



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 164 OF 2018**

**JK.....APPELLANT**

**VERSUS**

**NM.....RESPONDENT**

***(Being an appeal filed against the ruling delivered in Kakamega Children Case No. 29 of 2016 on 8<sup>th</sup> January 2019)***

**RULING**

1. On 8<sup>th</sup> January 2019, the lower court, H. Wandere, Senior Principal Magistrate, delivered a ruling whose effect was -

(a) That JMK, the appellant herein, had failed to comply with court orders that had directed that parental responsibility be shared out on a fifty: fifty basis; and

(b) That the appellant pays an outstanding figure of Kshs. 788, 660.00 first in the best interests of his children.

2. The appellant was aggrieved by the ruling and he chose to appeal against it. He filed a memorandum of appeal in this cause on 13<sup>th</sup> December 2018. He has listed several grounds, which I need not recite here. He filed a motion dated 13<sup>th</sup> December 2018, simultaneously with the memorandum of appeal, seeking stay of execution orders, stay of proceedings before the lower court and for an order that he continues to pay the sum of Kshs. 27, 050.00 as earlier ordered, pending the disposal of the appeal. He averred that he disagreed with the figure of Kshs. 788, 660.00, saying that the ruling was delivered in his absence. He asserted that he had a good appeal on merits.

3. The motion was placed before me under certificate of urgency on 13<sup>th</sup> December 2018, whereupon I directed that the same be served, for *inter partes* hearing.

4. The appellant swore a further affidavit on 20<sup>th</sup> December 2018. He avers in that affidavit that he was not seeking to evade meeting his obligations to the subject minors. He states that he had been paying Kshs. 27, 050.00 monthly towards upkeep of the children in accordance with the court orders. He has attached deposit slips as proof, for the months of October 2018 to December 2018. He also claims that he had paid school for the children, and he has attached two receipts issued by [particulars withheld] Elite Schools, both dated 5<sup>th</sup> September 2018, acknowledging receipt of money from TK and CM. There is also attached a bundle of supermarket receipts.

5. There is an affidavit of service evidencing that the memorandum of appeal herein, together with the motion, were served on the respondent, NNM, on 21<sup>st</sup> December 2018.

6. The respondent entered appearance on 24<sup>th</sup> December 2018 through counsel. She also swore an affidavit on even date. She averred that judgement was delivered by the trial court on 8<sup>th</sup> December 2016, where it was ordered that parental and financial responsibility be shared equally between the two parties. She asserts that the said judgement was never appealed against, neither was it complied with by the appellant. She complains that the appellant, rather than comply with the court orders, resorted to filing numerous interlocutory applications, which betrayed his intention not to comply with the judgement. She has attached to her affidavit copies of the judgement and of the various interlocutory applications that the appellant filed at the trial court over the period.

7. The application was urged orally before me on 24<sup>th</sup> December 2018. Both sides breathed life to the averments made in their respective affidavits.

8. I have not had the benefit of seeing the file of papers filed in the lower court, nor of the proceedings conducted by that court. It was the duty of the appellant to place the same before me so that I can have a fairly fuller and clearer picture of what had transpired before the trial court. The only record that he placed before me is the ruling that he proposes to challenge by way of appeal. The respondent has done a better job of attaching a copy of the judgement of the trial court, which is the genesis of the whole dispute, as well of as copies of other processes

lodged in the cause before the trial court. It would appear that the appellant has been selective in what he placed before the court for the purpose of these proceedings.

9. He alleges that he has been compliant with the court orders made by the trial court. The judgment that the respondent has placed before me is dated 8<sup>th</sup> December 2016, and which appears to be the foundation of the proceedings that led up to the orders the subject of the appeal. I trust that it is the orders made in the said judgment that the appellant alleges he has been complying with. To support his assertion that he has complied, he has attached some documents to his further affidavit. There are bank deposit slips for October, November and December 2018. The orders in question were made in 2016, where is evidence that he complied by making payments between December 2016 and October 2018? He has attached school fees receipts for two individuals, who I am not able to identify from the papers that he has lodged in court. Indeed, were it not for the documents annexed to the respondent's affidavit, I would not have known who TK and CM were in relation to these proceedings. In any event, the fees receipts only relate to September 2018, which begs the question whether he had been paying school fees for these children between December 2016 and September 2018.

10. I am not persuaded that the appellant has been vigilant in complying with the orders in question. At least, he has not persuaded me so. It would appear that he has only gotten busy at the tail end of 2018 in response to the efforts by the respondent to recover the moneys outstanding from him. Looking at what is due, in terms of the monthly sum of Kshs. 27, 050.00 and school fees, one gets the impression that the appellant does owe quite a good chunk of money by way of maintenance.

11. I note from the court record that the trial court had pronounced in its judgment that the appellant had parental responsibility to the minors the subject of the suit. That pronouncement was made in December 2016, and it would appear that the appellant has not taken up that responsibility seriously, going by what both sides have placed before me.

12. I think I need to state that parental responsibility is imposed by statute. It accrues from parenthood. It cannot be negotiated. Children never apply to be born. Those who bring them into this life incur the burden of taking care of them until they are able to stand on their own. The law, in both the Constitution and the Children Act, has made the welfare of the child a matter of paramount importance. It is not to be trifled with. I am persuaded that the appellant's attitude is a pointer to conduct of a person who is trifling with the interests of the children, contrary to the dictates of the Constitution and the Children Act.

13. I am not persuaded that the orders sought by the appellant are available in the circumstances. I accordingly dismiss the application dated 13<sup>th</sup> December 2018. The respondent shall have the costs of the application.

**DATED, SIGNED and DELIVERED at KAKAMEGA this 29<sup>th</sup> DAY OF April, 2019**

**W. MUSYOKA**

**JUDGE**