which is in sharp contrast to the countless of cases whereby when the level of income decreases, the parent is quick to move the court to reduce the order.[100]

3.2.3 Other alternative methods of compliance encourage by the courts

Despite some of the shortcomings of the methodologies adopted by the courts, one of the initiatives that have been encouraged with the overall effect of preserving good relationships between parents so as to create stable and supportive environments for their children. This is

[98] PKM v ANM (2020) eKLR.
[99] AHM v AWM (2023) eKLR.
[100] EM v AM (2020) eKLR.

through Parental Responsibility Agreements (hereinafter PRAs). These offer a practical and collaborative path that balances amicability with legal enforceability. This approach allows parents to agree on essential matters like financial support, visitation schedules, and shared responsibilities in a way that minimizes conflict and reduces the stress of prolonged litigation.[101]

While the agreements are crafted outside the courtroom, they are formalized through a court process, ensuring that they carry the weight of legal enforceability. Once the parents agree on the terms, the agreement is submitted to the court for approval and adoption as an order of the Court. The court's role is not to alter the terms arbitrarily but to ensure they align with the best interests of the child. Once adopted, the PRA becomes a court order and is binding on the parties and can be enforced as such.

This approach has several advantages. It empowers parents to have more control over decisions affecting their children, avoids the adversarial nature of court proceedings, and saves time and legal costs. At the same time, it provides the security of knowing that the agreement is legally recognized and enforceable, offering peace of mind to both parties. For a PRA to succeed, open communication, honesty about financial capabilities, and a commitment to prioritize the child's welfare are essential. Where needed, neutral third parties like mediators or family law experts can facilitate the process, ensuring the discussions remain focused and constructive.

Ultimately, PRAs and similar mechanisms underscore the importance of collaboration in family law matters, blending the flexibility of negotiation with the assurance of legal enforcement.

[101] MAK v RMAA & 4 Others (2023) KESC21(KLR)

CHAPTER 4: EFFECTIVE ENFORCEMENT OF CHILD MAINTENANCE IN KENYA, LESSONS FROM INTERNATIONAL MODELS

IV.1 Introduction

The enforcement of child maintenance orders by Kenyan courts, as demonstrated in the previous chapters, is fraught with persistent challenges. These include systemic inefficiencies, the burdensome need for repeated recourse to the judiciary, and the limited capacity to ensure consistent compliance by obligated parties. Such obstacles not only delay the realization of children's rights to financial support but also undermine the effectiveness of the child maintenance framework. Custodial parents and children are often left in precarious situations, while courts struggle with an overburdened docket, further exacerbating delays and reducing trust in the system.

Recognizing these challenges, this chapter seeks to broaden the scope of analysis by interrogating the child maintenance enforcement systems in the United Kingdom and South Africa. These jurisdictions offer valuable insights into alternative approaches, including administrative enforcement mechanisms, robust monitoring systems, and accessible, non-litigious pathways to resolve disputes. Each of these frameworks has been designed to address issues similar to those encountered in Kenya, providing potential lessons on how to improve efficiency, reduce reliance on court-based enforcement, and ensure greater compliance.

This chapter will critically examine the key features of these systems, assess their effectiveness in overcoming enforcement challenges, and explore their suitability for adaptation within the Kenyan context. By drawing on comparative insights, this analysis aims to propose actionable recommendations to strengthen Kenya’s child maintenance enforcement mechanisms, ensuring they better serve the interests of children and custodial parents while reducing the strain on the judicial system.

4.2. Current Models adopted Internationally

4.2.1. The United Kingdom (UK)

Laws governing Child Maintenance in the UK

Kenya's Children Act closely reflected the wording of the UNCRC with emphasis on the core principle that all actions concerning children shall be primarily concerned with securing the best interests of the child.[102] The UK Children Act and Kenya's Children act share similarities in the underlying principles and objectives, primarily due to Kenya's legal framework drawing inspiration for British common law and legislative models. Some of the similarities that are evident that justify the comparison of the UK enforcement mechanisms into the Kenyan system include: the paramountcy of the best interests of the child principle,[103]the emphasis on parental responsibility,[104]and protection of children,[105]to name a few. To this extent, borrowing from the UK enforcement mechanisms would be beneficial, not only from a historical perspective but also because of the shared principles in international conventions and previous comparisons, such as those made during the drafting of the ***Children Act 2022***.

In the UK, child maintenance is not only governed by the Children Act 1989 but also by the ***Family Law Act 1996***,[106] the ***Child support Act 1991***,[107] and a separate entity known as the ***Child Maintenance Service (CMS)***. The Child Support Act was enacted to make provision for the assessment/calculation, collection and enforcement of periodical maintenance payable by certain parents for children who are not in their care. It also addresses the collection and enforcement of other types of maintenance; and for related matters.[108] This is enforced by the CMS and is regulated by ***the Child support (Miscellaneous Amendments)Regulations 2018***.

Methods of enforcement adopted in the UK

[102] Cooper, E. "Following the Law, but Losing the Spirit of Child Protection in Kenya." *Development in Practice*, vol. 22, no. 4, 2012, pp. 486–97. *JSTOR*, http://www.jstor.org/stable/23214518. Accessed 1 Dec. 2024.
[103] Section 1, UK Children Act 1989.
[104] Section 3, UK Children Act 1989.
[105] Section 47, UK Children Act 1989, Section 120 Children Act 2022.
[106] Section 11(1), Family Law Act 1996.
[107] Section 1, Child Support Act 1991.
[108] Preamble, Child Support Act 1991.

To enforce child maintenance orders, the UK employs a range of mechanisms that vary in severity, from administrative measures to legal penalties. One of the most common methods is the deduction from income order, where the CMS directly deducts the required amount from the paying parent's salary or pension. This was first instituted under the Child Support Agency (CSA) within the Tax Office.[109] This is not the only method employed, as evident from the use of direct debits and standing orders, which were suggested as improvements to the CSA.[110] These methods ensure a consistent flow of payments without requiring active participation from the paying parent. Additionally, deduction orders allow the CMS to withdraw funds directly from the non-compliant parent's bank or building society accounts, either as regular payments or lump sums.

In cases where these administrative methods fail, the CMS can apply for a liability order through the courts. A liability order legally recognizes the debt owed and enables further enforcement measures. For example, bailiffs may be employed to seize the defaulter's goods, which can then be sold to recover unpaid maintenance.[111] Another option is imposing charging orders, which secure the debt against the parent's property, allowing the CMS to recover arrears through the forced sale of assets.[112] Additionally, non-compliant parents may face passport confiscation or driving license suspension, measures designed to exert significant pressure on the parent to fulfil their financial obligations.[113]It is standard practice for the CMS to exhaust all available avenues before considering imprisonment, which is viewed as a last resort and only in the most severe cases. Prior to this, various factors are taken into account, including civil enforcement actions as mentioned above.

While these enforcement mechanisms are comprehensive, their effectiveness and efficiency vary, presenting both advantages and limitations. On the positive side, direct income deductions and bank orders are highly effective at ensuring regular payments, particularly for employed

[109] Maclean, M. "The Making of the Child Support Act of 1991: Policy Making at the Intersection of Law and Social Policy." Journal of Law and Society, vol. 21, no. 4, December 1994, 509. HeinOnline.
[110] Sir. Henshaw.D, Recovering child support: routes to responsibility, 2006, www.dwp.gov.uk/childsupport,
[111] Department for Work and Pensions, Child maintenance: Liability orders, 1st October 2013, https://www.gov.uk/guidance/child-maintenance-liability-orders.
[112] Section 36, Child Support Act 1991
[113] Section 79 Sanctions, Volume 6: Collection and enforcement, https://assets.publishing.service.gov.uk/media/67177e0ed29a0f082ac9c12f/volume-6-collection-and-enforcement.pdf,

individuals. These methods reduce the risk of evasion and simplify the payment process, ensuring the child receives consistent financial support. Similarly, punitive measures such as license suspension or passport confiscation act as strong deterrents and incentives, encouraging compliance to avoid significant personal inconveniences. The CMS also provides a range of tools to adapt enforcement to specific circumstances, ensuring flexibility in handling different cases. This approach is further supported by clear guidelines and accessible services, helping parents navigate the process more easily.[114]

However, the system is not without its hardships. Bureaucratic delays can undermine the efficiency of enforcement, particularly in cases requiring court involvement, such as liability orders. This can result in delay of much-needed payments, leaving custodial parents and children financially vulnerable. Furthermore, the system struggles to address cases involving self-employed individuals or those who conceal their income or assets. For such individuals, methods like income deductions are less effective, and additional investigative resources are often required. Coercive measures, such as license suspension or imprisonment, can also have unintended consequences. These actions may worsen parental relationships, increase conflict, and have a negative emotional impact on the child, who may suffer from seeing their parent penalized. Moreover, administrative costs associated with the CMS, particularly for the "Collect and Pay" service, can place additional financial strain on custodial parents, discouraging them from pursuing enforcement.

Overall, the UK's child maintenance enforcement framework is robust and effective in many cases, offering a wide range of tools to ensure compliance. However, the system's efficiency is sometimes hindered by administrative complexities, difficulties in managing uncooperative or financially elusive parents, and the potential for negative family dynamics caused by punitive measures. To address these issues, ongoing reforms could focus on streamlining processes, reducing fees for custodial parents, and enhancing investigative capabilities to address hidden income.

[114] Bryson C., Ellman I.M., McKay S., and Miles J., “Child maintenance: how would the British public calculate what the State should require parents to pay?”, Nuffield Foundation, 2015, 16.

4.2.2. South Africa (SA)

Closer to Kenya, child maintenance in South Africa is governed by the ***Maintenance Act 99 of 1998***, which outlines the obligations of parents to provide financial support for their children and establishes robust enforcement mechanisms for maintenance orders.[115] The Act ensures that both parents share financial responsibility for the welfare of their children, regardless of whether they live with the child or not.[116] Maintenance courts, established under this legislation, play a pivotal role in adjudicating disputes and enforcing compliance with maintenance obligations.[117] There are also maintenance officers and investigators tasked under the Director of Public Prosecutions and Department of Justice respectively.[118] The ***Children's Act 38 of 2005*** complements the Maintenance Act by emphasizing the rights of children and the responsibilities of parents, particularly regarding the best interests of the child.[119] These laws are in place to ensure compliance and the best interests of the child. Additionally, from a family-oriented perspective they encourage amicable arrangements between parents but provide enforcement mechanisms when such agreements fail. Maintenance courts are thus viewed as tools to ensure that rights of children and most often the mother are met.[120] However, while the South African system faces its own enforcement challenges, this paper highlights valuable lessons that can be learned from its shortcomings.

Enforcement of maintenance orders in the South African system is similar to both the Kenyan and UK systems, particularly in methods such as attachment of earnings. In this approach, courts order that maintenance payments be directly deducted from the defaulting parent's salary to ensure consistent payments and reduce opportunities for evasion.[121] This is usually more effective when the parent has an identifiable source of income.[122] This is a challenge Kenya faces as well. However, in the South African context, the Maintenance Act requires maintenance officers to investigate complaints, which involves obtaining information and sworn statements

[115] Preamble, Maintenance Act 99 of 1998.
[116] Preamble, Maintenance Act 99 of 1998.
[117] Section 3, Maintenance Act 99 of 1998.
[118] Sections 4 & 5, Maintenance Act 99 of 1998.
[119] Sections 7-9, Children's Act 38 of 2005.
[120] G'sell B, The Maintenance of family: Mediating Relationships in the South African Maintenance Court, Africa today, vol.62, no.3 of 2016, 5, J*STOR*, https://doi.org/10.2979/africatoday.62.3.3. Accessed 1 Dec. 2024.
[121] Sections 26(1), 27, 28 or 30, Maintenance Act 99 of 1998.
[122] G'sell B, The Maintenance of family: Mediating Relationships in the South African Maintenance Court, Africa today, 4.

from individuals. Officers are also tasked with identifying defaulters and their whereabouts, and they have the authority to subpoena witnesses to give evidence.[123] Further courts can authorise the attachment of bank accounts and in more severe cases of non-compliance committal as evident in the landmark case of ***Bannatyne v Bannatyne***.[124] This measure is particularly effective in compelling the parent to appear in court and address the arrears. Another innovative method used in South Africa is blacklisting with credit bureaus, which negatively affects the defaulter's credit rating.[125] This not only discourages defaulting but also provides an additional layer of accountability by linking financial reputation to maintenance compliance.

While generally effective, the enforcement mechanisms in place are faced with challenges especially based on circumstances such as the employment or irregular income of the parent against whom the order is given or imprisonment exacerbating financial difficulties. This is similar to Kenya. However, there are aspects of the system that can be successfully adopted, such as granting the Directorate of Children Services investigative and bailiff powers to enable them to enforce maintenance orders and track defaulting parents. Additionally, blacklisting defaulters with credit bureaus would serve as a deterrent and create a long-term accountability framework by linking financial reputation to maintenance obligations. Lastly, the establishing special courts or enhancing the capacity of the DCS could provide an efficient forum for resolving disputes and ensuring compliance, given the backlog of the Kenyan courts. This approach would have the advantage of alleviating delays and ensure expertise in the handling of child welfare matters.

[123] Section 9(1), Maintenance Act 99 of 1998.
[124] Bannatyne v Bannatyne & Commission for gender equality, 2002, Constitutional court of South Africa.
[125] Section 26(2A), Maintenance Amendment Act, 2018.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1. Introduction

The aim of this paper was to not only demonstrate the flaws in the enforcement mechanisms of child maintenance in Kenya, nor was it to analyse how the laws in effect operate. Rather, it was aimed at depicting the challenges to propose practical solutions for improving the enforcement of child maintenance orders. Through benchmarking and learning from successful approaches as well as their shortcomings in other countries, we can advocate for more effective mechanisms that are tailored to Kenya's specific needs. The recommendations I propose, through careful consideration of its feasibility, would allow for lasting and meaningful reforms when implemented.

5.2. Conclusions

The enforcement of child maintenance orders in Kenya faces significant challenges, leaving many children without the financial support they are entitled to. Courts, already overburdened with heavy caseloads, often lack the capacity to follow up on compliance, placing an unfair burden on custodial parents who may not have the means or knowledge to seek further recourse. Enforcement mechanisms such as garnishee orders, contempt of court, and civil jail, while intended to ensure compliance, fall short in the Kenyan context. For example, garnishee orders are often ineffective due to the difficulty of tracking financial assets, particularly in an economy with a substantial informal sector. This makes it challenging to secure the financial resources needed to support the child.

Moreover, punitive measures like contempt of court and civil jail frequently result in unintended consequences that ultimately harm the child. Jailing a non-compliant parent or holding them in contempt may strip them of the ability to earn an income, worsening the child's situation rather than alleviating it. Civil jail, which is often a one-time punishment, fails to deter repeated non-compliance and does little to ensure long-term accountability. These systemic weaknesses highlight the urgent need for a more compassionate and effective approach to enforcement. A solution must focus on safeguarding the child's best interests by combining innovative strategies—such as better financial tracking systems, community involvement, and other

alternatives with stronger administrative frameworks that reduce reliance on punitive measures. Such reforms would not only enhance compliance but also promote a system that truly prioritizes the welfare of the child, hence the below my recommendations.

5.3. Recommendations

1. **Create legislation/guidelines tailored specifically to Child maintenance and its enforcement.**

Current legislation in Kenya acknowledges the importance of child maintenance, however, enforcement mechanisms pose a significant challenge. The current framework relies solely on the parents and the courts to follow up on enforcement and this has proven inadequate and short coming in the protection and support of children. In addressing this pitfall, I recommend the creation of legislation or guidelines to this effect. It is critical to establish a dedicated agency with the interests of the child at its core. The agency would have the mandate of overseeing enforcement of child maintenance orders and possess the authority and capacity to; [a] Supervise and ensure compliance through active monitoring of compliance of orders and investigating instances of non-compliance. [b] the agency would implement sanctions for non-compliant parents and [c] to provide support, be it administrative through tools for financial assessment and conflict resolution, in streamlining and making efficient the enforcement process.

The legislation and guidelines would ideally have the following sections detailing the following:

Part 1: Preliminary provisions [short title and purpose of the Act]

Part 2: Establishing the Agency [Child Maintenance Enforcement Agency of Kenya (CMEAK), outlining its mandate “the Agency shall operate independently but under the oversight of the Directorate of Child Services in enforcing child welfare”. Additionally, this section shall outline the location of the offices of the Agency, and its functions “enforce child maintenance orders, track and recover payments from non-compliant parents, provide financial tracing and investigation services to the court, act as intermediary between parents and the court, offer ADR services etc”

Part 3: This would outline the powers and responsibilities of the agency such as the ability to summon individuals, recommend penalties as well as monitor and report non-compliance.

Part 4: This would outline the structure of the Agency, with the leadership, the staffing including a board, and professionals in the field of finance, ADR, legal experts, social workers and police personnel (bailiffs).

Part 5: The guidelines would outline the procedure for enforcement and the stages in which ADR is possible, with the core purpose being the safeguarding of the best interests of the child. The procedure would be "an online portal for submission and tracking of complaints and payments set-up, investigations shall be reported to court within a specified number of days (30 or 60), ADR is the first resort thereafter before resorting to punitive measures with ADR services subsidised or free for low-income parents"

Part 6: Outlines the funding and accountability measures to sustain the agency. This would include fines imposed on non-compliant parents, moneys allocated by the Cabinet Secretary

Part 7: This section shall outline the offenses in relation to the agency and child payment and further stipulate the penalties that can be meted out both the agency and consequently the Judiciary.

In conclusion, the implementation of such a legislation establishing an agency would create a more child-centred enforcement system for maintenance, balancing judicial authority and administrative efficiency whereby the agency shall follow up on the orders of the Judiciary and relieve the courts of the burden of constant approach to enforce orders.

2. Establish an Agency for the enforcement of child maintenance.

In my view, there is a critical need to establish an institution dedicated to the enforcement of Child maintenance orders in Kenya. This institution could be modelled after the United Kingdom's Child Maintenance Service (CMS) and Child Maintenance Agency (CMA) ensuring that in the creation of such an institution, thorough research into compliance mechanisms and best practices is conducted. Forming such an institution will significantly enhance enforcing child maintenance orders and other necessities by granting it the authority to summon individuals and investigate cases with ease by tracking down non-compliance to the orders. Such changes will enhance the level of accountability and readiness of the current system to address persistent challenges.

Nonetheless, it is of paramount importance to understand that Kenya has a distinct socioeconomic landscape in developing enforcement strategies. In the UK, there are strategies such as credit banning or wage deductions which are effective, but, for Kenya, where the economy is heavily reliant on informal employment such strategies would be rendered impractical. Therefore, alternative enforcement methods tailored to Kenya's context are necessary. In integrating traditional and community-based strategies in the enforcement mechanisms this would suit the Kenyan context better. Given Kenya's socio-economic and cultural dynamics, enforcement strategies must align with the realities of everyday life. As earlier mentioned, while methods such as credit banning and wage deductions may be largely ineffective, collaboration with chiefs and sub chiefs and other local community structures could provide a viable alternative.

Ideally, this body would be separate and new, created under the proposed legislation tabled above. Cognisant of the practical dilemmas that may arise given the political and economic landscape, a practical way to establish such an institution in Kenya could be through the expansion and restructuring of the Directorate of Children Services. This transformation would mirror the development of the Anti-Trafficking Unit within the Kenya Police Force, which was specifically constituted to address human trafficking issues. By building upon an existing framework, the Directorate could be equipped with additional resources, staff, and specialized training to handle child maintenance cases effectively. This would ensure not only the enforcement of court orders but also the proactive identification and resolution of potential non-compliance cases. The recommendations in the legislation above would still be implemented, however, the body would be piloted under the directorate and its performance shall then determine further development.

Ultimately, developing enforcement mechanisms that reflect the realities of Kenya's economic and social structure is crucial for feasibility and implementation. Solutions must be both effective and appropriate, involving partnerships with community leaders and stakeholders to address the challenges in a practical and sustainable manner. Below are some of the avenues that could be adopted in achieving the inclusion of community leaders:

3. Innovative Enforcement measures such as the use of Mobile services and ID related amenities

Ensuring the welfare of children is of paramount importance. One of the significant challenges in Kenya is tracing the income of parents obligated to pay child maintenance, particularly those not engaged in formal employment. Given that Kenya's economy is predominantly informal, and credit system are not widely employed, innovative enforcement mechanisms must be explored. Drawing inspiration from South Africa's mechanism of blacklisting, I recommend that a similar approach be adapted to fit Kenya's context. Instead of merely focusing on credit, the system could be modelled after the existing financial product known as "Fuliza". Ideally, this system, but specific to child maintenance, would automatically deduct the obligated amount from the non-compliant parent from their accounts, mainly M-Pesa which has often been used to circumvent tracking which bank accounts would normally be subjected to. However, there are concerns as to the privacy of the individuals, concerns as to if the person is a custodian of another persons' funds among other legal issues. To adjust this recommendation to be more feasible and applicable, the monitoring of M-Pesa transactions, could be an indicative factor of the non-compliant parent's access to funds and income and this could then be used to determine the amount of child maintenance to pay. Further, this would be a rebuttable presumption, whereby the onus of proof would be on the parent to prove that the transactions do not adequately reflect income and justify why the amounts transacted should not be used to determine their income.

In practice, alongside the above Fuliza example, Kenya could leverage National identification systems. Non-compliant parents would have their details registered with the court and upon issuance of a maintenance order, the parent would be informed that failure to comply would result in measures such as the attachment of outstanding amounts to their ID. This record or attachment would allow for the flagging of transactions and other tasks completed by the parent to monitor expenditure. Therefore, activities such as borrowing, transfers and other activities related to finance would be registered and will raise concerns due to the outstanding financial obligation towards the child. These measures would serve as a deterrent to non-compliance as parents would face tangible consequences that do not necessarily affect personal freedom but essentially limits access to essential services until they fulfil their obligations. This could be

adopted in various spheres of life not only financial transactions, in the pursuit of better jobs, in leaving the country, in other aspects of life that would act as discouraging for the parent to be non-compliant. Further, this would be primarily enforced by the bailiffs attached to the Authority I propose above who would do the groundwork.

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