



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CIVIL APPEAL NO. 3 OF 2018

BM.....APPELLANT

VERSUS

BC.....RESPONDENT

(Being an appeal from the Judgment and decree by Hon. M. Nyigei (RM)

in Bomet PMC Maintenance Case No.46 of 2013 delivered on 24/7/2017)

JUDGMENT

1. This is an appeal from the judgment and decree in Bomet PMC Maintenance Case No.46 of 2013 where the Respondent was granted the following orders against the Appellant.

i) That custody of the child awarded to the Respondent.

ii) That the Appellant is ordered to pay a monthly contribution of kshs.4,000/- towards maintenance of the child w.e.f August 2017.

iii) That Appellant is further ordered to pay school fees for the child until she completes her studies.

iv) That the Appellant is granted visitation rights upon making prior arrangements with the Respondent.

v) That each party to bear its own costs of the suit.

2. The case proceeded exparte and the Appellant is aggrieved with the decree and judgment of the court. This matter proceeded before Justice Muya and the Appellant's counsel filed an Application dated 18/1/2019 seeking to reinstate the Appeal which was dismissed on 3/12/2018. I take the liberty to reinstate the Appeal and consider it on merit. I find that the Appeal was dismissed due to the mistake of his counsel.

3. The Appellant had entered appearance and filed a defence in case No.46 of 2013 but he did not appear in court for the hearing of the case. The case proceeded exparte.

4. The respondent said she lived with the Appellant between 1999 to 2005 when they parted ways. The child was born on 1/10/2002 and has always been in the custody of the Respondent.

5. In his defence the Appellant asked the court for custody of the child and said the Respondent had denied him access to the child and that she cannot be trusted with the child due to her immoral behaviour.

6. The court found that the paternity of the child is not in dispute. The court also found that the parties had entered into a parental responsibility agreement dated 15/5/2013 where it was agreed that the Appellant pays school fees for the child and that when school closes the child should stay with the Appellant.

7. The court gave the impugned orders and the Appellant has appealed to this court on the following grounds:

i) That the trial magistrate erred in law and in fact in disregarding the law on the application of the Children's Act thus arriving at a wrong conclusion.

ii) That the trial magistrate erred in law and in fact by issuing orders that were contrary to Article 53 (i) (e) of the constitution of Kenya which requires that both parents should have equal responsibility.

iii) That the trial magistrate erred in law and in fact in disregarding that the Appellant has several other Children to take care of and further that the sum of kshs.4,000/- is too high in the circumstances.

iv) That the trial magistrate erred in law and in fact in not according the Appellant a fair hearing and in applying the wrong principles.

8. The Appellant filed written submission but the Respondent relied on a Replying Affidavit sworn on 12/3/2019. I have considered both the Replying Affidavit and submissions filed herein and I find that the issues for determination are as follows:

i) Whether the exparte judgment and all consequential orders should be set aside.

ii) Who pays the costs of the appeal.

9. The first duty of the first Appellate court is to re-evaluate the evidence before the trial court and to arrive at its own conclusion bearing in mind that the trial court had the opportunity to see the witnesses. The Court of Appeal stated in **Okeno v The Republic [1972] EA32, 36** as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.”

10. I find that it is not in dispute that the case proceeded exparte. The Appellant is seeking to set aside the ex parte judgment. Setting aside an ex parte judgement is a matter of the discretion of the court.

11. In the case of **Esther Wamaitha Njihia & two others vs. Safaricom Ltd[2014] eKLR** the court citing relevant cases on the issue held as follows:-

"the discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.[4]) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise , to obstruct or delay the cause of justice(see Shah vs. Mbogo[5]). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali. [6])It also goes without saying that the reason for failure to attend should be considered."

12. I find that the Court has to consider several issues including the reason for failure to appear in court by the Appellant. In the case of **Captain Philip Ongom v Catherine Nyero Owota SCCA 14/2/2001 [2003] KALR**, the court held inter alia that the court must be satisfied about one of the two things namely:-

(a) either that the defendant was not properly served with summons;

(b) or that the defendant failed to appear in court at the hearing due to sufficient cause.

13. The Court of Appeal of Tanzania in the case of **The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others Civil Appeal No. 147 of 2006** in discussing what constitutes sufficient cause had this to say: -

“It is difficult to attempt to define the meaning of the words ‘sufficient cause’. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant”

14. The Appellant who was acting in person said that he was not aware of the hearing. I find that paternity of the minor is not denied. It is in the interest of justice that the Appellant be given a chance to be heard before final judgment is given. I allow the Appeal on the following conditions;

i. That the exparte judgment be and is hereby set aside.

ii. That the Appellant continues to pay interim maintenance of Ksh. 4,000 per month until the case is heard inter partes and determined.

iii. That the case be heard by any other magistrate other than the one who gave the impugned orders.

iv. That the Appellant bears the costs of this appeal.

Judgment delivered dated and signed at Bomet this 5th day of August 2020.

A.N. ONGERI

JUDGE