



REPUBLIC OF KENYA



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SKM v ASM (Civil Appeal E001 of 2021)
[2022] KEHC 13234 (KLR) (Civ) (29 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13234 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E001 OF 2021

AO MUCHELULE, J

SEPTEMBER 29, 2022

(CONSOLIDATED WITH HCCA NO. E002 OF 2021)

BETWEEN

SKM APPLICANT

AND

ASM RESPONDENT

(Being an appeal from the ruling of Children's Court delivered by Hon. (Ms). M.A. Otindo, Principal Magistrate on 22nd December 2020 in Milimani Children's Case No 1103 of 2019)

RULING

1. The applicant SKM and the respondent ASM got married on March 15, 2008. The applicant had at the time a son AU whom the respondent accepted as his own and took responsibility over him. The marriage was subsequently blessed with three children: AAM, ALM, and EAM.
2. On September 9, 2019 the applicant sued the respondent in Children Cause No. 694 of 2019 at Milimani seeking to have the custody of the children with the respondent having structured access; and for the respondent to be ordered to provide shelter and maintenance of the children. On May 6, 2020 the Children Court, after hearing the evidence of the parties, returned a judgment granting the parties joint legal custody; and giving the applicant physical custody, with the respondent having supervised access on alternate weekends. The parties had entered into a consent on October 3, 2019 in which the respondent was to provide a sum of Kshs.600,000/= per month towards the maintenance of the three children on top of paying their school fees and all related expenses, and to pay college fees and related expenses for AU in the United Kingdom. The consent was ordered to be part of the judgment.



3. By an application dated October 15, 2020, the respondent sought the review of the judgment. The application was opposed by the applicant. The application was heard by the trial court following which it was allowed on December 22, 2020 in the following terms:-

- “(a) an order hereby issues granting shared physical custody and care of the 3 minor children AAM, AAM and EAM to be shared equally between the plaintiff and the defendant on a weekly basis.
- (b) that an order hereby issues directing the defendant to provide the sum of Kshs.400,000/= to the plaintiff for purpose of the children daily maintenance in terms of groceries, food, utilities, staff salaries and all other household maintenance and costs and expenses;
- (c) an order hereby issues allowing the defendant to source and pay for rental accommodation of a 4 bedroomed apartment within Nairobi county for purposes of housing the plaintiff and the three 3 minor children but in an own compound residence;
- (d) that an order hereby issue declaring that the defendant has discharged his obligations set out in the consent recorded on October 3, 2019 in respect of maintenance, schooling expenses payable for AU and;
- (e) that the order of maintenance in respect of payment of school fees and related costs is temporarily stayed, that the adult subject AU in consultation with the applicant to source for local educational institution to enable him complete his studies while the parties herein give him moral support.”

4. The basis of the review was that the respondent’s economic and financial activities had been substantially affected by the covid-19 pandemic. The court considered this to reduce the monthly maintenance of the children from Kshs.600,000/= to Kshs.400,000/=. The ruling was on December 22, 2020.

5. The respondent was aggrieved by the order that the shared custody for the children be on a weekly basis instead of a fortnightly basis, and the order requiring him to consider supporting AU’s education in a local university. He appealed the ruling in that regard. On her part, the applicant was dissatisfied with the entire ruling. She filed her appeal dated 6th January 2021. With the appeal was the present application dated 6th January 2021 which sought the following prayers:-

- “(1) That this application be certified urgent, heard in the first instance, and on a priority basis.
- (2) That this Honourable Court be pleased to hear and make appropriate directions on the appellant/.applicant’s Notice of Motion application dated January 6, 2021 during this court vacation period.
- (3) That interim and pending the hearing and determination of this application the Honourable court be pleased to stay execution of the Ruling delivered on December 22, 2020 by Hon. M.A. Otindo (PM) in Children’s Court in Nairobi Children’s Case No. 1103 of 2019;
- (4) That pending the hearing and determination of this Appeal the Honourable court be pleased to stay of execution of the Ruling delivered on December



22, 2020 by Hon. M.A Otindo (PM) in the Children's Court in Nairobi Children's Case No. 1103 of 2019;

- (5) That this Honourable court be pleased to maintain status quo to maintenance fee of Kshs 600,000/=, supervised access over the minors every fortnight and half or each school holiday and housing of the minors at the matrimonial home;
- (6) That this Honourable court be pleased to reinstate maintenance fee of Kshs.600,000/= and or enhance the same;
- (7) That this Honourable court be pleased to direct that the Respondent shall have supervised access to the minors on alternate weekends;
- (8) That this court be pleased to recall the lower court's file for its perusal and determination;
- (9) That cost of this application be provided for; and
- (10) That this Honourable court be pleased to make any further orders and directions that it may deem fit and just in the circumstances and in the best interest of the minors."

6. The applicant's grievance was that the trial court's direction that the shared physical custody of the children on a weekly basis was not practicable as the children were school-going. Secondly, that that reduction of the monthly maintenance of the children from Kshs.600,000/= to Kshs.400,000/= was unfair and not in the best interests of the children, and given that she had no source of income and that her company was not profitable. She stated that she had given evidence to the trial court in regard to her limited income during the hearing of the application for review. Lastly, she stated that the direction in the ruling that the respondent sources and pays for rental accommodation for a four-bedroom apartment within Nairobi County for her and the children would affect the living standards of the children, and that would not be in their best interests.
7. The respondent opposed the application. Both in the replying affidavit and his counsel's written submissions, his case was that to allow the application would be to allow the appeal before hearing it. He pointed out that the same prayers in the application were those in prayers (a), (b), (c) and (d) of the Memorandum of Appeal. According to him, this court would have to re-evaluate the rival evidence in the lower court before determining the application, a task that should be left to the court hearing the appeal. He reiterated that the applicant had an income and had the responsibility of contributing towards the maintenance of the children.
8. On the question of accommodation, he stated that the house the applicant and the children were living in belonged to his father; that the house was luxurious and expensive to manage; hence his desire to provide a manageable four-bedroomed apartment for the family to live in.
9. Lastly, his case was that the applicant had not demonstrated that the children would suffer substantial loss if the application was granted.
10. On her part, the applicant's case was that the children were used to the present accommodation, and that moving out of it would be detrimental to them. On the question of maintenance, she stated that reduction from Kshs.600,000/= to Kshs.400,000/= would be detrimental as the children were now used to the higher amount; that she is now being forced to borrow to supplement their upkeep.



Lastly, she stated that the respondent was a man of substantial means who would easily afford to pay Kshs.600,000/= every month.

11. Under Order 42 rule 6(2) of the Civil Procedure Rules, stay of execution is a discretionary power bestowed upon the court to be exercised in favour of a deserving applicant who has appealed the decision of the court and is able to demonstrate that substantial loss may result if stay is not granted pending the hearing and determination of the appeal; that the application for stay has been made without unreasonable delay; and that that he has offered such security for the due performance of such decree or order that may ultimately be binding upon him (Antoine Ndiaye v African Virtual University [2015]eKLR). Because the dispute relates to children, it is now established that, under section 4(2) of the Children Act, 2001 and article 53(2) of the Constitution, the court should in such a case consider whether the suspension of the orders would be in the best interests of the children (DOB v DMA [2021]eKLR). In RWW v EKW [2019]eKLR, it was observed that, as a matter of principle, grant of stay of execution of maintenance order in children cases should be made in very rare cases. Parents have a statutory and constitutional responsibility to maintain their children. Where there is dispute regarding the question of maintenance, the better option is to expedite the appeal other than stopping the payment altogether.
12. In the instant case, the merits of the reduction of the monthly maintenance from Kshs.600,000/= to Kshs.400,000/= is questioned on appeal. The financial circumstances of the parties against the best interests of the children, were considered by the trial court. The consideration and determination by the court has been questioned in the appeal. The court cannot resolve the quantum issue without going into the merits of the appeal. This is why I agree with the submission by the respondent's counsel that it would not be appropriate to increase the monthly stipend from Kshs.400,000/= to Kshs.600,000/= before the appeal is heard.
13. The other reason why this court cannot at this stage interfere with the order of the trial court is because the prayers in the application are the same ones in the appeal. If the prayers in the application are allowed the appeal will stand allowed, without hearing it.
14. The trial court asked that the physical custody of the children be shared by both parents on weekly basis. In the instant application the applicant sought that the access be supervised and on fortnightly basis. Ideally, the parties should be able to approach the Children Court to vary any orders regarding the children, including the orders regarding access. It is the Children Court that has the primary jurisdiction to deal with all questions of legal and physical custody, including questions of access, supervised or not supervised. When orders of access have been issued and there is appeal on them this court's jurisdiction will be limited to determining whether, given the evidence before the court, the orders were merited. The question will be determined without seeking to take away the discretion of the Children Court that had the feel of the case.
15. In short, I dismiss the application with costs.
16. So that this matter is progressed expeditiously, it is directed that the consolidated appeals be admitted to hearing, and shall be heard on basis of written submissions. The applicant shall within 21 days' file and serve written submissions on the appeals. On service, the respondent shall respond within 21 days. The matter shall be mentioned on 24th November 2022 to give a judgment date.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 29TH SEPTEMBER, 2022.

A.O. MUCHELULE

JUDGE

