



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 73 OF 2012

IN THE MATTER OF M K, F K M, J K AND S M (MINORS)

J M A.....APPELLANT

VERSUS

R G O.....RESPONDENT

RULING

1. This application is brought by way of a Notice of Motion dated 22nd October, 2012, and taken out under Sections 99 and Order 42 Rule 6 of the Children's Act, Section 3 & 3A of the Court of Appeal Rules and all other enabling provision of the Law. Appellant thereby seeks orders that:
 - a.(Spent)
 - b. That this Honourable Court be pleased to order a stay of execution of the orders and stay proceedings in the Children's Court Case Number 781 of 2011 and all consequential orders pending the hearing and final determination of the intended appeal.
 - c. That the Honourable Court be pleased to review, set aside and stay for payment of rent from (Kshs.15,000).
 - d.(Spent)
 - e. That this Honourable Court be pleased to issue an order staying all further proceedings and or execution in the Lower Court and in the High Court pending hearing of this application inter-parties and subsequently pending the hearing and final determination of this application.
 - f. That the Respondent to pay the cost of this application in any event.
2. The application is premised on the grounds that:-
 - a. That the Appellant was compelled by an order of the Children's Court issued on 5th October, 2012 to pay rent arrears for the month of February to October, 2012.
 - b. That the Appellant has fully offered himself to take care of the minors since he is the one paying school fees, provides medical care and do cater for any need even when the Appellant is with the minors and or the minors are in boarding school.
 - c. That the Court issued a mandatory order without giving the Appellant an opportunity to ventilate the issues from his perspective and even after informing the Court that the rent receipt which was presented to court was fake.
 - d. That the Court without any legal basis whatsoever held that the Appellant herein was purportedly in contempt of the court order and granted orders to the Appellant for him to pay rent.

- e. That even after the Appellant indicated to the court that he needed a DNA report to be carried out on the minors, the court erred in law and in fact by failing to make such orders.
 - f. That the Court acted in disregard of established legal principles to granting the said orders and was obviously without any tangible evidence whatsoever.
 - g. That the Appellant and the children will suffer irreparable harm if the Court's order is not stayed and any further proceedings of any court are not stayed.
 - h. That the Appellant has an arguable appeal with high chances of success.
 - i. That unless this court stays the order of the Lower Court and further stays the entire proceedings of the courts, the intended appeal of the Appellant will be rendered nugatory and overtake the consequential orders of the Lower Court.
 - j. That the Appellant has filed a Notice of Appeal against the Order of the Lower Court.
3. The application is supported by a supporting affidavit sworn by J M A the Appellant herein on 22nd October, 2012 and is based on the grounds specified on the face of the application.
 4. In opposition to the application, the Respondent filed in a Replying Affidavit sworn on 7th March, 2013. In that affidavit she avers among other things that the Appellant was ordered to pay school fees and school related expenses, as well as rent for the house occupied by the children and herself, which rent is payable directly to the Landlord; that the Landlord's particulars and bank details were duly forwarded to the Appellant to enable him pay the rent as ordered by the Honourable Court; she avers that it is not true that the rent for the premises is Kshs. 3,400 per month and she has no idea where the Appellant obtained such false information; that the monthly rent for the premises is Kshs. 15,000 per month; that the Appellant has never paid even Kshs. 3,400 or anything at all for rent since the Order was made by the Children's Court in February; she states that the application herein is undeserving of this Honourable Court's discretion since the Appellant comes to seek an equitable remedy yet he himself does not do equity; it is further her averment that the only support she receives from the Appellant in terms of the maintenance for the children, is school fees which the appellant pays as and when he feels like; that the Appellant does not in anyway contribute to the school related expenses, transport, medical or clothing as alleged and despite the Orders of the Children's Court, this burden has been left to her entirely; that she believes that the Children's Court, in exercising its judicial mandate and in the best interests of the minors, rightly made the Orders that it did, having properly considered all the evidence presented before it; she avers that she has never, at any time concealed the fact that she is employed and even swore an Affidavit of Means on 21st October, 2011, in Children's Case No. 781 of 2011, clearly indicating that she is a teacher at **[particulars withheld]** Technical Institute and it is from the same Affidavit of Means that the Appellant herein obtained the copy of pay slip now attached to his Supporting Affidavit as Annexure JMA 3.
 5. It is her averment that it is curious that despite all the Appellant's allegations, both in this appeal and in the Children's Court, the Appellant has never filed his affidavit of means to prove that he is, indeed, incapable of meeting his parental obligations to the Minors herein, or that the "burden" is beyond his means, as he alleges; she further avers that despite the Order of the Children's Court dated 16th November, 2011, which allowed parties to share actual possession of the Minors during the school holidays, the Appellant has never bothered to share and enjoy even one (1) single day with the Minors; that she believes that the Appellant does not have the best interests of the Minors at heart, and that this application and indeed the entire appeal is a malicious attempt to get back at her, at the expense of the Minors and their general welfare.
 6. Both Counsel Mrs. Arasa for the Appellant and Mr. Omindo for the Respondent filed in their written submissions on 9th May, 2013.
 7. It is the Appellant's submission that the Respondent produced a receipt confirming the landlord to be Quality Agency while the exhibit dated 7th February, 2013 was full proof that the initial evidence did not tally with the evidence produced as it indicate Hellen N. Mwanzia and not Quality Agency; that the evidence tendered in court in the primary suit was not consistent with

receipts produced. The Appellant refers the court to peruse the Appellant's exhibit JMA8 detailing the details of yet another Landlord by the name B C.K. M therefore the question to be determined by the court is the genuineness of the receipts. The Appellant submits that it has been his culture and the Schools' rules that unless school fees is paid in full at the opening of the terms, no child is admitted and whatever school related expenses must be cleared, and he prays that the Respondent does cater for her rent as the minors are in boarding school. He further submitted that he has taken a company medical cover for all the minors and all the cards are in the Respondent's custody.

8. It is further the Appellant's submission that the Respondent's house allowance is well catered by her employer and is well demonstrated in her pay slip. He submits that he is only able to satisfy his liabilities by depending on his overtime as the total deductions add up (Kshs. 74, 862.64) which is in excess of his basic salary plus house allowance as shown on the pay slip. The Appellant submits that it is a duty for both parents to provide for the children as enshrined in the constitution under Article (53) and that the Respondent has the capacity to take care of the children's other needs, as she is in gainful employment. Lastly, the Appellant submits that the court does consider the issues with the best interest of the minors at heart and on both parties contribution towards the minors for their well- being without overburdening one party.
9. On her part the Respondent submits that the Appellant has not paid a single shilling towards the rent either to the Landlord directly or as ordered by the Court in February, 2012. Further that the Appellant alleges without proof that the rent amount of Kshs. 15,000 is incorrect and that the rent payable is Kshs. 3,400. On the allegation that the amount of Kshs. 15,000 is exaggerated and that the receipts presented to the children's Court are fake, the Respondent invited the Court to closely scrutinize the documents presented by the Appellant; firstly the letters dated 24th February, 2012 and 17th October, 2012, forwarding the Landlord's bank details to the Appellant both indicate the same name, albeit misspelled and the same account number, that the Landlord or account holder is one C.K. M; secondly the receipt Quality Agency presented by the Appellant as evidence of the Appellant's allegations, bears two stamps, one being up-side down, that the Honourable Court will note that the stamp reads Mogun Estate. Finally, the receipt presented by the Respondent herein (Exhibit RGO1), which the Appellant has concluded to be another falsification by the Respondent, was issued following a transaction at KCB Mtaani outlet and not at a banking hall, and that the KCB Mtaani agent's name is Hellen Mwanzia as clearly indicated on the receipt. It clearly indicates at the bottom left corner that the beneficiary of the said payment is one C.K. M. In view of the foregoing, the Respondent urged Court to respectfully dismiss these allegations, that they are nothing but a waste of this Honourable Court's time and an abuse of process.
10. On the Appellant's prayer that he does not have to pay house rent for the Respondent and the four (4) minors since the Respondent earns a salary as a teacher, in which she also gets a house allowance of Kshs. 20,000, the Respondent submits that the Court will note that as per the Order of 6th February, 2012, the Appellant is required to cater for school fees, school related expenses and house rent only. Therefore, she is left to handle the rest of the burden of feeding, clothing and meeting all other needs that the four (4) children may have. The Respondent contends that the Appellant has not satisfied the principles or conditions for review of an order. Further, that a review can be granted in particular circumstances, that the Appellant has not shown that there had been discovery of new or important matters or evidence which after due diligence was not within his knowledge or could not be produced before, that neither has he shown that there is some mistake or error apparent on the face of the record or that there is any sufficient reason for review. It is the Respondent's submission that he who comes to equity must come with clean hands. That since the Order was made in February, 2012, the Appellant has not paid even the Kshs. 3,400 that he claims is the actual house rent. Finally, the Respondent submits that the Appellant is not a candid man and is intent on misleading this Honourable Court and ensuring that the Minors' best interests are interfered with.
11. Having considered the application, the supporting affidavit, the replying affidavit and the supplementary affidavit as well as the written submissions by the counsel for the parties, I take the view that the main issues for consideration is whether the Orders issued on the 6th February, 2012

with regard to payment of rent of Kshs. 15,000, should be reviewed, set aside and stayed.

12. It is noteworthy to mention that an Order was issued by the Children's Court in case No. 781 of 2011 on the 6th February, 2012 by Hon. C.A. Ocharo, Principal Magistrate. The said order states that:

- a. The Defendant/Appellant do pay school fees and school related expenses.
- b. The Defendant/Appellant do pay rent of the house occupied by the Applicant and the Children directly to the Landlord on or before the time required.
- c. That costs be in the cause.

13. It is the Respondent's case that since the issuance of the said Order in February, 2012, the Appellant has not paid a single shilling towards the rent.

14. The Appellant has made allegations of incorrect amount of Kshs. 15,000 as opposed to Kshs. 3,400 being payable as rent, yet he has failed or ignored to prove his allegation. Worse still, it is patently clear that the Appellant has not made any effort to obey the said Court Order, neither has he made payment of the alleged confirmed figure of Kshs. 3,400. Consequently, the Appellant must be reminded that a Court Order demands obedience forthwith. The Appellant needed to obey the Court Order whether he was happy with it or not. This principle was laid out in the case of *Hadkinson –vs–Hadkinson* (1952) All ER 567 where the court stated that court orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away is to underestimate and belittle the purpose for which the court is set up. The Appellant's conduct in this matter shows plainly that he has come to a court of equity with unclean hands and should be reminded of the equitable principle that "*he who comes to equity must do so with clean hands.*" Being of that persuasion, the Appellant herein is unworthy of this Court's discretion. Similarly, the application should therefore not be allowed as the grounds for seeking such review, setting aside and stay are not merited. Further, the court should be inclined to find that the Appellant has come to a court of equity with unclean hands and therefore is not entitled to the orders sought.

15. Moreover, reference must be made to Section 99 of the Children's Act under which the application is made. The said section provides as follows:

"The Court shall have power to impose such conditions as it thinks fit to an order made under this section and shall have power to vary, modify or discharge any order made under Section 98 with respect to the making of any financial provision, by altering the times of payments or by increasing or diminishing the amount payable or may temporarily suspend the order as to the whole or any part of the money paid and subsequently revive it wholly or in part as the Court thinks fit."

16. In view of the fact that the Appellant has not obeyed the order of the Court given on the 6th of February, 2012, this court will not use the above mentioned power to impose any conditions, and accordingly declines to vary the said order. The circumstances of this case on the whole are such that the court does not think fit to grant the orders sought. The Appellant is under a duty in law to provide for the said minors- shelter, clothing, food medical care, education etc. He was ordered by the Court on 6th February, 2012, to pay rent among others, an order which he has disregarded and he has not brought before this Court sufficient material that would warrant a review of the said order. Can this Court entertain the Appellant's application in the circumstances? *Halsbury's Laws of England*, 4th ed. Reissue, vol. 9(1) (London: Butterworths, 1998) at para. 511, puts it this way:

"The general rule is that a party in contempt cannot be heard or take proceedings in the same cause until he has purged his contempt; nor while he is in contempt can he be heard to appeal from any order made in the cause."

17. In the light of all the above I have no hesitation in concluding that the application lacks merit and should not be entertained by this Court. In the result I make the following order:-

(1) The application is dismissed.

(2) The appellant is ordered to pay costs of the application to the Respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 29TH DAY OF MAY, 2015.

W. MUSYOKA

JUDGE