



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 194 OF 2012**

**MAAO (Suing on behalf of minors J Y O H & W H H)...PLAINTIFF/APPLICANT**

**VERSUS**

**CWH.....DEFENDANT/RESPONDENT**

**RULING.**

1. Before the court is an application made by the plaintiff, MAAO suing on behalf of two minor children, being the biological children of both herself as mother and the Defendant/Respondent as their father. The children are aged 13 and 12 years old and attend school at [particulars withheld] Nakuru.

2. At all material times to this suit, the plaintiff and the two children, as well as the defendant, when in Kenya, reside at the defendant's property known as **Nakuru Municipality/Block \*/\*\*\***.

In her application dated 3/10/2019, the plaintiff seeks numerous orders. On the 4/10/2019, pending interparties hearing, the court granted prayers No.1,4,5 and 6. The respondent/defendant was restrained from disposing off or in any way dealing with the suit property aforesaid and or evicting the plaintiff and the children therefrom.

3. By a consent order of the parties dated 2/11/2015 and adopted by the Court on the 27/1/2016, the Restriction placed on the suit property by the plaintiff on the 18/8/2011, and an order restricting any dealings with the said parcel of land were lifted and vacated to facilitate the defendant to obtain a separate title to the cottage, within the suit property, in which the plaintiff and the children reside, from another also thereon, which is occupied by other persons.

4. The issue that I am called upon to determine is on the maintenance of the minor children. Though served with the necessary application and hearing notice, the defendant's advocates have not responded to the application, despite the court extending time to the respondent to file his response.

5. Mrs. Muchela advocate urged the application for the plaintiff. The main issue as stated by the Advocate revolves around the property stated above as the residence of the minor children and the plaintiff, as well as provision of school fees and medical expenses for the children. **Under Prayer No.7 and 8**, the applicant seeks an order to set aside a consent judgement recorded by the parties on the 1/2/2016 and in the alternative, that the said order be reviewed and or varied to incorporate another consent by the parties dated 13/5/2013.

**MAO** swore the affidavit in support. She avers that both consent orders were procured through fraud and misapprehension and/or in ignorance of material facts on her part.

6. On maintenance, I have considered the affidavits and submissions. **Section 4 (2) of the Children's Act**, provides for the childrens welfare, their rights as enshrined under **Article, 53 (2) of the Constitution**, including guidance, correction, right to care, health care education and protection. It is a joint responsibility of both parents, whether married or not – as expounded in the case **JAM VS. FOK (2019) e KLR**

7. The minor children are under the physical custody of their mother, the plaintiff. The defendant has acknowledged paternity thereof, being the biological father of the children – **See Section 25 (2) Children's Act**.

There being no issue as to the children's paternity, it follows that each of the parents must play their role in the upkeep and welfare of the children. This shall be looked into with regard to their age, and circumstances and conditions they were living in before the biological father, the defendant stopped playing his part, and left them with their mother, the plaintiff.

8. **Under Section 24(1) of the Children's Act** the parents are obligated to share their parental responsibility and neither have a superior right or claim against the other in exercise of such parental responsibility – See **MMM –Vs- ENW (2016) e KLR**.

In seeking to ascertain maintenance, the court ought to have regard to the existing and potential means of the parties, their respective earning capacities, financial needs and obligations. They must be ascertained, and not by pure speculations.

9. It has been submitted for the applicant that the defendant has been, and is, paying school fees and school related items, including school transport for the children, and that there are no arrears in school fees and that the defendant has also been providing Kshs.20,000/= monthly for upkeep of the children while residing in his property, the suit property.

This is contained in settlement offers by the defendant, and accepted by the plaintiff, and contained in the orders adopted by the court on the, 23/10/2013 and 11/2/20167. These are the settlement offers that the plaintiff seeks to have the court set aside.

10. The plaintiff and mother to the children has not deposed as to her role, to the children's welfare other than staying with them and taking care of them. She too has not disclosed or demonstrated her financial status or otherwise.

**In her prayer No.5**, the applicant seeks for an order to restrain the defendant from leaving the country until the matter of maintenance of his children is resolved.

With respect, to do so would be to infringe the defendant's rights of freedom of movement as enshrined **under Article 39 of the Constitution**, being a citizen of Kenya, among other countries.

I decline to take that route as it is unwarranted in the circumstances.

**11. The upshot is that, I allow the application dated 3/10/2019 in the manner herebelow stated:**

**That pending hearing and determination of this suit,**

*(i) The Applicant and the two minor children shall continue to reside at the defendant's one cottage, the one they currently occupy in the Defendant's Land Parcel Nakuru Municipality Block \*/\*\*\*.*

*(ii) The defendant is, by himself his agents or by whomsoever barred and restrained by an order of injunction, from attempting to evict or interfere with the quiet and peaceful occupation by the plaintiff and two minor sons, at the designated cottage within Nakuru Municipality Block \*/\*\*\*.*

*(iii) The defendant shall continue to pay school fees and all school related requirements including school transport for the two minor children.*

*(iv) The defendant shall provide for the two children health care by taking out a health medical cover from a reasonable insurance company within Kenya.*

*(v) The defendant shall pay a monthly sum of Kshs. 30, 000/= for the Children's upkeep, with liberty to apply for review or variation, after one year, as circumstances may demand.*

*(vi) That the applicant is ordered to take active steps to set down the suit for hearing.*

*(vii) Prayer No. 5, 7 and 8 of the application shall be determined upon evidence hearing of the suit.*

**Dated, signed and delivered on this 12<sup>th</sup> Day of March 2020.**

**J.N. MULWA**

**JUDGE.**