REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MISCELLANEOUS CIVIL APPLICATION NO. 26 OF 2019

AT MALINDI

JJF.....APPELLANT

VERSUS

EMC (Suing as Next friend to V,V and VJ).....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Mr. Richard Otara for Appellant

Mr. Omagwa Angima for Respondent

RULING

Background

The appellant and respondent are married to each other since the year 2004. In the course of the subsistence of the marriage, they have been blessed with four children namely:

1. **VJF aged 10 years**
2. **VJF aged 6 years**
3. **VJF aged 3 years**
4. **VJF aged 1 year**

In a plaint filed in the Children's Court on 13th October, 2016 EMC applied for an order seeking maintenance order of Kshs.25,000 and school fees of Kshs.53,400 per year form 2017.

The respondent JJF filed a statement of defence alleging that the appellant is guilty of adultery and therefore it necessitated him to desert the matrimonial home. He denied the allegations of failure to guarantee maintenance of the children concerns, citing loans being deducted from his salary. Further the respondent pleaded that he is unable to pay school fees for the children and other expenses as pleaded in the plaint.

On 25th January, 2017 the trial magistrate in an application dated 12th October, 2016 made the following orders:

> **"That the respondent/applicant do pay interim maintenance of Kshs.8,000 per month with effect on the 5th day of every month. The respondent to settle school fees and educational needs of the children on term to term basis. The medical expenses be catered for by the respondent upon being notified by the applicant whenever the children require medical attention."**

Being aggrieved with this order, the respondent appealed to this court on the following four grounds:

> **1. That the learned trial magistrate erred in both fact and law not to call for an affidavit of means before making an order of maintenance of Kshs.8,000 per month.**

2. That the learned trial magistrate erred in law and fact by failing to allow the applicant access to the children.

3. That the learned trial magistrate clearly stated that the parental responsibility is a joint venture but failed to apportion the responsibility in monetary form.

4. That the learned magistrate failed to appreciate that he would shelter all the responsibilities from the payslip.

On appeal both counsels filed written submissions on the issues raised by the appellant.

Analysis

The Law

The law relating to children is first entrenched in our Constitution under Article 53 of the Constitution and several other legislations. The one master piece statute is the Children's Act No. 8 of 2001 which essentially incorporates the principles of the convention on the rights of the child and the African Charter on the Rights and Welfare of the Child for connected purposes. The constitution in Article 53(2) imposes and recognizes the principle of a child's interest to be of paramount importance in every matter concerning the child.

The children Act of 2001 also recognizes and imposes an obligations upon parties to ensure survival and best interest of the child explicitly to safeguard and promote their rights having regard to their welfare and the best interest in all the spheres of their lives.

This principle on the best interest of the child has been expressly summarized in the case of **Forsythe v Jones SCCA 49 of 1999 JMCA** where the court held as follows:

> **"A court which is considering the custody of the child, mindful that its welfare is of paramount importance, must consider the child's happiness, its moral or religious upbringing, the social and educational influences, its psychological and physical well-being and its physical and material surroundings, all of which go towards the true welfare. These considerations although the primary ones, must also be considered with the conduct of the parents, as influencing factors in the life of the child and its welfare."**

Further in the persuasive case of FLC the court in Australia recognized the balancing act of the court in safeguarding the best interest of the child as follows:

> **"It cannot be in the child's best interest to have the order for joint custody continue when the relationship currently existing between the parties is such that communication, where it takes place, between them is acrimonious and agreement on matters relating to the child so hard to achieve."**

It is a legal and Constitutional obligations of every parent to have regard to the welfare of the child as the first and paramount consideration. It follows that the courts jurisdiction is oversight in safeguarding the scheme of the prethora rights and in upholding the best interest of the child.

The decision in **J v C 1969 1 ALL ER 788** based on the English guardians of infants Act delved into the scope of the meaning of the words shall require the welfare of the infant child as the first and paramount consideration in the following passage:

> **"Reading these words in their ordinary significance, and relating them to various classes of proceedings which the section has already mentioned, it seems to me that they must mean more than that child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationship, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be in that which is most in the interest of the child's welfare as that term has now to be understood."**

A question often arises as to what is the court expected to take into account in determining the canopy of rights and the best interest of the child considerations. In determining these issues the English case of **Re Mcrath 1893 ICh 143** set out the following guiding principles:

> **"The dominant matter for the consideration of the court is the welfare of the child is not measured by money only or physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being, nor can the ties of affection be disregarded."**

With this in mind a court of law handling children matters has to be hesitant under Article 53(2) of the Constitution and Section 4(2) of the Children's Act to presume that the best interest of the child consideration has more to do with financial provision than other rights of fundamental importance.

The courts statement in **Poutney v Morris 1984 FLR 381** also of comparative jurisdiction stated as follows:

> **"There is only one rule, that rule is that in a consideration of the future of the child, the interests and welfare of the child are the paramount consideration. But within that rule, the circumstances are so infinitely varied that it is unwise to rely upon any rule of thumb, or any formula to try to resolve the difficult problem which arises on the fact of each individual case."**

In principle therefore the position in law is that both parents regardless of their mental status have an equal responsibility to provide for the best interest of the child beyond the question of financial provisions. Article 53(e) of the constitution provides that **"Every child has a right to parental care and protection which includes equal responsibility of the minor and father to provide for the child, whether married to each other or not"** unless there is existence of compelling or extenuating circumstances the court may not depart from this constitutional provisions. In this regard for all interests and purposes of to promote the welfare and best interest of the child.

The precedent setting case of **Zak & another v the Attorney General 2013 eKLR** gives a singular decision on the considerations that are attended to the right to equal benefit of the law under Article 27 of the Constitution. It is clear from the above decision that both parents whether married to each other or not at the time of the child's birth have equal responsibility to safeguard, protect and preserve the welfare and best interest of the child.

A court which is asked to consider the welfare and best interest of the child must in exercising jurisdiction determine such dispute in accordance with Article 53 of the Constitution and 54(2) of the Children Act. It is important to address the relevant issues of the best interest of the child by placing obligations to both parents. The term parental responsibility connotes shouldering all rights and duties with regard to the child and his or her property.

So does the order made by the learned trial magistrate fall within the scope of Article 27 on right to equal protection and equal benefit of the law or under Article 53(e) on equal parental responsibility of the mother and the father to provide for the child and Article 53(2) and Section 4(2) of the Children's Act on the best interest of the child? In these three questions the impugned ruling demonstrates that the learned trial magistrate misapprehended and applied wrong principles to the claim.

Therefore in the context of the proceedings in Children Case No. 35 f 2016, this legal test found little significance in the questions before that court.

It may then seem that the award on maintenance of Kshs.8,000 per month was discriminatory as no evidence flows from the decision. That both parents have equal responsibility in the maintenance, custody, guardianship and safeguarding the socio-economic rights in their best interest.

The operative part of the judgement fails to demonstrate whether a social inquiry was conducted with particular reference to the children's interest before the final decision was reached to deny or grant custody, order for payment of fees of Kshs.53,000 per term and to go a step further to incorporate the children's concerns in relation to spectrum of best interest being of paramount importance.

What informed the learned trial magistrate of reasonable means of support/maintenance for the appellant to contribute in making the order is in reality difficult to comprehend from the record. The appellant and the respondent were but enjoined to give a full inventory of the assets and liabilities to the court in respect to the claim on maintenance.

It is for this reason that court is mandated by law to make an order for support, welfare, maintenance or for any just reason to have called for evidence on contribution of each parent. My understanding of the illustrative constitutional and statutory provisions is that the obligation and responsibilities in the case of this nature does envisage a criteria of ratio apportionment in accordance with the income of the parents.

In absence of the affidavit of means and full disclosure of the earnings, liabilities and income measurable to both parents I believe it would be an exercise in futility to determine and approximate an order in maintenance and support in the best interest of the child.

For the above reasons I am satisfied that the trial court was wrong in determining the amount of support without adequate material from both parents. The order now is that the appeal is allowed. The file is returned back to the Chief Magistrate to allocate the case to another court to expedite the hearing within a reasonable time. I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 9TH DAY OF MARCH, 2020.

.....

R. NYAKUNDI

JUDGE