



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

MISC. CIVIL APPLICATION NO.14 OF 2018

MKN.....APPLICANT

VERSUS

JC.....1ST RESPONDENT

CHILDREN COURT AT KERICHO.....2ND RESPONDENT

RULING

A. BACKGROUND

1. This matter was brought to this court through a Notice of Motion dated 20th April 2018 and arose from the Children Court in Kericho Children Court Cause No. 21 of 2016, in which JC was plaintiff/applicant and MKN was defendant/respondent. The Notice of Motion herein was brought against JC and the Children's Court Kericho. In my view the children court Kericho was wrongly joined as a party.
2. The genesis of the matter is that on 3rd March 2017 the Children Court delivered its Judgment concluding as follows –

“ 8. In view of the foregoing reasons; and having evaluated the testimony of the defendant, I shall allow the prayers sought in the plaint dated 26/4/2016 as follows;

1. *Prayer (a) allowed in terms that the dependant does pay a sum of Kshs.350,000/= annually translating to a sum of Kshs.30,000/= per month being maintenance for the children on his part.*
2. *The plaintiff provides care, housing and medical for the children, whereas the defendant to pay for fees for the children.*
3. *Custody of the issues to remain with the mother/plaintiff*
4. *The costs of the suit be borne by each party.*

B. THE APPLICATION

3. Consequent upon the above judgment this Notice of Motion was filed by MKN with the substantive prayer being a review, variation and setting aside and or alteration of the Children Court orders.
4. The Notice of Motion was filed under Order 42 rule 6 of the Civil Procedure Rules, and section 1 and 3A of the Civil Procedure Act (Cap 21). The main grounds of the application was that the amount determined for payment by the defendant (now applicant), was more than three times the amount he previously paid for the children, and that the Children Court's orders violated the principle that parental responsibility was to be on 50/50 basis between the two parents.
5. After the filing of the application this court(Mumbi Ngugi J. as she then was), granted interim stay of the children's court's orders on 5th June 2018 in the following terms –

1) That the Children Officer Kericho East do investigate and file a report on the status of the children in this matter, including where they attend school relative to their home and the distance and means of transport and the relative means of the parents to take care of them.

2) That the applicant to pay the arrears of maintenance on the basis of Kshs.15,000/= from March 2017 as directed by this court on 18th May 2018 together with the monthly maintenance temporarily set at Kshs.15,000/= per month.

3) That the parties to file evidence of the amounts paid/received within the next 21 days.

4) Hearing on 21/09/2018

5) That in event of default of the applicant, the respondent is at liberty to apply as appropriate”

C. CONTENTION OF THE PARTIES

6. Thereafter, each of the parties filed documents relating to their incomes to support their position. The 1st respondent (JC) also filed an affidavit stating that the applicant herein had not honoured this court’s order for payment of Kshs.15,000/= per month for the maintenance of the children, as well documents relating to the two children’s school fees requirements.

7. Considering the above documents filed, on the 19th June 2019, I delivered a ruling maintaining this court’s interim orders for the applicant to pay Kshs.15,000/= per month for the maintenance of the children, pending the filing of the Children’s Officer’s report, which had not been filed. I deferred giving a ruling on the application herein.

D. CHILDREN OFFICER’S REPORT

8. Thereafter, the Children Officer Kericho East filed his report on 16th July 2019, in which the two children were named, one born on 25/07/2011 and the other born on 9/03/2014. The Kericho East Sub-County Children Officer also prepared and filed a proposed budget for the upkeep of the two children of Kshs.69,410/= per month, and stated that expenses on uniforms, medical and school fees be discussed between the two parents, and observed and concluded his report by stating as follows –

“Observation

The rented house is big but not furnished its two bed roomed one washroom, a kitchen and a sitting room. The furniture therein are one bed shared by the defendant with her children in the bedroom and in the ward robe are three bags of clothes, while in the sitting room there is one table and one dilapidated sofa set. The other rooms are empty.

Recommendation

Your Lordship the applicant herein is a mature lady whose home was visited on 27th June 2019 and it revealed that she has a fixed abode. She rents a house in [Particulars Withheld] Estate of Kericho Town at Kshs.15,000/=. On observation the house is frugally furnished with some rooms completely empty. The children are cheerful, though they miss a lot in terms of education, inadequate facilities in the house. The children academic performance could not be ascertained since they have been out of school from May, 2019. Following the report compilation, I recommend the following –

1) Both parties should realize that parental responsibility is a shared partnership at 50:50 section 24 (1).

2) The parental responsibility shall not cease section 24 (5)

3) In the above premise both parties as an urgent matter to consult each other and put children in school.

4) Though the mother is unemployed should give fairer and reasonable budget to the estranged husband; though budget is enclosed.

5) The above is subject review from time to time.”

9. When this matter came up in court on 25/07/2019 in the presence of both parties, the respondent (mother of the children) informed the court that she was concerned that the applicant had not yet paid the amount ordered by this court for the upkeep of the children but the applicant did not say anything in response.

E. CONSIDERATIONS

10. This Notice of Motion was brought under Order 42 rule 6 of the Civil Procedure Rules. The relevant part of that order and rule state as follows;

“ 6 (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order stay of execution of such decree or order, and whether or not the application for stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to cause such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless

a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without reasonable delay, and

b) such security as the court orders for due performance of such decree or order as my ultimately be binding on him has been given by the applicant”

11. It follows from the above provisions of Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, that an application such as the present can only be sustained if there is an appeal filed. The application herein is bare and there is no indication of an appeal having been filed or an intended appeal. The application will thus fail, as it is incompetent, not being based on any appeal filed.

12. I note that, though the application was brought under Order 42 Rule 6 of the Civil Procedure Rules, the prayers are actually for review or setting aside of the Children’s Court orders. I am aware that there are provisions in the Civil Procedure Rules for review of court decrees and orders under Order 45 of the Civil Procedure Rules. However, the said provisions are not of any assistance to the applicant herein, as the relevant parts of Order 45 Civil Procedure Rules on review of decrees or orders state as follows –

“1. (1) Any person considering himself aggrieved –

a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which after the exercise of due diligences was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay.

13. I note that there is no allegation in the application of discovery of new and important matter or evidence by the applicant or a mistake or error on the face of the record made by the Children Court. The fact that an award is high or low is not a mistake or error on the face of the record, unless the figures do not add up to the total. More importantly, however the application for review can only be made in the court which determined the matter, not in another court. This matter having been determined by the Children Court, the application for review of judgment, if any can only be made in that court, not to this court.

14. On that reason also, this application must fail, as the High Court cannot under the provisions of Order 45 of Civil the Procedure Rules review a decision of a subordinate court.

15. As this is a matter relating to parental responsibility for children, the report of the Children Officer filed herein gives all the considerations and guidance to the two contesting parents herein on how to handle this matter. There is no dispute that the two were living openly as husband and wife at the time the two children were born. Therefore section 24 (1) of the Children Act No.8 of 2001 applies. The sections provides as follows;

“24 (1) where a child’s father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility. “

16. The parental responsibility is equal between the two parents. The parental responsibility does not cease because of separation or divorce. However, circumstances and means of parents do change, and the best course of action is either for the two parents to agree or go to the Children Court and report any changed circumstances for decision. Each of the parents has to be reasonable, because one cannot pay or bear what he or she has no ability to do. I will thus order that each of the two parties herein be availed by the Deputy Registrar with a copy of the Children Officer’s report filed herein, for their perusal and understanding, guidance and necessary action for the good of the two children.

F DETERMINATION

17. As for this application, I dismiss the same as it is incompetent, as the decision of the Children’s Court can only be challenged in this court through an appeal. Any interim orders issued by this court regarding the judgment of the Children Court herein are hereby vacated.

18. The Deputy Registrar will supply each of the parties with a copy of the Kericho East Children Officer’s report filed herein.

19. Each party will bear their respective costs of this application.

Dated and delivered at Kericho this 14th August 2019.

GEORGE DULU

JUDGE