REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO.41 OF 2017

SMW.....APPELLANT

VERSUS

EWM.....RESPONDENT

(Appeal against the Judgment of Hon. B.M.Ekhubi-Senior Resident Magistrate

in Othaya Children case No.9 of 2016 of 16th October 2017)

JUDGMENT

The appellant herein SMW and the respondent EWM married under Kikuyu customary law in 2006. They were blessed with 2 children: -

A son FWM – in 2008

A daughter BNM- in 2012

They had their own problems and by 2016 the respondent had left the matrimonial home with the 2 children to her parent's home, and enrolled them in a different school. She had also enrolled in Othaya Teacher's College.

On 20th September 2016 the two appeared before the District Children's Officer Nyeri South to discuss the issues of parental responsibility for the 2 minors. They entered into a parental responsibility agreement which shows that the mother was to have custody of the minors, provide shelter, basic needs, food and clothes, while the father would pay school fees and cater for healthcare.

The respondent was dissatisfied with this arrangement and filed suit on 26th September 2016 seeking: -

i) To have the legal and actual custody of the children.

ii) To provide home clothing and health

iii) The defendant to pay Kshs. 10,000/- per month for food, education and education accessories.

An exparte judgment was entered against the appellant on 15th November 2016 and a decree was issued in terms of the prayers in the plaint.

At some point on 2nd March 2017, the exparte judgment was set aside and the appellant allowed to file his defence so that the matter would be heard on its merit.

During the hearing, the respondent reduced her claim to Kshs.6000/- . She said she did not know whether the appellant was employed but that at the time of separation he was a boda boda rider, had leased tea bushes, and had a cow which generated income. She said that the agreement they made at the District Children's office was erroneous. She relied on a letter written by the Children Officer to the effect that following the signing of the agreement the respondent had complained about the heavier responsibility on herself and attempts to review the same had failed as the appellant would not relent.

She said she did not know that the respondent's cow had died, or that his lease of tea bushes had not been renewed or that he had sold his motorcycle in 2014 to pay her hospital bills. She said she did not know that the respondent was now a casual labourer. She confirmed that

she was a trainee and unemployed.

In his defence the appellant told the court that the children were attending a public school when they were all living together but the respondent had taken them to a private school, that the tea bushes lease had expired and due to incitement from the respondent the lease had not been renewed, that the cow had died out of poisoning in April 2017 and he suspected the respondent, that he sold the motorcycle in 2014 at the respondent was aware.

That he was a casual laborer and could not afford the school fees, which he was paying now in installments. He produced supporting evidence- receipts, Mpesa statements. He said that the cost of school accessories should be shared.

He said the balance in his Mpesa statements included money for the group he was chairperson of, and money his brother had sent him to construct a house for him.

In the judgment of 16th October 2017 the court granted the plaintiff's respondent prayer-

1) Defendant to pay Kshs.6000/- per month upkeep for the 2 children.

Thereafter the appellant proceeded to pay the money in various installments. On 8th February 2018 appellant told the court that he was unable to pay – by then he was in arrears for January of Ksh.6000/- and a previous Kshs. 1,100/-. The respondent told the court,

> "*The children are suffering. I am a student and I cannot afford to feed and clothe the children*"

The court issued a warning for appellant to bring the money by 15th February 2018. Come that date he told the court he was unable to pay.

The respondent told the court that the appellant was blatantly refusing to pay yet she was not working but she was supporting the 2 children.

By 26th February 2018- the appellant had raised Kshs.730/-. He told the court he could not afford.

The respondent told court that the children were suffering.

The court stated,

> "*The defendant has flagrantly disobeyed orders of the court. However he has requested for one month, I will give him that latitude to offset the outstanding amount. Mention on 26/3/18"*

By 26th March 2018, appellant had paid Kshs.900/- only, leaving a balance of Kshs. 18,000/-.

The plaintiff's plea was that the children were suffering. On 25th April 2018 a warrant of arrest was issued against the appellant following the respondent's information to court that she had notified him of the date and he had told her he would not attend court.

On 4th December 2017 /appellant brought an application for stay pending appeal. I ordered that the same be served on the respondent. On 19th April 2018 the matter was before Mshila J. The appellant proposed to deposit Kshs.3000/- per month in the respondent's account if he was granted stay pending the appeal he had lodged.

The respondent had been served with the application and was absent. The application was allowed. The appellant was granted stay pending appeal subject to the deposit of Kshs.3000/- per month into the respondent's account on the last day of every month.

As at the time of hearing the appeal, the stay had lapsed since the appellant had defaulted in depositing the money for upkeep, leaving the respondent at liberty to execute for the outstanding sums. Respondent raised the issue of the default by the appellant and the court referred her to the orders on record. That the stay of execution was subject to his depositing the money in her account.

The grounds of appeal are set out as follows:-

> *1. The learned Senior Resident Magistrate erred in law and in fact in failing to consider that what the Appellant told the court in respect of his intention to have the **custody of the children** was not recorded during the hearing of the said children's case.*
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> *2. The learned Senior Resident Magistrate erred in law and in fact in taking to consideration that the Appellant in the so called **"parental responsibility agreement"** made in the children's office **under pressure while as the children's officer** was totally biased against the Appellant and she could not allow the Appellant to express himself.*
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> *3. The learned Senior Resident Magistrate erred in law and in fact in failing to consider that because the **Respondent is a student** in Othaya Teachers College she cannot maintain the children and at the same time she pays her college fees, and as such the children will only suffer more and under the hands of the Respondent.*
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> *4. The learned Senior Resident Magistrate erred in law and in fact in failing to consider that the Appellant cannot refuse the custody*

of his children while as the children are suffering at the home of the Respondent who does not live with them because she is a boarder at Othaya Teachers College and ***the children are staying with their grandmother, who has no source of income****.*

5. The learned Senior Resident Magistrate erred in law and in fact in considering that the Appellant was ***earning*** *some money simply because he was shown a* ***balance in the Mpesa account*** *of the Appellant of Kshs. 30,300/- which was not his.*

6. The learned Senior Resident Magistrate erred in law and in fact in taking to consideration that the ***Appellant is employed*** *while as the said sum of Kshs. 30,300/- was money entrusted to him by his brother, otherwise there was nothing else to show that the money credited to the Appellant was brought their monthly or not and he cannot afford Kshs.6000/-.*

7. The learned Senior Resident Magistrate brought some ***extraneous matters*** *to support the argument of the Respondent has true and worthy of any credit in the said children's case No.9 of 2016 Othaya.*

The issues then are:

1. Whether the appellant can have custody of the children and take care of them.

2. Whether the parental responsibility agreement entered before the children officer was oppressive to the appellant

3. Whether the respondent's status as a student is such that she cannot maintain the children, as well as pay her fees.

4. Whether the children are suffering by being left with the respondent's elderly mother who cannot maintain them

5. If the answer to 3 and 4 is true whether the children should not be placed in the custody of the appellant

6. Whether the appellant is unemployed and can afford the Kshs.6000/- per month ordered by the trial court.

7. Whether the trial magistrate considered extraneous matters in determining the case.

Having heard the appellant and the respondent in submissions, it is clear to me that the issue, in a nut shell is whether the trial magistrate erred in granting the order that the appellant pay the respondent the sum of Kshs.6000/- per month for the upkeep of the 2 children.

The basis for a maintenance order is parental responsibility. This is defined at s.23 (1) of the Children Act as-

-The duties

-Rights

-Powers

-Responsibilities

-Authority

which *by law* a parent has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child. So, these duties, rights, powers, responsibilities and authority of a parent over a child are defined by law, and may change depending on the changing capacities of the child. That is to say they will be determined by law.

That is why the same law goes on to define some of the duties to include maintenance of the child. Maintenance includes the provision of adequate diet i.e. food, shelter, clothing, medical care, education and guidance, protection from neglect, discrimination and abuse.

The parent's rights include the right to give parental guidance – in religious moral, social, cultural and other values, determine the name of the child, appoint a guardian etc.

These duties have been set out as the rights of the child under Article 53 of the Constitution as the right – to a name and nationality, to education, basic nutrition, shelter and health care, protection from abuse, neglect, and all forms of violence and to parental care and protection – which is the equal responsibility of the father and the mother.

In addition, the best interests of the child are of paramount importance in every matter concerning a child.

Hence, a maintenance order will be one which encompasses the duties and of rights of the parents, and the rights of the child, putting at the center of it all the best interests of the child

But what do we mean by best interests on the child? The term, though used generously throughout the Children's Act is not defined. Section 4 however binds all persons to consider the best interests of the child.

Section 4 (2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(3) All judicial and administrative 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 this 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;*

(c) Secure for the child such guidance and correction as is necessary for the ***welfare*** *of the child and in the public interest.*

(4) In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity.

From the wording of section 4 (3) a, b, and c, it is evident that the welfare of the child is central to the attainment of the best interests of the child. The term **welfare** is not defined but it generally refers to the overall well- being of the child. There is no specific definition or guide in the Children Act as to what this welfare is and how to determine the same so as to arrive at the best interest of the child.

Bromley's Family Law, Eleventh Edition (2015), decries the dearth of judicial articulation on what the term welfare means despite *'the welfare principle [being] the cornerstone of child law for a considerable time'*. The definition found in **Re McGrath (Infants) [1893] 1 Ch 143 at 148**, described as '*an early* 'definition quotes Lindley L J:

"…the welfare of a child is not to be measured by money alone nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare must be considered as well as its physical well-being. Nor can the ties of affection be disregarded. "

Welfare is what can be provided with money, physical comforts, religious and moral upbringing, and parental love and attention which comes with access. At page 400, Bromley, there is what is described as the 'welfare checklist' which is similar the provisions of s. 76 of the Children Act which sets out the **general principles** with regard to the court's proceedings. These guidelines are tied to section 4 for obvious reasons.

(1) Subject to section 4 where a court is considering whether or not to make one or more orders under this Act with respect to a child it shall not make the order or any other orders unless it considers that doing so would be more beneficial to the welfare of the child than making no order at all.

(3) Where the court is considering whether or not to make an order with regard to a child, it shall have particular regard to the following matters—

(a) The ascertainable feelings and wishes of the child concerned with reference to the child's age and understanding;

(b) The child's physical, emotional and educational needs and in particular, where the child has a disability, the ability of any person or institution to provide any special care or medical attention that may be required for the child;

(c) The likely effect on the child of any change in circumstances;

(d) The child's age, sex, religious persuasion and cultural background;

(e) Any harm the child may have suffered, or is at risk of suffering;

(f) The ability of the parent, or any other person in relation to whom the court considers the question to be relevant, to provide for and care for the child;

(g) The customs and practices of the community to which the child belongs;

(h) the child's exposure to, or use of drugs or other psychotropic substances and, in particular, whether the child is addicted to the same, and the ability of any person or institution to provide any special care or medical attention that may be required for the child;

(i) The range of powers available to the court under this Act.

(4) The court may, if it considers it imperative for the proper determination of any matter in issue before it, of its own motion or upon application, call any expert witness it shall deem appropriate to provide assistance to the court, and the expenses of any such witness shall be determined by the court and shall be defrayed out of moneys provided by Parliament.

Every person considering the best interests of the child ought to treat this as the checklist to consider as the guide towards determining the best interests of the child. It is clear then it is not just about money, but about the complete welfare of the child, the child's feelings, his or her

needs, the capacity of the parents or any other person to provide child's needs. These are questions that the court ought to ask itself. The court can obtain more information by seeking reports from relevant authorities as provided for under s. 76(4) and s. 78 of the Act.

In addition, the court has powers under s. 114 to make other orders in the best interests of the child. e.g.

> *(a) An **"access order"**, which shall require the person with whom the child is residing to allow the child to visit, or to stay periodically with the person named in the order, or to allow such person to have such other contact with the child as may be directed by the court:*
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> *(d) a **"child assessment order"** requiring a child to be investigated or evaluated by a person appointed by the court to assist the court in determining any matter concerning the welfare and upbringing of the child;*
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> *(e) a **"family assistance order"** requiring a person appointed by the court to provide such advice, counselling and guidance to a child, his parents or custodian or guardians, the child's relatives, or any person who has care and control of the child or with whom the child is residing, as the court may specify;*

What I am saying here is that in making the final orders in the best interest of the child, the court ought to have been clear as to what orders were available to it to determine those interests of the children, what the actual needs of the children herein were, what needed to be done to provide for them, how they were to be provided for and who was best placed to provided them. The fact is, these 2 adults lived together as husband and wife for about 10 years and had the 2 children. It is their joint and equal duty to raise them. They are socially and legally responsible for the upbringing of the children. If they had not separated and created the crisis that is: how the children will to be taken care of, the family appears to have been managing within its means. It would appear, from the affidavit of the respondent that there was the usual underlying issue of another woman, and for the appellant the suspicions of unfaithfulness.

These are situations that the children had nothing to do with. The court needed to make that clear to the parties. That as the adults in the matter they are to keep those issues separate from the issues the maintenance and custody of the children, only involving the children where necessary without jeopardizing their welfare.

From the foregoing it is evident that the trial court awarded the sum of Kshs.6000/- simply because the respondent said so. There was no evidence supplied to the court as to the actual needs of the children. There was no analysis of what the welfare of the children required as provided for under s. 76 of the Children Act. There was no justification for Kshs.6000/- and not Kshs.10,000/- the respondent had sought earlier. It was simply a figure clutched from the air.

I say so because from the record there was no explanation as to how the sum claimed dropped from Kshs.10,000/- per month to Kshs.6000/- per month.

The respondent had also not demonstrated what her contribution was going to be taking into consideration that although she was a student, she had taken the children out of a public school into a private school. She had not demonstrated the justification for the same or that she had consulted the appellant and he was agreeable or that there was a demonstrable change in the overall incomes of either of them.

Sharing of parental responsibility for children should not be arbitrary. It should be well laid out by the parties. Children courts have a responsibility, to pursue the procedure that least disrupts the lives of the children involved, that least adds to the friction between warring parents. My humble view is this:

> 1. The first point of stop should have been the social inquiry report. S.76 of the Children Act clearly lays out the 'welfare check list'. The principles laid out there provide for the court an objective checklist which can be investigated through a request for a social inquiry report from the Department of Children Services. Through this report the court would be provided with an independent analysis of the state of the child or children as at the time the matter is being litigated. It would also bring on board the voices of the children to be heard above the cantakary that is their parent's disagreement. The report would give the ***status quo*** of the welfare of the children, and the status of each parent through a home visit, if necessary, school visit. The court would also get a glimpse of the underlying issues which the warring parents would have an opportunity bring on board giving the court the chance to interrogate the necessity for psycho social support and any other appropriate s. 114 orders.
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> 2. The parties have an obligation to supply to the court an affidavit of means. It is expected that each of them fends for themselves in one way or the other even as they live separately. This is information that is verifiable and would be of assistance in determining what each of the parents will provide, by arriving at a balanced distribution of the duties of the parents to maintain the children.
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> 3. The parents know the needs of their children. They are obligated in the affidavit of means to set out the specific needs of the children and how each parent intends to meet his/her share of the needs.
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> 4. Decisions on maintenance for children should not be made arbitrarily. A mere statement that "*the children are suffering*" is not sufficient to warrant the arrest of the other parent. Compulsion to carry out parental responsibilities must come as a last resort hence

Every effort ought to have been made to have the parents undertake ADR and other alternatives methods as required by article 159 (2) of the Constitution. It is one way of ensuring that the subsisting environment is not poisoned against the children's right to interact with each of their parents.

Hence before I make final orders herein I order: -

1. That the appellant to continue paying the Kshs.3000/- the proposed himself when he got the stay orders to file this appeal. He cannot come to court seeking to be heard yet at the same time disobey orders he sought himself.

2. The Children Officer to avail a social inquiry report on the welfare of the children based on the check list under s. 76 of the children Act including a home visit for each of the parents.

3. Each party to file an affidavit of means.

4. Mention on 7th March 2019 for compliance.

5. The order for the Children Officer's Report to be extracted and served on the County Children Services Co-ordinator, Nyeri to avail the report on or before 7th March 2019.

Dated, delivered and signed at Nyeri this 22nd day of February 2019.

Mumbua T. Matheka

Judge

In the presence of: -

Court Assistant: Juliet

Appellant: present

Respondent: present

Mumbua T. Matheka

Judge

22/2/19