



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
CIVIL APPEAL NO. 21 OF 2014

S K M.....APPLICANT

VERSES

M W I

(Suing on behalf of Arian Nyaruru and Ajani Njeri).....**RESPONDENT**

Being an appeal from the Ruling and Order of the Chief Magistrate's

Court, Children Court, Milimani Law Courts, delivered on 13th March

2014 in Children Case No. 1056 of 2013.

RULING

1. The applicant was, following DNA test, shown to be the father of the children herein in respect of whom the respondent sought an order of maintenance before the Children Court. He was aggrieved by the order and filed this appeal. He has sought the stay of execution of the order pending the hearing and determination of the appeal, and has in the meantime sought to be allowed to pay Kshs.7,000/= per month towards the maintenance of the children. The application was made under **section 80** of the **Children Act** and **order 42 rule 6** of the **Civil Procedure Rules**. The Children Court had on 9th December 2013 ordered the payment of Kshs.100,000/= per month which was on 13th March 2014 reviewed to Kshs.60,000/= per month.
2. The applicant's complaint was that the court had failed to consider and apply the provisions of **sections 91** and **101** of the **Children Act**, including:-
 - a. the true needs of the children;
 - b. an inquiry into the means of the applicant;
 - c. the fact that the applicant had four other children whom he was taking care of; and
 - d. the obligation of the respondent to contribute towards the maintenance of the children in the case.
3. On 1st June 2014 the application came before this Court and was ordered to be served for *interparte* hearing on 2nd July 2014. On 2nd July 2014, on the basis that the application had been served and had not been opposed, stay was granted on condition that the applicant pays

Kshs.20,000/= per month towards maintenance.

4. On 23rd July 2014 the respondent applied to have the order issued by this Court on 2nd July 2014 set aside on the basis that the application leading to the order had been served on 1st July 2014, which was late, and that on 2nd July 2014, the matter had not been cause- listed and therefore it was not known it would be heard. The fact that service was on 1st July 2014 allowed for little time to respond to the application. Further, that the applicant had not come to court with clean hands and was guilty of material non disclosure. It was deponed that the applicant had on 1st December 2013 been ordered to pay Kshs.100,000/= per month which he had not paid. The order had been reviewed at his request to Kshs.60,000/= per month on 13th March 2014 but, again, had not been paid. This had led to execution proceedings which had provoked the appeal and application for stay. The arrears are Kshs.371,000/=. In the affidavit sworn by the respondent, she stated that when the applicant was asked to pay Ksh.100,000/= per month he has intermittently been paying Kshs.7,000/= per month. It is the Kshs.7,000/= that he seeks to be allowed to pay per month. The respondent states that the amount cannot suffice. She further stated that the applicant had disputed paternity and that was how DNA was conducted for which he paid Kshs.100,000/=. She wonders why he was ready to pay Kshs.100,000/= for DNA and cannot pay for maintenance. The applicant's case was that he has between November 2013 and June 2014 been paying Kshs.7,000/= per month towards the upkeep of the children. He stated that the order to pay Kshs.60,000/= per month was both punitive and arbitrary.
5. The children in question are twins who are of tender age. Their custody was granted to their mother, the respondent. It was not disputed that the respondent was unemployed and putting up with a well-wisher and the applicant has a law firm. He has his four other children to take care of. The trial court considered these and other facts to reach the amount now subject of the appeal.
6. The order for maintenance was an interim one pending the hearing and determination of the main suit. It is considered that it is in the main suit that the parties will be allowed to testify and call witnesses, or other evidence, to enable the court to make a determination as to the reasonable maintenance for the children, while considering their best interests.
7. The applicant is no longer challenging the fact of maintenance, now that DNA test has found him to be the father of the children. He is challenging the amount. He was ordered to pay Kshs.60,000/= per month, Instead he unilaterally decided to be paying Kshs.7,000/= per month. He was under a duty to pay the ordered amount, until it is reviewed or set aside. In the face of the order and with the accumulated arrears, and noting that these children are tender and need to be maintained, it would be difficult to exercise my discretion in favour of the applicant.
8. More important, the applicant has not shown that if the order is not granted he will suffer substantial loss. It is also clear to me that the order for the payment of Kshs,20,000/= per month that was made on 2nd July 2014 was made on the basis of material non disclosure on the part of the applicant. It is set aside. I dismiss the applicant's application for stay with costs.

DATED and DELIVERED at NAIROBI this 18th August 2014.

A.O. MUCHELULE

JUDGE