



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 76 OF 2012

B K C.....APPELLANT

VERSUS

B C S.....RESPONDENT

(Being an Appeal from the entire Ruling delivered and Order made on the 28th September, 2012 by D.K. Kuto Resident Magistrate in Nairobi Children Case No. 341 of 2012).

JUDGMENT

1. On 9th July 2012 the appellant herein filed in Nairobi Children Case No. 341 of 2012 a Notice of Motion seeking review, variation and suspension of the orders made on 20th June 2012. The respondent opposed the application and swore a replying affidavit on 23rd July 2012 and a Further Affidavit on 23rd August 2012.
2. The learned Resident Magistrate had ordered on 20th June 2012 that:-
 - a. the child's medical expenses be covered by the defendant's employer, and any other extra expenses be equally met by both parties;
 - b. on access, the orders in respect of the elder child were reviewed to allow for equal holiday access that is on 50-50 basis;
 - c. DNA test be done in respect of the younger child (M J C) at a facility to be agreed upon by the parties, with the parties to share the costs of the test.
 - d. The rest of the orders to remain as per the ruling dated 20th June 2012.
3. The ruling dated 20th June 2012 whose orders the appellant sought to review as above mentioned, were made on a Chamber Summons dated 12th March 2012. The applicant in the said application sought from court interim custody, care and control of the children of the marriage, interim maintenance for the children of the marriage by the Defendant/Appellant herein, among other orders. The review application dated 9th July 2012 was heard and on 28th September 2012 the court partially reviewed the earlier orders made on 20th June 2012.
4. Being aggrieved by the said decision the Appellant filed the present appeal founded on the grounds set out in the memorandum of appeal dated 17th October 2012, and filed herein on 18th October 2012. The appellant prays that the ruling delivered and the order made on 28th September 2012 by the Children's Resident Magistrate Court be set aside and that the Honourable Court be pleased to issue any further orders as it deems fit and convenient in the circumstances of the case.
5. The appeal was prosecuted by way of written submissions. The appellant's written submissions

- were filed on the 16th October 2013, while the Respondent's submissions were filed on 30th October, 2013. Parties highlighted their written submissions on 5th June, 2014.
6. It was submitted on behalf of the appellant that the appeal is grounded mainly on one issue which is all encompassing, that the learned magistrate erred in law and in fact in failing to note of all else and in dealing with the issues concerning a child the best interests of the child ranks supreme. The appellant relied on Article 53(2) of the Constitution of Kenya, 2010. Further, that the parental care and protection which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not. As a result it was submitted, it was unfair as the learned Magistrate did lump the entire maintenance of the children on one party and ordered that the appellant pay single handedly the child's school fees at a high cost school at over Kshs. 80,000.00 per term and still pay a further Kshs. 17,000.00 monthly maintenance and yet the respondent is an employee of Parliamentary Service Commission and earning over Kshs. 60,000.00 per month. It was the Appellant's contention that the elder child was removed from of the Milimani Kitengela Junior Academy abruptly without the consent of the appellant and admitted at a high cost school.
 7. Further, that the trial court did not take into consideration the net income of the appellant, the income of the respondent, the ability of the parents and the best interests of the children. It was further argued in the circumstances of this appeal and in order to achieve the best interest of the child, it is necessary that the said child be returned to the said Milimani Kitengela Junior Academy and that upon return the parents will adjust their schedules and their residences to suit the child's or organize transport to and from school. It was submitted that the appellant had another child to maintain and pay school fees for at Multimedia University, and that the learned Magistrate totally shut out his eyes to the existence of the said child.
 8. On the respondent's part, it was submitted that the appellant has not demonstrated any grounds to warrant the court granting the orders sought in the appeal. It was further submitted that the appellant denial of paternity is an afterthought which he intends to use to turn the Children's Court orders against him and to defeat the best interest of his children. The respondent has conceded that a paternity test was conducted, which had mysteriously turned negative, and that she has sought a second opinion on the same from the Children's Court and is awaiting directions of the court on the second paternity test. It was submitted that on 28th September 2012, the court upheld the orders of 20th June 2012 and the only orders the court deemed necessary to review was the issue of access wherein the court ordered the appellant to have access to the eldest child during the school holidays and the appellant to continue providing medical cover but any extra expenses to be equally shared and the respondent to take out a Notice To Show Cause if the appellant failed to comply with the orders.
 9. It was submitted that the appellant has not complied with the said orders of the court, he has partially complied by paying school fees only without catering for related expenses but was still in contempt of the maintenance orders to take out medical covers and that all the expenses the appellant was ordered to take up have been left entirely to the respondent. It was their submission that this appeal is not in the best interests of the children, and that the appellant has come to court to frustrate, forestall and defeat the orders of the Children Court for him to continue in default as the Children continue to suffer. It was stated that the court has never stayed or set aside the orders of 20th June 2012 and 28th September, 2012, and that the appellant cannot abdicate his share of parental responsibility under the pretext that the ruling of the lower court was unfair to one party.
 10. The respondent submitted that the appellant does not pay school fees from his pocket, as he has a benefit afforded to him by his employer to him, he always enjoyed this benefit and should not therefore be heard saying that he has had to pay anything extra from his pocket and that he is the one who took the child to Riara School. It was submitted that the orders of this court are not issued in vain and this court should not entertain any appeal by the appellant. The respondent relied on the case of *Mawani vs. Mawani* (1997) KLR 159 where at page 607 Simpson J held:

"That Application ought not be heard until the Principal has purged his contempt and

complied with orders of the court.”

11. The respondent submitted that the appellant in this case ought not to be afforded an opportunity to be heard until he has purged the contempt of the lower court orders. She prays that the appellant's appeal be dismissed with costs.
12. This court has carefully considered the appeal herein, the grounds proffered, the submissions by respective parties and the orders appealed against. In this appeal the appellant's fundamental argument is that the learned magistrate erred in law and in fact in failing to note that in dealing with issues that concern a child or children the best interests of the child or children rank supreme. The respondent's case on the other hand is that this court should not afford the appellant a hearing on the ground that he has not complied with the orders that were made by the lower court. These are the very orders the appellant seeks to be set aside in his appeal. I also note that the appellant did seek an order for stay pending appeal, an application that this court dismissed.
13. Primarily, this court will have to determine whether an appellant who has not complied with the orders of the court deserved to be heard. It was the respondent's contention that the appellant has failed to obey the orders of the lower court. She argues that he has partially paid school fees and the said child has been sent home for non-payment of school fees on three occasions. She further argues that the Appellant has not provided the medical cover and maintenance as was ordered by the court and therefore urges the court to dismiss the appeal as it was bad in law.
14. Court orders must be obeyed as soon as they are issued. In *Kanchanben Ramniklal Shah vs. Shamit Shantilal Shah & 6 Others* (2010) eKLR Njagi J stated that:

“A court order is valid and effective from the moment it is made. It is born mature and has no period of infancy, and therefore commands obedience forthwith.”
15. It is clear from the record that the appellant did not agree with the orders given by the lower court, and indeed sought review of the said orders. When the review application was determined he was again dissatisfied with the result. However, his dissatisfaction, did not absolve him from obeying the said orders until and unless they were set aside. The court in *Hadkinson vs. Hadkinson* (1952) All ER 567, maintained 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.”*
16. In the appellant's application dated 17th October 2012, where stay of execution of orders of the Children's Court made on 20th June 2012 and 28th September 2012, this court held that stay of execution of orders by the Children's Court for maintenance of a child, is not available. The application for stay was dismissed primarily on the grounds that the appellant had not been faithful in complying with the orders of the lower court. It emerges from the record of the lower court, and from the proceedings before me, that the appellant has not been paying school fees, and one of the children, who I had occasion to interview had been sent out of school for non-payment of school fees.
17. It is the very considered opinion of this court that the failure by the appellant to obey the said orders has amounted to failure to carry out his obligations as was directed by the lower court and that means that the appellant has come to a court of equity with unclean hands which equity frowns upon.
18. *I am in agreement with the respondent's contention that court orders are not issued in vain and in view of the fact that the appellant has not complied with the said orders, this court should not entertain his appeal. There were orders which were issued which orders required obedience, and as it turned out the appellant has not complied with them. In the circumstances, this appeal is for dismissal and I hereby dismiss the same with costs.*

DATED, SIGNED and DELIVERED at NAIROBI this 24th DAY OF October 2014.

W. MUSYOKA

JUDGE