

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.51 OF 2013

G K.....APPELLANT

VERSUS

K M K 1.....1ST RESPONDENT

K M K 2.....2NDRESPONDENT

RULING

On 26th November 2013, Musyoka J delivered a Ruling in respect of an application that had been filed by the Appellant seeking various orders from the court, including an order staying proceedings before the Children’s Court and other orders issued in **Nairobi Children’s Court Miscellaneous Application No. 2 of 2006**. Another application was filed by the Appellant seeking to set aside the orders that had been issued by this court on 13th November 2013. After considering both applications, the court made the following order:

“23. Accordingly, the court finds that the application in terms of Prayer 3 fails for lack of merit, and on Prayer 4 the court finds that both the father and mother shall have joint equal responsibility with regard to the educational needs for the Respondents herein. The parties are at liberty to agree on the modalities, failing which the college fees and related expenses shall be divided equally between the two parents. This order shall apply to the expenses that shall fall due from the date of this Ruling.

24. On the second application dated 14th November 2013, I find that the same has already been dealt with by the orders of this court made on 14th November 2013 and 21st November 2013 respectively. Consequently, no further orders shall be made in that behalf.”

The Respondents were aggrieved by this decision. By Notice of Motion made under **Order 45(1) and Order 51 Rule 15** of the **Civil Procedure Rules** and **Sections 1A, 1B, 3A and 63(e)** of the **Civil Procedure Act**, the Respondents sought to review and set aside the said orders of this court on the grounds that there was an error apparent on the face of the record. In particular, the Respondents stated that there existed an agreement on parental responsibility which had been reduced into writing by consent of the parties which had defined the sharing of parental responsibilities between the mother and the father of the Respondents. That agreement is dated 11th September 2009, and was entered pursuant to **Section 25** of the **Children’s Act**. The Respondents stated that that agreement required the Appellant to cater for the school fees and school related expenses while the mother of the Respondents was required to continue providing shelter, food and clothing for the Respondents. The Respondents want the order issued by this court on 26th November 2013 reviewed to the extent of recognizing the said parental responsibility agreement or in the alternative direct that the Appellant in addition to paying half of the college fees pay half his share for the provision of shelter, medical care, food, clothing and other college related expenses. The application is supported by the annexed affidavit of the 1st Respondent K M K1.

The application was opposed. The Appellant filed a preliminary objection to the application. The Appellant noted that the Respondents lacked *locus standi* to file the application as there were no orders issued against them by this court capable of being review or set aside. The Appellant further contended that the application was filed contrary to the mandatory provisions of **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1(1)(a)** of the **Civil Procedure Rules**. Contemporaneous with responding to the application, the Appellant filed a Notice of Motion pursuant to the provision of **Order 45 Rule 1** and **Order 51 Rule 15** of the **Civil Procedure Rules** and **Sections 1A, 1B and 3A** of the **Civil Procedure Rules** seeking orders of this court to review or set aside the order that this court issued on 13th November 2013 together with the consequential orders flowing therefrom. The Appellant further prayed that the outstanding arrears of Kshs.138,731.25 in respect of the 1st Respondent's University fee at Nazarene University be equally shared and borne by the Appellant and the mother of the Respondents, F M M. The grounds in support of the application are stated on the face of the application. In essence, the Appellant wants the court to uphold the decision rendered by the court on 26th November 2013 requiring the mother and the father to share the responsibility of the educational needs of the Respondents. The application is supported by the annexed affidavit of the Appellant. The application is opposed. The 1st Respondent swore a replying affidavit in opposition to the application. The 1st Respondent essentially reiterated the contents of the Respondents' application seeking to compel the Appellant to exclusively cater for the college fees for the Respondents.

Counsel for both parties agreed, during the hearing of the application, for both applications to be heard at the same time. This Ruling therefore is in respect of both applications. This court heard oral rival submission made by Mr. Mungai for the Appellant and by Mr. Mageto for the Respondents. This court has carefully considered the said submission. Both the Appellant and the Respondents want to review and set aside the orders that they considered were made in their respective opponent's favour on 14th November 2013 and 26th November 2013. The issue for determination by this court is whether the Appellant and the Respondents made a case for this court to review the said two (2) decisions. Before giving reasons for this decision, it is imperative that this court gives an explanation why it is considering the application instead of the court that heard the initial application that is sought to be reviewed and set aside. On 30th December 2013, Musyoka J disqualified himself from further hearing this matter. The case was therefore referred to this court for the purposes of the hearing of the applications filed, respectively, by the Appellant and the Respondents.

It is apparent from both applications that the Appellant and the Respondents desire an interpretation of this court in regard to an earlier consent which was entered between the Appellant and the mother of the Respondents and which filed in **Nairobi Children's Court Miscellaneous Civil Application No.2 of 2006 Faith Mwari M'Murithania -Vs- Geoffrey Kimaita** on 13th October 2009 and the Order issued by this court on 26th November 2013. In the earlier order before the Children's Court, the Appellant had agreed by consent to ***"pay school fees and all educational related expenses."*** It was apparent that the dispute between the Appellant and the Respondents took a turn for the worse when the Appellant took issue with the fact that the 1st Respondent had unilaterally decided to join Africa Nazarene University instead of Mount Kenya University where the Appellant had been consulted and agreed to pay the University fees for the latter institution. The Appellant refused to pay the University fees of the 1st Respondent at African Nazarene University resulting in the Ruling that was delivered by Musyoka J on 26th November 2013.

The Respondents want the said Ruling reviewed because, in their view, there was an error apparent in the face of the record because the court did not take into account the earlier consent order in which the Appellant had agreed to pay all the school fees and the educational related expenses while the mother of the Respondents had agreed to cater for the shelter, food and clothing of the Respondents. The Appellant on his part is of the view that in so far as the Respondents chose to join Africa Nazarene University instead of Mount Kenya University which he had assented to, then he should only be required to pay half of the university fees of the 1st Respondent. On the other hand, the Respondents submitted that it was unfair for the mother of the Respondents to be required to cater for the shelter, food and clothing for the Respondents while at the same time providing for half of the university fees of the Respondents.

Having evaluated the facts of this application, it was clear to this court that both the mother of the Respondents and the Appellant appreciate the fact that they are required under **Section 90(e)** of the **Children Act** to have joint responsibility in terms of the maintenance of the Respondents. The Appellant has interpreted his responsibility as regard the educational needs of the Respondents to constitute paying only half of the university fees of the Respondents, and in this particular instance, the university fees of the 1st Respondent. This court is of the considered view that there was indeed an error apparent on the face of the record that requires to be rectified by this court reviewing the order made on 26th November 2013. The court did properly find that the Appellant and the mother of the Respondents ought to equally share the responsibility of maintaining the Respondents. However, the order issued did not require the Appellant to also equally share the responsibility of providing the shelter, food and clothing for the Respondents. This responsibility was left solely to the mother of the Respondents.

In the premises therefore, this court will review the Ruling of this court issued on 26th November 2013 to the extent that the Appellant shall be required to pay the entire college fees of the 1st Respondent at Africa Nazarene University excluding the provision of shelter, food and clothing which shall remain the sole responsibility of the mother of the Respondents. In that regard, this court upholds the consent that was entered between the Appellant and the mother of the Respondents on 13th October 2009 before the Children's Court. It was apparent from these proceedings that parental responsibility of the Appellant and the mother of the Respondents had been extended beyond the Respondents' eighteenth birthdays. This extension is provided under **Section 28** of the **Children Act**. This order shall only apply in that regard to the extent of undergraduate studies of the Respondents upon which the Appellant's responsibility to cater for the educational needs of the Respondents shall cease. In view of the above Ruling rendered by this court, it is evident that the Appellant's application seeking to be excused from paying the entire college fees of the 1st Respondent lacks merit and is hereby dismissed. There shall be no orders as to costs.

DATED AT NAIROBI THIS 26TH DAY OF JUNE, 2014.

L. KIMARU

JUDGE