



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
HIGH COURT CIVIL APPEAL NO. 58 OF 2017

M K S.....APPELLANT

VERSUS

P J K.....RESPONDENT

RULING

1. The appellant is aggrieved by the order of *maintenance* made by the Eldoret Children’s Court on 31st March 2017 in *Children’s Case 29 of 2017*. The impugned order requires the appellant to pay interim maintenance in the sum of Kshs 40,000 per month from 5th April 2017. It also commands him to “pay school fees, do shopping and purchase school related needs for the 3rd minor”.

2. The appellant has presented a notice of motion dated 28th April 2017 praying for stay of execution of the order for maintenance until the appeal is heard and determined. The gravamen of the motion is that the paternity of some of the minors is disputed; that, the appellant should not shoulder parental responsibility of two minors from an earlier marriage between the respondent and one KKC; that the Children’s Court has not heard the application for maintenance but has condemned the appellant to pay a substantial sum in the interim; and, that unless the orders sought are granted, the appeal will be rendered nugatory.

3. Those matters are buttressed by a deposition of the appellant sworn on 28th April 2017. I will set out paragraphs 4 to 9; and 17 of the deposition-

“4) That the Respondent had filed child maintenance suit against her previous husband Kenneth Kipruto Chelimo where she was granted custody of Chelsea Cherotich and Casey Chepkorir.

5) That the Respondent had indeed filed two separate divorce causes against the said KKC being High Court Misc. Application No. 70 Of 2004 and Divorce Cause No.2 of 2006

6) That the Respondent now alleges that the minor children either belong to me biologically and/or by adoption, an allegation I have refuted in the Subordinate Court.

7) That the biological father of the minor children, being the first three, is still alive and ought to be sought by the respondent to provide for the upkeep of the minor children.

6. That it is baffling how the Respondent was contented to be divorced from the said KKC and not to ask for any financial responsibility from him yet she is keen to demand support from me.

7. That the order made against me for Ksh. 40,000/= per month for the minor children by the subordinate court is a clear indication that the subordinate court has already made up its mind that the minor children are mine without testing the evidence I have to the contrary.

17) That the order does not indicate the contribution to be made by the respondent and as per courts' finding yet the applicant risks indirectly paying to the respondent over Kshs 100,000/= per month in the guise of maintaining the minor children."

4. The motion is contested. The respondent has filed a replying affidavit sworn on 25th May 2017. She avers that the appellant is the *biological father* of the two of the minors; and, that *he* undertook *parental responsibility* over two of her other children from her previous marriage. She avers that the conditions for stay have not been met; and, that the stay would not be in the *best interests* of the children. She avers that the appellant is dillydallying over the DNA test ordered by the lower court. In a synopsis she says that she is unable to maintain the minors on her salary.

5. At paragraphs 8 to 12 she deposes as follows-

"8) That with regard to paternity over minor c and d, by way of a consent order recorded before court on the 28th of February 2017; the parties were to attend Lancet, Eldoret to submit their samples to facilitate DNA analysis to determine the paternity of the said minor c and d.

9. That my counsel on record subsequently wrote to the appellant's counsel to have the appellant avail himself [sic] as ordered by the Court to give his sample for DNA analysis in vain.

10) That by 21st of March 2017 when the matter was placed before the trial court, the appellant had blatantly refused not submit his sample for DNA analysis and thus the application for interim maintenance was argued. The counsel for the appellant made lengthy submissions in opposition to the prayers for interim maintenance.

10. That the trial court reserved her [sic] ruling for 21st March 2017 on which date the trial court delivered her [sic] ruling and made orders of interim maintenance.

11. That despite being present when the ruling was delivered through his counsel, the appellant has treated the said order of the court with utter contempt and in the process undermining the rule of law. It is imperative that the court order be obeyed."

6. On 30th May 2017 I heard brief submissions from both counsel. I have considered the application, depositions, and the rival submissions.

7. This is an *interlocutory appeal*. For that reason, I shall refrain from commenting on the merits of the matter before the Children's Court. The court is empowered to grant a stay pending appeal if certain conditions are met. Under Order 42 of the Civil Procedure Rules 2010 Rule 6 (1)-

"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 but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such 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 have such order set aside.

(2) No order for stay of execution shall be made under subrule (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 unreasonable delay; and

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

8. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the learned Judge, Madan JA (as he then was) quoted with approval the views of Brett L.J. in *Wilson v Church* (No 2) 12 Ch D [1879] 454 at 459.

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory”

9. Justice Madan delivered himself thus in the *Butt* case (Supra) at page 419,

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings”

10. This is a *children’s* matter. The court is enjoined by section 4 of the Children Act to act only in the *best interests* of the child. The Court must also pay heed to the *overriding objective* to do justice to the parties. See Article 159 of the Constitution and sections 1A, 1B and 3A of the Civil Procedure Act. See also *Harit Sheth T/a Harit Sheth Advocate v Shamas Charania* [2010] eKLR (Civil Application No 68 of 2008. It is noteworthy that the present motion is predicated upon sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act.

11. I am satisfied that the application was brought *with expedition*. I am also satisfied that a *memorandum of appeal* was lodged on 2nd May 2017. None of the parties has annexed a copy of the impugned ruling. What is annexed is the *order* of the lower court on interim maintenance marked MKS1. Like I stated, it commands the appellant to pay interim maintenance in the sum of Kshs 40,000 per month from 5th April 2017; and, also to “pay school fees, do shopping and purchase school related needs for the 3rd minor”.

12. Although the appellant claims that he was not heard by the learned trial magistrate, the materials before me point to the contrary. The respondent filed an application for maintenance by way of a chamber summons dated 26th January 2017. She was claiming Kshs 150,000 per month. It would appear that the applicant filed a reply in which he denied *paternity* over minors c) and d) from the previous marriage; and, denied *parental responsibility* over minors a) and b). That was the basis of the consent for a DNA test over minors c) and d). The appellant has *not* yet taken the test.

13. The matter then came up for hearing before the learned trial magistrate on 21st March 2017. From the averments at paragraph 10 of the respondent’s deposition that I set out earlier, the parties addressed the lower court on *interim maintenance*. The appellant objected to the prayers. A ruling was reserved for 31st March 2017. From the annexed copy of the impugned order, both counsel sent representatives to take the ruling. So much so that what has not been heard is the main application for maintenance. It follows that the learned trial magistrate only pronounced herself on *interim maintenance*.

14. I have studied section 97 of the Children Act. It empowers the Children Court to make an *interim order* for maintenance. I do *not* agree with the notion by the appellant that by making the order, the learned trial magistrate has necessarily made up her mind on the question of *paternity*. The less I say about it the better. Like I stated the transcript of the proceedings and the impugned ruling have not been made available. I am thus unable to say that the order of *interim maintenance* of Kshs 40,000 was unreasonable or whimsical. I am thus *disinclined* to order a stay of that part of the order.

15. I am fortified there because it is a *specific* monetary sum. There is no allegation that the respondent would be *unable* to refund it. Like I stated earlier, this is a *children’s* matter. Staying that part of the order would be highly prejudicial to their *welfare*. Paraphrased, their welfare cannot be stayed casually.

16. However, the second part of the order commanding the appellant to “*pay school fees, do shopping and purchase school related needs for the 3rd minor*” is too *vague* or *ambiguous* and open to *abuse*. The extent of financial implications *cannot* be ascertained. It is the kind of order that would be more appropriate on *tested evidence* of the needs of the minor; and, the financial capacity of the appellant. It is also not lost on me that the respondent is a *salaried employee* at the Moi Teaching and Referral Hospital. I cannot comment further because the matter is still *pending*; and, this is an *interlocutory appeal*.

17. Granted all those reasons, the notice of motion dated 28th April 2017 succeeds only in part. There shall be a stay of the part of the order of the lower court dated 31st March 2017 that required the appellant to “*pay school fees, do shopping and purchase school related needs for the 3rd minor*”. The prayer for stay of the interim payment of Kshs 40,000 per month from 5th April 2017 is *dismissed*. For the avoidance of doubt, the appellant shall continue to pay *Kshs 40,000 per month* from 5th April 2017 as ordered by the Children’s Court.

18. Costs follow the event and are at the discretion of the court. In the interests of justice I order that *each party* shall bear its own *costs*.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 27th day of June 2017

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Mr. Bitok for the appellant instructed by Rotuk & Company Advocates.

No appearance for the respondent.

Mr. J. Kemboi, Court Clerk.