



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.59 OF 2012

BETWEEN

JOO APPELLANT

AND

NO (suing on behalf of WJO(mino))..... RESPONDENT

(Being an appeal from ruling of the Resident Magistrate Kisii, Hon. Kaitany dated 20th day of April 2012 in CMC Children's case No.28 of 2011)

JUDGMENT

1. The appellant herein JOO was the defendant in the Chief Magistrate's Court Kisii in Children's Case No.28 of 2011. In that case the plaintiff now respondent herein NO (suing on behalf of WJO (minor) filed a children's case on 11th April 2011 vide a plaint dated 11th April 2011 seeking the following prayers:-

- a. *Legal custody of the child/subject be granted to the plaintiff;*
- b. *That the defendant takes responsibility of maintaining the subject and meeting the costs of his education;*
- c. *The defendant be compelled to pay to the plaintiff such monthly sum as this court may consider reasonable contribution as being educational fees for the aforementioned child;*
- d. *In default of the defendant paying promptly as shall be ordered by the court defendant's salary be attached in such proportion as to meet the cost of maintenance and education of the subject;*
- e. *That the defendant bears the costs of this suit.*

2. Simultaneously with the plaint, the respondent also filed a Notice of Motion dated 24th April 2012 seeking the following prayers:-

1. *That this application be certified as urgent and service of the same be dispensed with in the first instance;*
2. *That there be stay of execution of the Orders dated 12th May 2011 herein pending hearing and determination of this application interparties;*
3. *That this honourable court be pleased to set aside its orders dated 12th May 2011 on such terms as are just;*
4. *That the applicant/respondent be granted leave to file reply to Chamber summons dated 11th April 2008;*
5. *That upon setting aside the orders of 12th May 2011, the court be pleased to fix a hearing date of*

this application dated 11th April 2008 interpartes;

6. *That costs be provided for.*

3. The appellant neither entered appearance nor filed a defence. The court thereafter made orders dated 12th May 2011 which read as follows:-

- a. *That pending hearing and determination of the application the respondent do immediately pay/and or provide Bankers cheque of a sum of Kshs.50,000/=.*
- b. *That pending hearing and determination of the suit the respondent pay school fees for WJO (hereinafter called the subject) as it falls due in his respective school aforementioned.*
- c. *That pending hearing and determination of this suit the respondent do make such periodical payment to the plaintiff/applicant in the sum of Kshs.10,000/= per month for education and medical expenses for the above mentioned subject.*
- d. *That costs of this application be provided for.*

4. Upon being served with the above mentioned orders the appellant filed an application dated 3rd August 2011 through the firm of Ochillo & Co. Advocates seeking orders:-

- a. *That the application be certified as urgent and service of the same be dispensed with it in the first instance.*
- b. *That there be stay of execution of orders dated 12th May 2011 pending hearing and determination of this application.*
- c. *That this honourable court be pleased to set aside its orders dated 12th May 2011 on such terms as are just.*
- d. *That the applicant/respondent be granted leave to file reply to chamber summons dated 11th April 2011.*
- e. *That upon setting aside the orders on 12th May 2011, the court be pleased to fix a hearing date of this application dated 11th April 2011 interpartes.*
- f. *That costs be provided for.*

5. The above application was canvassed on 8th December 2011 and a ruling made on 26th January 2012 where the trial court allowed the application on condition that defendant/applicant would continue giving the plaintiff herein Kshs.8000/= per month for the maintenance of the child herein pending hearing and determination of the suit. The above stated amount was to be paid to the respondent by appellant starting end of January 2012.

6. The appellant failed to comply with the maintenance order dated 26th January 2012 so the respondent commenced execution. The appellant then filed a Notice of Motion dated 13th March 2011 seeking orders:-

1. *That this court be pleased to certify this application s urgent and the same be heard ex-parte in the first instance.*
2. *That pending the hearing and determination of this application the court stays execution of the order.*
3. *That this honourable court be pleased to recall and set aside the NTSC issued against the applicant pending determination of this suit.*
4. *That the costs of this application be provided for.*

7. In a ruling delivered on 10th April 2012, the trial magistrate held:-

“The application herein is for setting aside of a court order dated 14th February 2012. The same order required the applicant herein to pay the respondent Kshs.8000/= per month for the maintenance of the child pending the determination of this suit. That order was the result of an application made by the appellant dated 3rd August 2011. The applicant at that stage also denied being the child's father. However, the court proceeded to make this order. Setting aside of that order at this juncture would be

tantamount to this court sitting on appeal of that decision. This is because there is no new issue that has been raised to warrant this court to set that order aside. If the applicant was dissatisfied with the same he ought to have appealed against that order and not to bring back a similar application. Consequently, I must decline the orders sought. The application is therefore dismissed with costs.”

8. Being dissatisfied with the above ruling, the appellant has now filed this appeal. In his memorandum of Appeal dated 24th April 2012, the appellant herein JOO has set out the following grounds:-

1. *The trial magistrate erred in law by disallowing the application dated 13th day of March 2012, which application was not opposed by the respondent as required by law.*
2. *The trial magistrate erred in law by not appreciating the grounds of the application more particularly the denial of parental responsibility over a stranger child and by not ordering for DNA test.*
3. *The trial magistrate did not consider that by failing to consider the application before her which was unopposed it luried tatamount to oppressive before the appellant thus occasioning a miscarriage of justice.(sic)*

9. The appellant asks the court for an order that:-

- a. *The appeal be allowed;*
- b. *The N.T.S.C. against the appellant be lifted;*
- c. *The respondent be allowed to pay the appellant taxed costs of appeal.*

10. When the matter came before me on 12th June 2014, it was directed that the appeal be argued by filing and exchanging written submissions. Both counsel representing the respective parties have filed their written submissions and I have read them.

11. This court being conscious of its role as the first appellate court as stated in **Selle -vs- Associated Motor Boat Co. Ltd.[1968] E.A. 123** has to reevaluate the evidence that was tendered before the trial court, assess it and make its own conclusion.

12. As indicated elsewhere in this judgment, the appellant despite being served with the plaint and chamber summons dated 11th April 2011 failed to enter appearance and thus an order was made ex-parte dated 12th May 2011. Pursuant to the order of 12th May 2011, the appellant filed an application dated 3rd August 2011 and in its ruling, the trial court allowed his application and ordered him to pay Kshs.8000/= per month for maintenance of the child pending hearing and determination of the suit inter parties.

13. From the record of proceedings before the trial court, the appellant was ordered to give respondent Kshs.8000/= by the end of January 2012. The hearing was set for 15th February 2012 and the respondent proposed that the appellant deposits the money on the child's line by M-pesa phone No.0720084825. It was then ordered that the money should be deposited on the 10th day of each preceding month.

14. When the matter came up for hearing on 15th February 2012, the court was informed that the appellant was not feeling well though he had not sent the money. However, despite the fact that appellant's advocate produced treatment notes, the trial court still accorded the respondent her request to apply for execution on 24th February 2012. The matter was mentioned and a hearing date was set for 6th March 2012. This time the appellant was present.

15. The matter was then severally adjourned at the instance of the appellant whom it was contended was feeling unwell. Meanwhile the respondent filed a Notice to Show Cause since the appellant had never complied with the trial court's order to remit Kshs.8000/= in the child's phone via M-pesa effective January 2012.

16. The appellant in turn filed a notice of motion seeking to set aside the Notice to Show Cause filed by

the respondent. It is the ruling arising from the said application that gave rise to the instant application.

17. In the case of Hadkinson -vs- Hadkinson 2 All ER 1952 pg.56A Ropper J stated:-

“It is plain or unquantified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even in cases where the person affected by an order believes it to be irregular or even void.”

18. In this case, the appellant was duly represented in court when the order dated 26th January 2012 was made ordering him to remit Kshs.8000/= to the child's M-pesa account pending hearing inter partes. The Kshs.8000/= was a pre-condition to be met by the appellant before any hearing inter partes was to be conducted. In as much as he was represented by counsel, the appellant never objected to the order whose compliance was a pre-condition before giving the appellant audience for hearing inter partes.

19. Consequently, the appellant failed to remit the amount and as a result the respondent filed a notice to show cause. The appellant opposed the said notice to show cause not on valid grounds of service of the said notice but he contended that the child for whom he was to pay Kshs.8000/= p.m was not his biological child. The trial court in my humble view rightly dismissed the appellant's application on the basis that:-

- a. **The appellant once the order was made on 26th January 2012, he should have appealed against the said decision on the basis that he had no obligation to the said child since he was not its biological father.**
- b. **Secondly, on the issue of DNA even if the appellant contends that he is not the father of the child, he does admit in his defendant's written statement dated 1st March 2012 that he married the respondent in 1989, they were blessed with two children that is Teddy Ouma and Collins Otieno (deceased). That Teddy Ouma was born on 25th December 1992. That in the year 1994 April, the appellant developed some sickness and in turn their relationship with the respondent broke down. Since the appellant had admitted that he was infact married to the respondent in the year 1989; the said child being born in the year 1992 only means that there is a presumption that a child born during the subsistence of the marriage belongs to the appellant unless DNA evidence proving the contrary is adduced. I am also guided by what Lord Mangham stated in Joseph Constantine -vs- Imperial Smelting Cororation (1941) 2 All ER 165, 179.**

“That the burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule which applies is that the burden of proof lies upon him who affirms and not upon him who denies. It is an ancient rule founded in consideration of good sense and which should not be departed from in the absence of any strong reasons.”

20. In my considered view therefore, what the appellant should have done is to have asked the trial court to order a DNA on the child before he could pay the Kshs.8000/=. The fact that he accepted the terms of the court order dated 26th January 2010 and now comes to court to vary the said orders without bringing any new evidence as to why he is unable to fulfill the orders given by the trial magistrate simply amounts to an abuse of court process which this court cannot countenance. In any event, he who seeks equity must do equity and approach the court with clean hands. The appellant's hands are dirty from willful disobedience of a lawful court order.

21. For the foregoing reasons I uphold the trial court's ruling dated 10th April 2012 and dismiss the appellant's appeal in its entirety. The costs of this appeal are awarded to the respondent.

Delivered, dated and signed at Kisii this 29th day of October, 2014

R.N. SITATI

JUDGE.

In the presence of:-

1. Mr. Nyangosi h/b for S.M. Sagwe (present for Appellant)
2. Mr. Ochwangi h/b for Ochoki (present) for Respondent
3. Mr. Bibu - Court Assistant