



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL 79 OF 2014

J IAPPELLANT

VERSUS

S K.....RESPONDENT

RULING

PLEADINGS

APPELLANT'S POSITION

By an application filed as Notice of Motion brought under **Section 80 & 99 of the Children Act ,2001 and Order 42 Rule (6) CPR 2010**; the Appellant sought and was granted temporary stay of execution on 3rd October 2014.

The Appellant sought stay of execution pending appeal.

The application is based on the following grounds;

- a. The Appellant lost employment and is not in gainful employment and has no source of income;
- b. The Appellant all along provided for his children and is now without means to provide for the minors herein;
- c. On 26th September 2014; The Children's Court dismissed his application for variation; setting aside or suspending the maintenance order against him and issued warrants of arrest.
- d. The Appellant is making effort to obtain employment and if warrants of arrest are executed it will not be possible to secure a new job or means to provide for the children
- e. In the interest of justice and best interest of the child the warrants are stayed.
- f. The Appellant attached documents of proof of payments made for the children.

The supporting affidavit contains details of the Applicant's financial status and attached is the letter of termination from Nakumatt Holdings marked '**J13**'

The copies of warrants of arrest annexed as '**J14**'

The application for variation of maintenance orders '**J15**'

The purpose of seeking the suspension of maintenance orders is to allow the Appellant to reorganize himself financially.

The Appellant filed affidavit of means on 23rd September 2015 and stated that;

He is father to D M and H K.

Notwithstanding loss of employment he has paid school fees and expenses for both children until 13th November 2013 when his employment was terminated.

D, who is 19 years now, joined [Particulars Withheld] University and is in 2nd year and he pays for his transport and lunch.

H K is in [Particulars Withheld] High School and he paid school fees and expenses.

It has been difficult without employment and he relies on friends and well-wishers.

He also has another family of 3 children who also depend on him.

He is in a financial crisis that has caused him to be evicted from his home as shown by the eviction notice annexed as 'J12'

Early 2013 he borrowed from the bank a loan of Ksh. 1m which is due and owing as he defaulted in monthly payments as shown by documents attached.

The Appellant by a further affidavit filed on 6th October 2015, stated that the 2 acres in Embu is ancestral land and is for his 5 children. There's 1 acre in Kitengela divided in 1/8 plots held by Links Holding Limited which comprises of 10 shareholders. The bar is owned by the said Company and he has no control over the same. The car is on loan.

RESPONDENT'S POSITION

The Respondent filed a Replying affidavit on 12th March 2015

She stated that the court ordered the Appellant to pay maintenance at Ksh. 10,000/- every month. The Appellant defaulted from October 2010.

She sought the Court to enforce maintenance orders; the Trial Court conducted a full hearing and on 25th June 2013 ordered the Appellant to pay maintenance arrears, school fees and school expenses within 30 days in default the Court would issue Notice to Show Cause.

Despite service, the Appellant did not comply and the Court proceeded with Notice to Show Cause proceedings. She sought to enforce the Court orders and warrants of arrest were issued.

The Appellant defaulted on maintenance from October 2010 way before he lost his job in November 2013. He engaged in delaying tactics for 6 years and she was left to carry out parental responsibility to their children singlehandedly with considerable difficulties especially facilitating their educational needs. The children H and D have been sent away from school for school fees arrears. She faces eviction due to rent arrears.

The Respondent stated that the Court's role is protect and safeguard at all times the welfare of the minors and staying the Trial court orders would prejudice their interests. The Appellant as the father of the children is obligated in law to provide reasonable maintenance for the children.

The Respondent filed affidavit of means on 18th September 2015 and stated that she lost her job when her

contract ended in May 2010 and since then she sustains herself through relatives and well -wishers.

From October 2010, she has single handedly catered for the 2 children financially and it has been burdensome in light of the fact that she has no work.

She listed expenses as totaling Ksh. 65,660/- per year to maintain the children.

The respondent filed a further affidavit filed on 16th October 2015 and stated that the Appellant has 2 acres land in Embu, 10 acres in Kitengela a club at Outer ring Road and motor vehicle Reg [Particulars Withheld]. The Court had earlier sought from the Appellant's former employer the records indicating his terminal benefits which was not furnished to this Court.

ISSUE

Whether the Court should stay execution of warrants of arrest issued by the Children Court or not?

DETERMINATION

This Court considered the pleadings and oral submissions made by the parties in Court and wish to address the matter as follows;

Article 53 1(e) Constitution 2010 and **section 23 & 24 of the Children Act 2001** provides for the parents of the children to have equal responsibilities for their children.

In the instant case the Appellant and Respondent have equal responsibilities to the 2 children. However, the responsibilities are allotted based on the specific circumstances of each case.

In this case the Appellant was Financial Controller of [Particulars Withheld] Holdings until 13th November 2013 when he lost his job. Therefore the maintenance orders made taking into account his position and financial ability to sustain maintenance of the children. Since November 2013 circumstances have changed he has no gainful employment and has another family with 3 children. He claims he is struggling.

In the case of the Respondent she was working; it is not clear where and when; there are no documents to show that she was terminated upon the expiry of her contract. She has struggled singly to provide for the children food , clothing and shelter and it has been more difficult due to the Appellant's default of payment of maintenance of Ksh 10,000/-

The Affidavits of means do not shed ample light on the way forward. There are glaring gaps of critical information on who is to do what in maintaining the children. The matter is more desperate in light of the fact that both Appellant and Respondent are unemployed.

Secondly the Court noted that there are anomalies in the Trial Court orders of 25th June 2013;

- a. The Appellant was to pay maintenance arrears, school fees and school expenses, text books , uniforms, transport , extra- curricular activities, school trips,
- b. medical expenses by taking out comprehensive medical cover and to give the Plaintiff the medical cards
- c. Maintenance Ksh 10,000/- and during holidays Ksh. 15,000/-

(When the Appellant was entitled to be with the children half the holiday as ordered in order 2)

- d. The Plaintiff to cater for all other needs (not indicated)

The Court notes that all parental responsibility was heaped on the Plaintiff without recourse to the

Respondent taking up any duties.

The 2nd anomaly is that from the Notice to Show Cause and warrant of arrest have different unexplained figures of arrears of maintenance; Ksh. 340,000/= (Ksh.10,000/- from October 2010-June 2013) Ksh. 617, 779/- whose claims have not been tabulated or receipts attached of any monies claimed as refund by the Respondent.

On the other hand, it is clear from the record that the Appellant defaulted in school fees and school expenses for the children until enforcement by the Children Court and this Court ensued. He had defaulted even before he lost his job. He is not coming to Court with clean hands.

Despite these issues raised it is clear that the best interests of the children are paramount as prescribed under **Article 53 (2) of the Constitution 2010 & Section 4 (3) of Children Act 2001.**

FINAL ORDERS

This Court orders as follows;

- 1. The Children Court orders of 25th June 2013 and 26th September 2014 are hereby stayed; warrants of arrest withdrawn conditionally**
- 2. The Appellant shall pay school fees and school expenses for the 2 children when due**
- 3. The Appellant shall provide medical expenses for 2 children.**
- 4. The Arrears of maintenance shall be confirmed as due and owing as per attached documents of claiming refund and what is actually due within 30 days by the Respondent**
- 5. The Appellant shall within that period propose to this Court mode of repaying the agreed sum of arrears of maintenance.**
- 6. The Deputy Registrar shall in writing obtain the termination dues paid by the Appellant's employer within 30 days in default witness summons to issue to the Financial Controller Nakumatt Holdings.**
- 7. The Respondent shall also provide documents of her former employment and termination to this Court within 1 month.**
- 8. The Respondent shall in the interim period cater for food, shelter and clothing of the children pending final determination of the maintenance of the children.**
- 9. The Appellant to provide Memorandum and Articles of Association of Links Holding Company to Court within 30 days.**
- 10. The issue of maintenance to be determined upon the documents and clarifications provided on 17th March 2016**

DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2016

M.W. MUIGAI

JUDGE

In the presence of:

Mr. Olonde

Respondent in person