



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COURT BUILDING
FAMILY DIVISION
HIGH COURT CIVIL APPEAL 121 OF 2015
(CHILDREN COURT CASE 606 OF 2006)

S M WAPPELLANT

VERSUS

J N N.....RESPONDENT

RULING

(Application for stay pending appeal)

APPELLANT'S CASE

By an application under certificate of urgency filed by the Appellant on 16th December 2015, he sought temporary stay of execution of Ruling and Orders of the Trial Court in **Children's Court Case 606 of 2006** of 10th December 2015 pending hearing and determination of the appeal.

On 17th December 2015 this court issued interim stay of execution pending hearing and determination of the application pending appeal and the application and orders were served to the Respondent.

The Appellant averred in the supporting affidavit to the application, that the Respondent sued him for maintenance of their 2 boys, namely K W M and J T who were minors in 2006.

The Appellant paid school fees and school related expenses for both children and was responsible for their medical expenses if need arose from October 2012 to 2014 when the eldest child completed secondary education. He continued to pay school fees for the younger child.

The Respondent filed for execution of a decree for Ksh84, 453/- as arrears of school fees as at 8th January 2013 and sought a Notice to Show cause be issued to the Appellant. The Appellant proved in Court that he did not default in payment of school fees for the 2 children from 2012 to 2014 and this was a false claim.

Whereas the Trial Court conceded that the Claim for execution of the decree could not be granted as there

were no arrears, The Court further ordered as per the application filed on 22nd September 2015 that he ought to continue paying school fees for the eldest child as he was joining University.

The Appellant contested this issue, as he was condemned unheard. On 7th December 2015 the Court confirmed to his advocate that the application for hearing was only the Notice to show cause. Yet the Court's Ruling of 10th December 2015 determined the issue of payment of University fees for the older child. Secondly, the eldest child is an adult over 18 years old and therefore he would not be compelled to pay fees and he appealed the order.

RESPONDENT'S CASE

The Respondent filed Replying Affidavit to the Application on 20th January 2016 and she deposed that the Appellant paid school fees for the children for Primary and secondary education. There were no arrears and the Trial Court did not enforce execution of the decree.

The issue was the Appellant's continued parental responsibility to pay University fees. The eldest child was admitted to [particulars withheld].

The Respondent filed an application under certificate of urgency on 22nd September 2015 for extension of parental responsibility for M K W in form of University fees as he was at risk of not being registered in the University as he was admitted on passing the KCSE examinations. The Admission letter and Fees Structure and Expenses were attached to the application.

The Appellant was served with the application and he did not defend his position in Court with regard to the application despite numerous opportunities to do so. The Trial Court then ordered the Appellant to pay University fees for their eldest son. The Respondent averred that their son though an adult would suffer irreparable damage if an opportunity to further his studies was curtailed.

ISSUES

1. Should this Court grant stay of execution pending appeal?
2. What are the best interests of the child in the instant case?
3. What orders should this Court grant?

ANALYSIS

This Court confirms that there is no memorandum of appeal on record nor certified copies of proceedings and ruling of Trial Court available. Despite written instructions by the Deputy Registrar Family Division to obtain the Court file **Children's Case 606 of 2006**, the same was not availed to this Court.

Therefore any procedural issues raised, this Court cannot ably and in an informed manner verify and comment on. The Court shall rely solely on the pleadings filed and oral submissions made during the hearing on 10th March 2016.

The Appellant filed Grounds of Objection on 6th October 2015 to the application filed on 22nd September 2015 for extension of parental responsibility and payment of University fees.

In a nutshell, the grounds are;

1. The Applicant (Respondent) being a parent to the person now aged 20years old has no authority to file the application for extension of parental responsibility, the application contravenes **Section 91(b) (1) of the Children Act 2001** and should be struck out with costs.

2. There are no special circumstances that exist to necessitate the extension. The application was filed way after the person attained 18 years.

3. The Appellant's Replying Affidavit filed on 1st December 2015, he asserts that K W is an adult and he should fend for himself and the Respondent his mother has no *locus standi* to file the instant application. She has no Power of Attorney from the child.

4. The Appellant is aggrieved by the fact that the Respondent did not allow him access to the children. After K W became an adult, he has never contacted him.

On the issue of who should file the instant application for extension of parental responsibility; this Court has looked at the following legal provisions;

Article 22 (2) of Constitution 2010 provides;

In addition to a person acting in their own interest, court proceedings under Clause (1) may be instituted by;

***(a) a person acting on behalf of another person who cannot act in their own name;
.....***

(b) a person acting as a member of or in the interest of a group or class of persons

(c) a person acting in the public interest or

(d) an association acting in the interest of one or more of its members.

The extension of parental responsibility is based on payment of University fees to enable K W attend further studies proved by his admission to JKCUAT University. This is a human right protected by the Bill of Rights in **Chapter 4 of the Constitution**; the right to education. **Article 22** ousts the issue of *locus standi*; when instituting proceedings to claim a right or fundamental freedom in the Bill of Rights that is denied, violated or infringed or is threatened. The Respondent, mother of the child can and may sue on his behalf to enforce his right to education under **Article 43(f) as an adult and or Article 531(b) of Constitution 2010 as a child**

Secondly; **Section 28 of Children Act 2001 provides;**

“Parental responsibility in respect of a child may be extended by the Court beyond the date of the child’s 18th birthday, if the Court is satisfied upon application or of its own motion, that special circumstances exist with regard to the welfare of the child that would necessitate such extension being made;

Provided that the order may be applied for after the child’s 18th birthday.

An application under this section maybe made by;

(a) the parent or relative of a child

(b) any person who has parental responsibility for the child

(c) the Director

(d) the child

The Provision allows the child’s mother to file an application for extended parental responsibility and the

Court can determine such a matter on its own motion. Therefore this ground of objection is not borne out by law as it is in line with the Constitution the supreme law of the land. Again the issue of *locus standi* is not mandatory various parties can institute the proceedings or the Court may address the matter on its own motion.

Thirdly; **Section 91 (b) of Children Act 2001** provides;

A person who has attained the age of 18 years may, with leave of the Court, apply to the Court for maintenance order to be made in the following circumstances;

(i) the person is or will be involved in education and training which will extend beyond the person's 18th Birthday.....

(ii) A person is disabled and requires specialized care.....

(iii) The person suffering from illness or ailment and requires medical care.....

(iv) Other special circumstances which would warrant the making of the order.

This provision mandates the affected party to file the relevant application in Court to obtain orders of maintenance after attaining 18 years old and satisfying the Court of the special circumstances to warrant the orders some of which are listed above. Clearly, it is not mandatory for the person who attains 18 years to apply; it is discretionary due to the word 'may' and not 'shall'. Therefore from the above provisions, the application may be filed by the person over 18 years old or by his parent or one with parental responsibility. The application filed on 22nd September 2015 was properly before the Trial Court and was not fatal to be struck out.

By virtue of **Section 28 of the Children Act 2001**, The Trial Court proceeded to address the issue on its own motion and each party is bound by pleadings and the Appellant was served with the application, he filed the Replying affidavit and grounds of objection; it is alleged he had ample opportunity to address the court and he did not. He chose to delay the matter.

It is not denied the Appellant is the child's or person's father, he has paid his school fees and expenses for his basic education, The child passed KSCE examinations and was admitted to University. These circumstances merit that the child should not lose the opportunity to pursue further education.

The Appellant is aggrieved that he was denied access to the children by the Respondent, he did not apply to Court to be granted such orders or for the Court to enforce his existing right to access to the children. The isolation of the children from the Appellant cannot be blamed on the children but their mother. Now that he is an adult they should meet and discuss his education among other father and son issues. Certainly, the Respondent continues to shoulder and provide the children's food, clothing and shelter. Why would the Appellant be absolved of contribution to the person's higher education?

Finally, the Trial Court order of 14th December 2015 is to the effect that the Appellant to pay school fees for the child at [particulars withheld] and the child to pursue other opportunities to pay fees like the Higher Education Loans Board (HELB) and if successful, the Appellant to supplement any balance of fees and other expenses. The Trial Court did not heap the responsibility to pay University fees wholly on the Appellant but as a joint effort so that the Child may also pursue other avenues to obtain funds. The Appellant's rights are not infringed nor prejudiced as the Court granted alternative means of obtaining fees for the child's education.

Furthermore, what he paid as school fees and expenses would be a starting point and he may also engage the University on fees payment by installments.

The totality of the evidence discloses that a proper and competent application was filed in the Trial Court; special circumstances were laid out to warrant the Appellant contributing to his son's University

education, and that he passed KSCE examination and he should not lose this opportunity of his education. The Appellant's rights were not infringed upon; the issue that he was not heard and only the NTSC proceedings were conducted is not borne out by evidence, the Court proceedings and Ruling have not been availed.

There is no memorandum of appeal, therefore there lacks evidence of an intended appeal. In light of the special circumstances of the case, this Court has delved into the pleadings and finds that the Appellant shall contribute to the child's University education.

COURT ORDERS

After examination of the pleadings and the hearing on 10th March, 2016 this Court grants the following orders;

- (1) Temporary stay of execution orders issued on 17th December 2015 is hereby vacated.**
- (2) The application for stay pending appeal against the Ruling and orders of the Trial Court of 10th December 2015 is dismissed with costs to the Respondent and Trial Court orders upheld.**
- (3) The Appellant shall contribute to K W's University fees and pay directly to [particulars withheld] on an installment arrangement to be agreed with the university.**
- (4) The Child /person shall pursue Higher Education Loans Board (HELB) with a view to obtain alternative source of funds to pay fees and if so the Appellant shall pay only outstanding fees and expenses.**
- (5) The Appellant and person/child shall meet and discuss the matter regarding payment of fees**
- (6) The Appellant may have access to the younger child in consultation and agreement with the Respondent.**
- (7) The enforcement of these orders and any other relevant applications shall be filed heard and determined in the Children Court.**
- (8) The Deputy Registrar to serve copy of Ruling to the Trial Court.**
- (9) Each party to bear is own costs**

DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI ON THIS 16TH DAY OF AUGUST, 2016

M.W.MUIGAI

JUDGE

In the presence of:

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