REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

CIVIL APPEAL NO. 32 OF 2014 (0S)

D M……..…….APPELLANT

VERSUS

R W……...…….RESPONDENT

RULING

1. The appellant lodged a Memorandum of Appeal herein on 21st May 2014 challenging orders that had been made in Nairobi Children's Court Case No. 884 of 2010. The grounds raised included, *inter alia,* that the lower court failed to consider the evidence on record, that the appellant's financial standing had gone down, that it failed to consider the fact that the appellant was willing to pay school fees for the minors but upto an amount that he is able to afford, that it failed to consider that the respondent took the children to a very high cost school without consulting him contrary to what had been ordered by the court, among others.

2. The Memorandum of Appeal was then followed by a Motion dated 10th June 2014 and lodged in court on 12th June 2014, where the appellant sought stay of the orders of 25th April 2014 in Nairobi Children's Case No. 884 of 2010 pending appeal.

3. The grounds upon which the application is predicated are set out on the face of the application as well as in the affidavit in support sworn by the appellant on 10th June 2010. He depones that his financial circumstances have changed and he is not able to meet the obligations imposed upon him by the court in the order of 25th April 2014. He pleads that the lower court in arriving at its decision of 25th April 2014 failed to consider his averments regarding his financial status. He expresses fear that he would be prejudiced if the orders made on 25th April 2014 are allowed to stand. He feels that the orders of 25th April 2014 have unfairly placed the burden of maintaining the children solely on his shoulders, instead of the burden being shared equally between him and the respondent.

4. To the affidavit in support of the application, the appellant has attached two documents, the affidavit filed on 25th March 2014 in respect of the application which culminated in the orders of 25th April 2014 and the Memorandum of Appeal filed herein on 21st May 2014. The affidavit and its annextures are designed to demonstrate that the appellant's financial circumstances have changed in a manner adverse to him, a fact that the lower court should have taken into account. The memorandum of appeal is meant as proof that an appeal is pending.

5. The application was served on the respondent, who has responded to it through his affidavit sworn on 16th July 2014. She contests the appellant's alleged inability to meet his personal obligations to the children on the grounds that he has not fully disclosed his sources of income. She avers that he has been

complying with the orders of the lower court most reluctantly.

6. Parties disposed of the application by way of oral submissions made on 3rd October 2014. The appellant's case was urged by Mr. Ochola, while Mrs. Wang'ombe argued the case for the respondent.

7. From Mr. Ochola's address it is apparent that the appellant was aggrieved by the order that he should pay Kshs.100,000.00 per term at Brookhurst School. It is that order that he seeks to have stayed. His grouse is that the child was taken to that school without his being consulted by the respondent. This he says happened at a time when he had moved the court to have the child moved from Riara School where he was at the time to Moi High School, Kabarak, a more affordable school. His plea was rejected by the court which ordered that the child remain at Riara School. Shortly thereafter the child was removed from Riara School, where school fees stood at Kshs.100,000.00 per term to Brookhurst School, where the fees were charged at Kshs.300,000.00 per term. When he protested at this, the court ordered that the child should remain at Brookhurst School with the appellant continuing to pay school fees at the rate he was paying at Riara School, that is to say at Kshs.100,000.00 per term. He submitted that the amount of Kshs.100,000.00 was still on the higher side and proposed to pay Kshs.80,000.00 instead.

8. The submissions by Mrs. Wang'ombe dwelt on matters of fact that were not deponed to in the respondent's affidavit sworn on 16th July 2014. On the Kshs. 100,000.00, she submitted that although the appellant alleges school fees at Brookhurst School is over Kshs.300,000.00 he was not ordered by the lower court to pay the full amount of Kshs.300,000.00, but rather the Kshs.100,000.00 that he had been paying at Riara School. Looked at that way, the orders of 25th April 2014 did not change the burden on the appellant. Mrs. Wang'ombe wound up by pointing out that the appellant is a defaulter who should not benefit from the mercy of the court.

9. The ruling of 25th April 2014 emanated from an application by the appellant dated 4th February 2014, in which he sought several orders. He wanted the respondent restrained from taking the subject child to the Brookhurst International School, that she be ordered to transfer him to a public school after consulting him and, in the alternative, that his contribution to the subject minor's school fees be limited to a sum of Kshs.80,000.00 per year or equivalent sum to that being paid currently at a public secondary school in Kenya.

10. The lower court heard the rival arguments by counsel appearing for the parties, and delivered a ruling on 25th April 2014 in the following terms:-

"I therefore make the following orders in the best interests of the minor:-

1. ***Defendant's application to have the minor's admission to Brookhurst school stopped has been overtaken by events;***
2. ***The minor to remain at Brookhurst school unless and until the parties agree and with consultation with the minor find a cheaper and suitable secondary school to the minor, which need not necessary be a public secondary school;***
3. ***Defendant to pay school fees for the minor equivalent to what he was paying for him at Riara School, that is Kshs.100,000.00 per term, and plaintiff to pay the extra fee for the minor that is from first term 2014;***
4. ***School related expenses of the minor at Brookhurst School be shared equally by the parties as from the first term 2014…"***

11. The orders rehashed in paragraph 7 above related to the application dated 4th February 2014, but there was also a notice to show cause dated 19th February 2014, which was heard at the same time and orders therein made on 25th April 2014. The notice to show cause was allowed and the appellant was given time to clear the arrears of accumulated maintenance amounts.

12. The orders set out in paragraphs 7 and 8 above are the ones sought to be stayed pending appeal. I am cognizant of the fact that this is a matter touching on children. The orders made on 25th April 2014

concerned the welfare of the children the subject of these proceedings. One aspect related to a child's education and the other related to the children's maintenance and subsistence.

13. The moot question in cases of this nature is whether stay of execution of orders touching on children's education and general welfare should be granted. On education, the child in question is at Brookhurst school and was already enrolled at the school at the time the ruling was delivered. It was that fact which informed the decision by the court that the prayer for restraining the respondent from taking the child to that school had been overtaken by events. If the order to pay school fees and school-related expenses for the child at that school is stayed, what then would be the fate of the child? Would he drop out of school? Would he have to be moved back to Riara School? Would any of those options be in his best interests? If he remains at Brookhurst School with the stay orders in place who then would pay for his education? Would it be fair for the respondent to shoulder the full burden of the child's school fees and school –related expenses.

14. Even on the question of stay of the orders on the notice to show cause, pertinent questions would still arise. The maintenance payments ordered by the court are meant to cater for the children's daily needs. The maintenance order was made on 27th May 2011 and was to the effect that the respondent would provide shelter for the children, while the appellant would shoulder the burden of school fees and school-related expenses. The court found the children's monthly expenses to be Kshs.62,000.00 and ordered the appellant to shoulder half of that amount – put at Kshs.30,000.00 per month. The appellant was found by the lower court to be in arrears of this monthly payment, hence the orders on the notice to show cause. The orders of 27th May 2011 have not been set aside, at least with respect to the maintenance, and they have not been appealed against. On what basis then would this court stay the order on the notice to show if the parent order of 27th May 2011 is still valid and intact.

15. It has been stated in various decisions where stay of execution of orders in respect of children's matters are sought that stay is not a suitable remedy. It is a good remedy in pure civil and commercial cases, where the dispute is often on commercial transactions that have gone wrong or on liability arising from tortious actions. In children's cases that remedy has to bend to the overriding principle of the paramountly of the child's welfare. Would stay of execution of the orders in question be in the best interests of the child in this case? I think not. I do not believe that the orders sought are available for granting.

16. In any event, I cannot interfere with the exercise of discretion by the lower court and make alternative orders, for to do so would be tantamount to determining the appeal without hearing the parties substantively. The appellant complains that the lower court did not properly evaluate the evidence before it, before coming to the conclusion that it came to in the ruling of 25th April 2014. I cannot delve at this stage into considering whether indeed the lower court fell into error, as I am now being invited by the appellant to do. That is the responsibility of this court at the time it will be seized of the main appeal. That is a matter that I cannot deal with at the interlocutory stage.

17. In the end, it is my conclusion that the application before me is without merit. I hereby dismiss the same. The interim orders made on 17th July 2014 are hereby discharged. Costs shall abide the outcome of the appeal.

DATED, SIGNED and DELIVERED at NAIROBI this 30th DAY OF January 2015.

W. MUSYOKA

JUDGE