



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 139 OF 2019

MOA.....APPELLANT

V E R S U S

HAO.....RESPONDENT

(Being an appeal against the Ruling and Order delivered by Hon. T. B. Nyangena on 20th December, 2018 in Nairobi Children's Case No. 1012 of 2014)

JUDGMENT

1. This is an Appeal arising from the Ruling and Order delivered on 20th December 2018 by Honourable T. B. Nyangena in **Nairobi Children's Case No. 1012 of 2014**. Vide a Plaint dated 1st August 2014, H.A.O suing as a next friend to the minor sought the following reliefs;

- (a) **Legal and actual custody of the minor be granted to the Plaintiff;**
- (b) **Defendant to pay school fees and related expenses and medical expenses;**
- (c) **Defendant to provide monthly maintenance of Kshs. 130,000/-;**
- (d) **Defendant to reinstate the Plaintiff and the minor to Madaraka House Block MF: X No. E as their original accommodation and costs of the suit.**

2. Contemporaneously filed with the Plaint is a Chamber Summons of even date seeking;

- (1) **That the application herein be certified urgent and be heard on priority basis.**
- (2) **That the Defendant/Respondent to be compelled to provide school fees and other related expenses as per the fees structure, medical cover and monthly maintenance for the minor at Kshs. 130,356 pending the hearing and determination of this application.**
- (3) **That legal and actual custody, care and control of the child herein be granted to the Plaintiff/Applicant.**

3. Upon considering the application, the trial Court pronounced itself in a Ruling dated 30th July 2016 thus directing;

- (1) **That the Plaintiff and Defendant to have joint legal custody of the minor.**
- (2) **That physical custody of the minor be shared out as follows;**
 - (a) **During the school session, the minor shall be in the physical custody of the Defendant.**
 - (b) **During the weekends, the Plaintiff shall be at liberty to pick the minor from school on Friday, spend the weekend with her and drop her back to school on Monday. Provided that adequate notice shall be given to the**

Defendant and to her current school.

(c) That during the school holidays access shall be shared equally and the Plaintiff shall be at liberty to move with the minor to Kisumu for the period of access.

(3) That the Defendant shall cater for the needs of the minor fully when she is in his custody and shall contribute Kshs. 30,000/- for the upkeep of the minor during the holidays and Kshs. 10,000/- during the weekends when she is in the custody of the Plaintiff unless she happens to have secured a stable job.

(4) That the Plaintiff shall be required to indicate time to be with the child during the stated periods of time.

(5) That there be liberty to apply.

(6) Costs in the cause.

4. Dissatisfied with the said Ruling and Orders, the Respondent M.O.A filed Notice of Motion dated 3rd September 2018 seeking orders to review the orders made on 30th June 2018 by;

(a) Revoking the order granting the Plaintiff joint legal custody of the minor with the Defendant and substituting the same with an order granting the Defendant sole and full legal and actual custody of the minor herein.

(b) Revoking the order directing the Defendant to pay the Defendant Kshs. 30,000/- for upkeep of the minor during the holidays and Kshs. 10,000/- during weekends.

(c) The Plaintiff be ordered to meet half of the school fees expenditure of the minor.

5. Upon considering the application, the court delivered its ruling on 20th December 2018 thereby ordering;

(a) That parties are granted joint legal custody.

(b) That physical care and control be shared equally during school holidays and public holidays.

(c) That the father to provide school fees and related expenses and medical care and further pay Kshs. 30,000/- to the mother when the child is in her custody during half of the school holidays. But the payment of Kshs. 10,000/- on weekends is revoked.

(d) That the amount outstanding upto the day of delivery of the Ruling be paid immediately, if not $\frac{1}{3}$ of the Defendants basic salary be attached.

(e) That for avoidance of doubt the father shall be the primary care giver doing as he has been doing.

(f) That no order as to costs.

6. Aggrieved by the said Ruling and Orders, the Respondent filed a Notice of Motion on 25th July 2019 in **Civil Appeal No. 84/2019** seeking leave to appeal out of time against the Rulings delivered on 20th December 2018 and 4th June 2019. She further sought stay of execution of the orders for payment of the outstanding arrears of the amount ordered to be paid as well as notice to show cause. In his Ruling delivered on 18th November 2019, Justice Muchelule granted leave but declined to stay execution orders on grounds that, maintenance, education and upkeep of the child herein is a continuing obligation and that stay will not be in the best interests of the child. Secondly, stay was declined as there was no pending appeal.

7. After being granted leave, the Respondent/Appellant filed a Memorandum of Appeal dated 19th November 2019 listing 11 grounds of appeal as follows;

(1) The learned trial Magistrate erred in law and in fact in totally disregarding the Appellant's Notice of Motion Application dated 3rd December, 2018, the Replying Affidavit of MOA sworn on 26th October 2018, the Supplementary Affidavit of MOA sworn on 5th November 2018, the Appellant's written submissions dated 4th November 2018 and all the documentary evidence adduced by the Appellant seeking to review the earlier orders of Hon. F. K. Munyi of the 13th day of July 2016.

(2) The Learned trial Magistrate erred in law and in fact in failing to appreciate that parental responsibility as provided for in the Children's Act 2001, and in the Constitution of Kenya at Article 53(1)(e) of the Constitution of Kenya is a shared responsibility between the father and mother of a child.

(3) The trial Magistrate erred in law and in fact in finding that the Appellant was solely responsible for the minor's full financial provision and failing to appreciate the partial contribution by the Appellant through the rental proceeds already being collected by the Respondent.

(4) The learned trial Magistrate erred in law and in fact by failing to revoke the orders made on 30th June 2016 which had proved subject of abuse by the Respondent.

(5) The learned trial Magistrate erred in law and in fact by failing to make a determination on the issue of the proceeds of the rent from the house located on L.R. No. 25980 Madaraka Estate Nairobi.

(6) The learned trial Magistrate erred in law and in fact by failing to consider the glaring inconsistencies in the Respondent's testimony and evidence adduced.

(7) The learned trial Magistrate erred in law and in fact by finding that the Defendant disobeyed Court orders despite glaring evidence to the contrary.

(8) The learned trial Magistrate erred in law and in fact by failing to find that the orders issued by Hon. F. K. Munyi on 30th June 2016 were not absolute but were premised on the Respondent having actual custody of the minor during weekends and during the holidays.

(9) The learned trial Magistrate erred in law and in fact by ordering that the Appellant pays an unspecified outstanding amount immediately or one third of his salary to be attached.

(10) The learned trial Magistrate erred in law and in fact by delivering an unambiguous Ruling that is subject to abuse by the Respondent.

(11) The learned trial Magistrate erred in law and in fact by unilaterally ordering that the minor be transferred to a boarding school relying solely on the evidence of the Respondent without interviewing the minor as requested on the allegations of the Respondent thereby forcefully removing the child from the care of her parents.

8. On 21st May 2020, the Court directed parties to file their submissions. The Appellant filed his submissions dated 17th June 2020 and further submissions on 15th July 2020. The Respondent also filed hers dated 9th July 2020 through the firm of Anne Maloba and Co. Advocates.

Appellant's Submissions

9. The Appellant argued grounds 1, 4 and 6 together thereby contending that the learned Magistrate did not consider the application dated 3rd September 2018, affidavits and submissions filed by the Appellant. In respect of those grounds, Counsel submitted that the Court did not consider the evidence and submissions that the Respondent had a source of income amounting to Kshs. 45,000/- being income generated from rent solely collected by the Respondent out of their family owned house; that the Court failed to appreciate that the Applicant is the sole financial provider for the minor a fact that was never controverted by the Respondent and, that the Court failed to take into account the principle of equal parental responsibility underscored under Article 53(1)(2) of the Constitution.

10. He further contended that the trial Court did not demonstrate how a figure of Kshs. 681,700 came about so as to attract Notice to Show Cause and attachment of salary.

11. Counsel argued grounds 2, 3, 5, 7, 8 and 9 together seeking to have the orders set aside. Under these grounds, Counsel submitted that it's the Appellant who is having full physical custody of the minor and effectively taking care of all her financial needs. That the payment of Kshs. 30,000/- during holidays and Kshs. 10,000/- during weekends was subject to the child being picked by the Respondent which she failed to do.

12. Counsel further submitted that an order directing payment of Kshs. 681,700/- will actually affect the Appellant's financial stability which will in turn affect the best interests of the baby. That the Appellant does not contribute anything towards the welfare of the baby hence should not seek contribution to maintain the baby when in her custody.

Respondent's Submissions

13. The firm of Anne and Maloba filed their submissions dated 9th July 2020 on behalf of the respondent contending that the orders of 20th December 2018 were in conformity with the child's best interests' principle underscored under Article 53(2) of the Constitution. M/s Maloba contended that the trial Magistrate sufficiently considered the affidavits and submissions tendered before the Court. That the orders made are in the best interests of the minor hence cannot be set aside. To espouse this proposition, reliance was placed in the case of **Butt HCCC No. 8/2014 (O.S)** Mombasa High Court where the Court held that the best interests of the child are superior to any other person. Learned Counsel submitted that the Appellant is a rich man with a lot of property hence should ensure the support of the child and development.

14. According to M/s Maloba, the Respondent has no means of income and that the Court should carry out a thorough inquiry on the earnings of the parties before making a decision. In support of this argument, Counsel referred to the case of **Geoffrey Onsare Onchiri – Vs- Leah Nyakeri High Court Children Appeal No. 5/2017**.

Determination

15. I have considered the Memorandum of Appeal herein and the grounds cited. I have also considered parties' oral submissions. Upon

analysing and examining the Grounds of Appeal against the Rulings and orders of 30th June 2016 and 20th December 2018, I will summarise them as hereunder;

(1) Whether the trial Court took into consideration the fact that parental responsibility is equal.

(2) Whether the orders directing payment of Kshs. 30,000/- as maintenance expenses of the minor during holidays and Kshs. 10,000/- during weekends when the minor is in custody of the Respondent was justifiable.

(3) Whether the trial Court failed to take into consideration that the Respondent had a source of income out of rent collected from their matrimonial home.

16. There is no doubt that in every matter affecting or concerning a child, the child's best interests is paramount (see Article 53(2) of the Constitution). Section 4(2) and (3) of the Children Act goes further to operationalise the spirit of Article 53(2) of the Constitution by stating that, in all actions concerning children, whether undertaken by administrative, public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

17. In executing this paramount principle, Article 53(1) (e) clearly does lay the burden of taking care of a child squarely on the parents by providing 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, whether they are married to each other or not.”

18. Section 90(a) of the Children Act further amplifies the doctrine of equal parental responsibility by stating that;

“Unless the Court otherwise directs and subject to any financial contribution ordered to be paid by any other person, the following presumptions shall apply with regard to the maintenance of a child-

(a) Where the parents of a child were married to each other at the time of birth of the child and are both living, the duty to maintain a child shall be their joint responsibility.”

19. Both parties are in agreement that the decision of the Court must uphold the best interests of a child. There is no dispute that the actual physical custody of the child is with the father save for school holidays and weekends when the mother assumes temporally physical custody(access). The father is therefore solely paying school fees for the minor who is now in boarding school, buying clothes, food, providing all other school related expenses, medical expenses, shelter when on holiday and entertainment when possessed of the minor's custody.

20. Literally, the Respondent is not making any single contribution towards the minor's welfare or needs. I am alive to the fact that equal parental responsibility does not mean equal and similar contribution. See E.M.M. Vs. M.O. O (2016) where Meoli J observed that;

“However, equal responsibility does not mean equal and similar contribution as the income of each parent, and other non-monetary contribution must be borne in mind.”

21. Although parents may not have equal financial ability for the Court to demand equal contribution, one must at least exhibit some sense of seriousness in making some contribution as a sign of good will that he or she is not geared towards overburdening the other parent for the sole purpose of punishing him or her using the best interests of a child principle or as a ground to settle scores out of marital differences.

22. I am in agreement with the holding of Justice Thande in the case of L.A.O. -Vs- O.K Arap M. (2019) eKLR where she pronounced herself as follows:-

“In the present case, the Appellant states that she does not have a job and only assists her father on the farm and in running her late mother's business. The Appellant is paid Kshs. 40,000/= by her father, and receives Kshs. 10,000/= from the Respondent each month. She is not exactly destitute. In spite of this, she still seeks that the Respondent be saddled with the entire financial responsibility over the child. This negates that constitutional principle that parental responsibility is a shared responsibility. In this regard, I agree with Kimaru, J in C.I.N v J.N.N [2014] eKLR, where the Court stated that:-

“It will not do for the Respondent to say that she has an uncertain source of income and therefore the responsibility of maintaining the children should only be borne by the Appellant. The Respondent must establish, to the satisfaction of the court, that she has also made effort to provide for the upkeep of the children”.

23. In the instant case, the Appellant has taken up full responsibility by providing the child with everything. The Respondent is purely not playing any role. She is a dormant or passive participant with no contribution to make towards the welfare of the child. She is simply not discharging her parental responsibility as required of her. To demand that the Appellant does pay her Kshs. 30,000/- to meet maintenance expenses when she takes custody of the child during the holiday and Kshs. 10,000/- during weekends is to say the least overburdening another parent in this case the Appellant. The Respondent should at least make even the slightest effort to take care of her child whom she purports to love by maintaining her during that short period of holidays and weekends while in her custody.

24. It will be too much to demand 100% maintenance from one parent while the other is playing the role of spectator yet claim to be a

responsible parent. Children matters or needs should not be used to punish one parent at the comfort of another parent. Children should be viewed as a blessing to parents but not a curse. To overburden one parent at the comfort of another will be tantamount to punishing the overburdened parent and to some extent perpetuating irresponsibility or laxity on a parent who is duty bound to contribute towards a child's welfare.

25. Considering the circumstances of this case, the Respondent ought to make some contribution towards maintenance of the child when in her custody. To demand money from the Appellant in order to maintain the child while in her custody is not fair. I do not find any convincing or justifiable rationale in making this directive. Although the Court stated that the respondent was not working, she is earning some rental income from their matrimonial home a fact that was not denied. This is sufficient money to take care of the child for only 3 holidays in a year and 4 weekends in a month which are not even applicable now that the child is in boarding school. I do agree and support the decision by Hon. Nyangena in revoking the payment of Kshs. 10,000/- maintenance expenses during weekends which in my view was punitive.

26. In a nutshell, it's my finding that both Magistrates in the Rulings dated 30th June 2016 and 20th December 2018 acted on a wrong principle thereby overburdening the Appellant by ordering him to discharge 100% parental responsibility when the Respondent has some source of income out of rental income. See **Richard Kaitany Chemagong –Vs- Republic (1984)eKLR** where the Court held:-

“A court on appeal will not normally interfere with a finding of fact by the trial court whether in a civil or criminal case unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”

27. Further in the case of **S.A.K –Vs- Z.D.N.P (2019)eKLR** the Court held that:-

“The duties referred to above include *inter alia* the duty of a parent to maintain the child and in particular to provide him with food, shelter, clothing, medical care, education and guidance. Parental responsibility falls on both parents and no parent has a superior right or claim against the other in exercise of parental responsibility.”

28. Having held that the order directing the Appellant to pay Kshs. 30,000/- and Kshs. 10,000/- as maintenance expenses when the child is on holiday or weekend respectively with the mother was erroneously arrived at, it is my finding that the two learned Magistrates relied on wrong principles and without justification failed to take into account that the Respondent had some source of income (Kshs. 45,000/-).

29. If the Respondent loves her child and wants to have custody of her child during holidays and weekends, she should be prepared to spend and if not, she will be failing her parental responsibility. She cannot entirely rely on the Appellant to make her life ease at the Appellant's expense. Accordingly, I am in agreement with Mr. Ligunya that the sum of Kshs. 30,000/- as maintenance expenses and Kshs. 10,000/- when the child is with the mother during holiday and weekends be and is hereby revoked and or set aside.

30. Any claim for any amount outstanding out of that claim or order is hereby lifted or set aside and the same shall not be recoverable through whatever means. Any attachment orders if made in realization of that amount including salary attachment be and is hereby set aside. It will not be in the best interests of the child that the primary giver be committed to civil jail for non-compliance of that order or be subjected to unfair treatment. It is in the best interests of the child that the mother shows love to the child by contributing towards her welfare as well.

31. For avoidance of doubt, the order in the ruling dated 30th June 2016 relating to the payment of Kshs. 30,000/-and Kshs 10,000 being maintenance expenses payable to the respondent by the appellant be and is hereby set aside; That orders No. 3 and 4 in the Ruling and Order dated 20th December 2018 directing payment of Kshs. 30,000/- Kshs in respect of the minor's holiday maintenance expenses and clearance of the outstanding arrears in default attachment of 1/3 of the appellant's salary in realization of the outstanding arrears are hereby set aside. The rest of the orders shall remain in force.

32. Regarding the prayer for contribution towards school fees expenses or any other need by the Respondent, that is an issue that shall be properly dealt with during the hearing of the main suit. Regarding costs, this is a family matter. Each party shall bear own costs. The original lower court file be returned to the trial Court for expeditious hearing and determination of the matter

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH JANUARY 2021.

.....

J. N. ONYIEGO

JUDGE