



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 135 OF 2019

PWM.....APPLICANT

VERSUS

GWG.....RESPONDENT

(Being an Appeal of the Ruling Hon. G. M. Gitonga (SRM) of the Children's Court

at Nairobi dated 28th October 2019 in Children's Case No. 1441 of 2018)

RULING

1. Before this Court is the Notice of Motion dated **11th November 2019** by which **PWM** (the Appellant/Applicant) seeks the following orders:-

1. SPENT

2. SPENT

3. SPENT

4. THAT the Honourable Court be pleased to order stay of the orders issued on **28th October 2019** in Nairobi Children's Case No. 1441 of 2018 with respect to payment of monthly maintenance of Kshs. 30,000/- pending interpartes hearing and determination of this Appeal.

5. THAT the Honourable Court be pleased to order stay of the orders issued on **28th October 2019** in Nairobi Children's Case No. 1441 of 2018 with respect to the Appellant taking out a medical cover with an outpatient limit of at least Kshs. 150,000/- and an inpatient limit of Kshs. 1,000,000/- pending interpartes hearing and determination of this Appeal.

6. SPENT

7. THAT the Honourable Court be pleased to order stay of the orders issued on **28th October 2019** in Nairobi Children's Case No. 1441 of 2018 pending interpartes hearing and determination of the appeal.

8. THAT the costs of this application be provided for.

2. The Application was premised upon **Sections 1A, 1B, 3, 3A, 63, 75, 78 and 79G** of the **Civil Procedure Act**, **Order 42 Rule 6**, **Order 51 Rule 1** of the **Civil Procedure Rules** and **Section 159** of the **Constitution of Kenya** and was supported by the Affidavit of even date sworn by the Applicant.

3. The Respondent **GWG** opposed the Application through her Replying Affidavit dated **20th December 2019**. The Application was canvassed by way of written submissions. The Applicant filed his written submissions dated **12th October 2020** whilst the Respondent filed the submissions dated **16th October 2020**.

BACKGROUND

4. On **29th November 2018**, the Respondent herein filed an application in **Nairobi Children's Court No. 1441 of 2018** before the lower Court seeking interim maintenance in respect of her two children fathered by the Appellant. On **28th October 2019** the learned trial Magistrate delivered her Ruling granting the orders for interim maintenance in the following terms:-

i. The Defendant/father shall take care of the children's school fees and school related expenses at their current school or any other school to be agreed upon by the parties.

ii. That Defendant/father shall continue paying Kshs. 30,000/- by end of every month for the children's food and general upkeep pending the hearing and determination of main suit.

iii. That the Defendant shall also provide the Children's medical care by taking out a medical cover with a reputable medical insurance provider with an outpatient cover of at least kshs. 150,000/- and an inpatient cover Kshs. 1,000,000/-. This shall make it easier for the child with a medical condition to be treated when need arises. The cover shall be in place within 45 days of this Ruling.

iv. That the Plaintiff/mother shall take care of the children's housing, clothing and utility bills including house-help by virtue of having actual custody thereof.

v. That the Defendant is granted 14 days within which to pay Kshs. 30,000/- the decretal amount herein failing which a Warrant of Arrest shall automatically issue.

5. Being dissatisfied with that decision of the trial Court the Applicant filed this application in the High Court seeking a stay of the said orders pending the hearing and determination of his appeal against the same.

ANALYSIS AND DETERMINATION

6. The Applicant appears to take issue only with the order that he pay monthly sum of **Kshs. 30,000/-** as interim maintenance for the two (2) children and with the order requiring him to take out medical insurance cover with an outpatient limit of at least **Kshs. 150,000/-** and an inpatient limit of at least **Kshs. 1,000,000/-**. The Applicant does not seem to be perturbed by the order requiring him to pay school fees and meet the school related expenses of the two children.

7. The Applicant submits that he is financially unable to pay monthly maintenance of **Kshs. 30,000/-** and to meet the costs for the medical cover as outlined by the Court. He argues that the trial Magistrate failed to take into account the detailed monthly expenditure as submitted in the Court. He stated that his monthly income is about **Kshs. 149,000/-** whilst his monthly expenditure is approximately **Kshs. 138,625/-** leaving a balance of only about **Kshs. 10,000/-** for his personal use.

8. The Applicant also avers that aside from the two children he fathered with the Respondent, he has two other minor children aged **6 years** and **10 months** whose care he is also responsible for. Therefore the Applicant pleads that if the said orders are not stayed, he faces the likelihood of being committed to Civil jail which will cause him both prejudice and substantial loss.

9. On her part the Respondent asserts that the Applicant is a man of means who has merely refused to comply with the maintenance orders as issued by the lower Court. That the Applicant earns way more than the **Kshs. 149,000/-** monthly which he admits. That the Applicants lifestyle belies this claim that he only earns **Kshs. 149,000/-** per month. She depones that the Applicant failed to avail proof of his monthly income.

10. The Respondent states that she herself earns only **Kshs. 30,000/-** per month from which she is required to provide for the children's food, housing, clothing and househelp. That she has been unable to afford accommodation for the minors who have been forced to seek accommodation from their maternal grandparents.

11. The Respondent submitted that one of her child is Diabetic and requires specialized medical care thus the medical cover is a necessity. Finally the Respondent submitted that it would not be in the best interest of the minors to stay the interim maintenance orders made by the trial Court.

12. It is trite law that in any decision involving the welfare of children, Courts are obliged to give priority to the **'best interests'** of the child. The fact that the parents of the minors have separated does not mean that the minors should be subjected to a lower standard of living than they have been used to. The Applicant submits that he is not able financially to comply with the orders of maintenance as directed by the trial Court. He urges that if the orders of stay sought are not granted he may be subjected to committal to Civil jail for failure to pay the amounts as directed which would result in **substantial loss to himself**.

13. **Order 42 Rule 6(2)** of the **Civil Procedure Rules** provides for the conditions to be met for an order of stay pending appeal to be granted by the Court. The Court must be satisfied that the Applicant stands to suffer substantial loss in the event the stay are not granted and secondly security must be offered for performance of the decree.

14. It is conceded that the Applicant meets the educational expenses for both children ie payment of school fees and school related costs. As stated earlier the Applicant is not seeking a stay of these particular orders. However the Applicant submits that he is unable to meet the order requiring him to pay **Kshs. 30,000/-** per month as well as the order requiring that he take out medical insurance for the two minors.

15. **Article 53(1) (e)** of the **Constitution of Kenya, 2010** provides that **both** parents of a child have equal responsibility to provide for their children whether said parents are married to each other or not.

16. The Respondent who is the mother of the minors has demonstrated that she earns an amount of **Kshs. 30,000/-** monthly. Annexure **'GWW-2'** to the Replying Affidavit dated **20th December 2019** is a Consultancy Services Agreement dated **1st January 2019** indicating that in return for specified Consultancy Services the Respondent will be paid a monthly fee of **Kshs. 30,000/-**. There has been no demonstration that the Respondent receives any further or additional income. Out of this **Kshs. 30,000/-**, the Respondent is required to provide housing, food, clothing, house help and other miscellaneous expenses for the children. The Respondent has annexed various grocery receipts indicating how much she spends just on food alone for the minors. She has also annexed Pharmacy and Hospital receipts from Gertrudes Children's Hospital indicating payment made for the children when they fall ill as young children are wont to do. Aside from expenditure for food the Respondent avers that one of the minors is Diabetic. He therefore requires a specialized diet to manage his condition and also requires constant medication and medical care.

17. The Applicant claims that his monthly earnings amount to **Kshs. 149,000/-**. The Applicant has not availed to this Court any documentation to prove that this is the only income which he receives.

18. The Respondent alleged that the Applicant has failed to disclose to the Court the fact that he owns various companies from which he also earns an income. She states that the Applicant is a beneficial shareholder in [particulars withheld] **Company, Bhuttan Limited** and [particulars withheld] **Limited**. That he has interests in [particulars withheld] **Court in South B** which lets out furnished Apartments to paying guest from which substantial income is derived. Annexed to the Respondents Affidavit are copies of receipts issued for short lets of said apartment at **Kshs. 95,000/-** and **Kshs. 85,000/-** per month (Annexure **'GWW2'**).According to the Respondent the Applicants earnings are closer to **Kshs. 443,000/-** per month.

19. The Respondent did not file a Further Affidavit to deny and/or controvert the allegations of his involvement in the named companies. I further note that the Applicant is the proud owner of a Toyota Prado as evidenced by the copy of the Search (Annexure **'GWW-1'**) for motor vehicle Reg. No. [particulars withheld]. This is not the vehicle of choice for a person of modest means.

20. It is apparent to this Court that the Applicant has not been totally forthcoming in respect of his monthly income. I am mindful of the fact that the Applicant has two other children whom he is also required by law to provide for. However the minors in question herein ought not be relegated to a lower position than the Applicants other children. All four children should be treated equally.

21. This Court is particularly mindful of the fact that one of the Respondents children is Diabetic. Given that Diabetes is a chronic condition requiring lifelong medical care, the orders that the Applicant take out adequate insurance over cannot be faulted. In my view the conditions attached to the said insurance cover were necessary given the fact that the child is living with a chronic illness.

22. This is not a matter in which security for performance of the decree would be appropriate. The children's needs cannot be put on hold pending the hearing and determination of the Applicants Appeal. In the case of **ZMO –VS- EIM [2013]eKLR Hon. Justice Musyoka** held as follows:-

“As a matter of principle, grant of stay of execution of maintenance orders in children's cases should be made in very rare cases. I say so because parents have a statutory and mandatory duty to provide for the upkeep of their minor children. There are no two ways about it. Suspension of a maintenance order is not in the best interests of the child, particularly in cases such as this one, where paternity is not in dispute. To my mind once a maintenance order is made where parentage is undisputed it should not be suspended pending appeal, where the appeal is on the quantum payable. The solution ideally lies in expediting the disposal of the appeal and staying the matter before the Children's Court to wait the outcome of the appeal. Tinkering with the quantum at this stage would amount to determining the appeal before arguments are heard from both sides on the merits of the same....” [own emphasis]

23. The above authority is **'on all fours'** with the present matter. The Applicant does not dispute paternity. As such it makes more sense to hear and determine the appeal on merit rather than staying the interim orders of maintenance granted by the Children's Court.

24. All in all I am not persuaded that the learned trial Magistrate made orders which were unwarranted and/or excessive in the circumstances of this case. The interim orders in my view were made to ensure that the best interests of the two minors were assured pending the hearing and determination of the matter.

25. Accordingly I am not persuaded that there is any need to stay those interim orders of maintenance. Therefore I decline to grant the stay orders sought in this application and I dismiss in its entirety the Notice of Motion dated **11th November 2019**. Each party to meet its own costs.

Dated in Nairobi this 21st day of May, 2021.

.....

MAUREEN A. ODERO

JUDGE