



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL APPEAL NO. E062 OF 2020**

**EKTM.....APPLICANT**

**AND**

**ECC.....RESPONDENT**

***(Being an appeal from the Judgment of the Senior Resident Magistrate at Nairobi (Hon. G.N. Opakasi) delivered on 2<sup>nd</sup> December 2020 in Children Case No. 1314 of 2019)***

**RULING**

1. The applicant EKTM and the respondent ECC began living together as husband and wife in 2006. On 11<sup>th</sup> November 2016 the marriage was solemnized under the **Marriage Act** at the Attorney General's Chambers in Nairobi. They separated in December 2018, and formally divorced on 2<sup>nd</sup> September 2020.
2. Over the period of the couple's staying together, three children were born. They are MC born on 5<sup>th</sup> November 2006, RC born on 5<sup>th</sup> July 2009 and NCT born on 19<sup>th</sup> December 2014. It is not in dispute that, of the three children only RC was fathered by the applicant.
3. While the couple was married they took a mortgage of Kshs.8,700,000/= over a house situate in Athi River in Machakos County. They are jointly servicing the mortgage. The respondent resides here with the children. The applicant had to seek an alternative rented accommodation for himself and his new family.
4. Before the children Court at Nairobi, the respondent sued the applicant seeking that he be compelled to pay school fees and school related expenses for the children, to pay for their upkeep and for her to be given the custody of the children. He counterclaimed for orders that he be given physical custody of RC, he be given reasonable access to RC, the respondent be compelled to provide for the schooling and upkeep of MC and NC and that the respondent to provide for the reasonable maintenance of RC.
5. The learned Senior Resident Magistrate Hon. G.N. Opakasi heard the cause. She found that, although the applicant was not the father of MC he had assumed parental responsibility over the child and therefore was required to provide its education, upkeep and medical needs. The responsibility was to be shared with the respondent according to their means. The court found that the applicant and the respondent were to share parental responsibility over RC. Physical custody, care and control over MC and RC were given to the respondent, with the applicant having access to them on every alternate weekend of the school days and half of the school holidays. The applicant was ordered to cater for the school fees and school related expenses of MC and RC, and also to cater for the medical expenses of the two children. The applicant was to pay Kshs.30,000/= monthly towards the upkeep of MC and RC, with the respondent meeting the rest of the upkeep. The respondent and the children were to continue to live in the house whose mortgage the parties were to service on a 50:50 basis.
6. The judgment was delivered on 2<sup>nd</sup> December 2020. The applicant appealed to this court against part of the judgment. He was aggrieved by the holding that he had assumed parental responsibility over MC; that he should solely cater for the school fees and school related expenses of MC and RC; that he was to have limited access to MC; he should pay Kshs.30,000/= monthly towards the upkeep of MC and RC; and that the parties should provide shelter on a 50:50 basis.
7. The present motion by the applicant is dated 9<sup>th</sup> December 2020. He seeks the stay of the order that he pays Kshs.30,000/= monthly towards the upkeep of MC and RC pending the hearing and determination of the appeal. The complaint is that he is not able to meet that amount given his means and obligations which he says the lower court did not properly consider. He was apprehensive that if the order is not stayed the respondent will move to execute for the same and that will render the appeal nugatory. The respondent opposed the application. Her case was that since the order for the payment of the money, the applicant has not made a single payment; and that once the

applicant is in disobedience of the order to pay the Kshs.30,000/= per month towards the children's upkeep, his hands are not clean and hence he is not entitled to the order of stay. She stated that the applicant has not shown that he will suffer substantial loss if stay is not granted. The applicant filed a supplementary affidavit to reiterate that his means could not allow him to pay the Kshs.30,000/= monthly. He stated that he was struggling with the payment of the fees and related expenses and the mortgage, and given that this net salary was Kshs.83,963/= (the gross being Kshs.306,400/=) it was difficult to pay the amount. He acknowledged that the respondent had taken out a notice to show cause why he should not pay the amount.

8. Mrs. Rotich represented the applicant and Ms. Jemator represented the respondent. I have considered what they had to say on the application.

9. The lower court record has been filed, and therefore I give direction that the parties do file written submissions within 14 days from today, starting with the applicant. On service, the respondent will file her submissions within 14 days. This is how the appeal will be heard. I make this direction because one of the grounds of appeal relates to how the trial court dealt with the rival evidence regarding the financial capacity of the parties. It was claimed that the court did not properly assess each party's means to reach the determination regarding what was to be paid by the applicant on school fees, school related expenses and the upkeep of the children. The appeal court will be under the duty to reconsider and reevaluate all the evidence that was tendered before the trial court to determine whether the orders arrived at were supported by that evidence. (**Selle –v- Associated Motor Boat Company Ltd [1968]E.A 123**).

10. The question is whether, before that reconsideration, the present application has laid a basis for this court to stay the order for the payment of the Kshs.30,000/= per month towards the upkeep of the children. Judge Musyoka in **Z.M.O. –v- E.I.M [2015]eKLR** advised that it is rare in such an application for the court to grant stay of maintenance orders as that would mean suspending a statutory obligation placed on a parent, and that such suspension would leave a vacuum with the children being without upkeep for the duration of the appeal. This, the judge observed, may not be in the best interest of the child.

11. Now that the application was substantially made under **Order 42 rule 6** of the **Civil Procedure Rules**, I am aware that the applicant has an appeal and it is the duty of the court to ensure that the appeal will not be rendered nugatory. At the same time, the respondent (on behalf of the children) has orders which she is entitled to execute. The court has to balance those rights and exercise its discretion to grant or not grant stay pending the hearing and determination of the appeal (**Butt –v- Rent Restriction Tribunal [1982]KLR 417**).

12. The appeal was brought without delay, but no security for the due performance of the decree that may ultimately be binding on the applicant was offered. I agree with the respondent that, at the core of this application is the responsibility on the part of the applicant to demonstrate that he will suffer substantial loss if stay is not granted (**Adah Nyambok –v- Uganda Holding Properties Limited [2012]eKLR**). Further, now that the dispute relates to the welfare of children, under **section 4(2) and (3)** of the **Children Act** and **Article 53(2)** of the Constitution the court has to consider what is in the best interest of the children. I find that, without a substantive analysis of the financial capacity of the applicant in relation to that of the respondent, and against the needs of the children, it may not be easy at this stage to determine that, without stay, the applicant will suffer substantial loss.

13. It is a material consideration that the applicant is already in arrears as he seeks the exercise of the court's discretion in his favour. The court may not look favourable to such a party. (**M.M.K. –v- S.N. [2020]eKLR**). Using the old adage, his hands are not clean.

14. In conclusion, I find no merit in the application and dismiss it. I make no order as to costs, considering the nature of the dispute.

15. To determine the compliance with the direction in paragraph 9 of this ruling, I will mention this matter on 3<sup>rd</sup> June 2021.

**DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 22ND DAY OF APRIL 2021.**

**A.O. MUCHELULE**

**JUDGE**