



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO 145 OF 2019

LMN.....APPELLANT/APPLICANT

VERSUS

FWM AND JWM

(Minors suing through their mother) JWM.....RESPONDENT

RULING

1. This is a Ruling of an application filed by the Respondent, in this appeal, and which is dated 22nd July 2020. The Respondent by that application seeks an order for the Appellant, in this appeal, to provide to the Respondent with an additional amount of KSh.10,000 for the upkeep of the children of that union.

Background

2. The learned trial magistrate before the Thika Children's court in children's case No. 48 of 2019 entered judgment on 9th October 2019, that is that the Appellant to provide and cater for school fees and all school related expenses of the children of the marriage, and further that the Appellant do pay children's maintenance of KSh.15,000 per month on or before 5th day of every month.

3. The Appellant being aggrieved by that judgment he filed this appeal. Pending the hearing and determination of this appeal the Appellant sought by an application filed on 24th January 2020 a stay of execution of the Children's court judgment. This court by its Ruling dated 12th May 2020 revised downward the monthly maintenance payable by the Appellant for the upkeep of the Children from KSh.15,000 per month to KSh.12,000 per month. This court, by that Ruling did not alter the order for the Appellant to pay the children's school fees and other school related expenses.

The Notice of Motion Dated 22nd July 2020

4. The Respondent deponed in her affidavit in support of that application that following the outbreak of the pandemic of COVID-19 and the government's directives to close schools the children of the family have been at home and therefore that the Appellant has not had to pay school fees and school related expenses as required by the Children's Court judgment. The Respondent stated further that due to the Children's stay at home she has faced several financial constrains because the household expenses have doubled. That the costs of utilities, such as water, electricity and internet have gone up and similarly the costs of food and toiletries have also increased. To support this the Respondent provided her own list of item and their costs she has provided for the childrens' use while at home. Further the Respondent deponed that had the children been attending school the school would have provided for their lunches and snack which costs would have been catered under the school fees payable by the Appellant.

5. Further that during the COVID-19 pandemic the school directed the children to continue with their lesson online at a weekly fee of KSh.750 which the Appellant has failed to make. That because the Respondent was unable to meet that cost of tuition the Respondent had to obtain wifi connection for the children to share learning, online, with other children. That accordingly the amount of KSh.12,000 maintenance paid by the Appellant fails to lift the financial burden of the Respondent. That also the Appellant's haphazard remittance of the maintenance amount to the Respondent had the Respondent to borrow money in order to meet the needs of the children.

6. The Appellant opposes the application. He deponed that the COVID-19 pandemic affected his remuneration downward. The Appellant attached an addendum to his contract of employment with his employer which referred to the adverse effects on the employer's business that the pandemic and the subsequent government directive of lockdown of parts of the country and proceeded to state that as a consequence the Appellant's gross salary would be KSh.48,400. The Appellant also annexed his employer's written notice of intention to declare its staff redundant. The appellant did not however state that he had been affected by that redundancy notice. The Appellant did however state that he was not in a position to provide an additional amount of KSh.10,000 for the children's upkeep because he had suffered a salary cut, and also because he has another family he support.

Analysis And Determination

7. I have considered the parties' affidavit evidence and submissions. Indeed, in considering applications such as the one before me the court, in deliberating over the same, has to consider that the children's best interest as paramount. This is what learned Justice Achode stated in the case **SMK -v- EWN (2015) e KLR**, thus:

"16. First and foremost the court notes that the orders that the Applicant has asked the court to stay relate to children. Under Article 53(2) of the Constitution the best interests principle should be applied in all cases concerning the child. Article 53(2) provides that:

"A child's best interests are of paramount importance in every matter concerning the child". The said Constitutional provision should be read together with Section 4(3) of the Children's Act, which reads thus: -

"(3) All judicial institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that is consistent with adopting a course of action calculated to -

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child..."

As stated above the orders made by the Children's Court, which this Court has been invited to stay, were made in favour of the Children and were meant to serve the interests of the said Children."

8. As stated before the Respondent is in receipt of KSh.12,000 for the children's maintenance. The Respondent is looking for a helping hand from the Appellant to provide additional amount for the children during this time when they are restricted at home due to COVID-19 pandemic. In considering the prayer for extra funds to be provided for the children the court needs to be conscious of the fact that the difficulties, related to the COVID- 19 pandemic, has also befallen the Appellant who provided evidence that his employer not only has reduced his salary due to the effects of business, because of COVID-19, but that there is the threat of redundancy.

9. It is in view of the above that I make the following orders:

(a) Until the children's schooling is re-opened the Appellant will increase the monthly maintenance from the present amount of KSh.12,000, presently being made to the Respondent; to KSh.15,000 per month with effect from 5th January 2021.

(b) For avoidance of doubt if the children's schools are reopened by 5th January 2021 the present status quo of remittance of maintenance and school fees and school's related expenses will subsist, that is the Appellant shall continue to pay KSh.12,000 maintenance and the children's fees and their school's related expenses, until the hearing and determination of this appeal or until further orders of the court.

SIGNED AND DELIVERED VIRTUALLY THIS 14th DAY OF DECEMBER 2020.

MARY KASANGO

JUDGE

14th December 2020

Before Justice Mary Kasango

C/A: Kevin

For the Appellant: Ms Kiarie holding for Mr. Ndungu Mwaura

For the Respondent: Ms Waithira Mwangi

COURT

Ruling virtually delivered in their presence.

MARY KASANGO

JUDGE