



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 26 OF 2008**

M B B.....APPLICANT

VERSUS

M K H.....RESPONDENT

**RULING**

1. On 31<sup>st</sup> January 2014 I delivered a ruling that disposed of prayers 3, 4 and 5 of the application dated 15<sup>th</sup> September 2010. I expressed myself as unable to deal with prayers 1 and 2 of the application in the absence of affidavits of means. I granted the parties 14 days within which to file the affidavits.
2. The parties have complied with the order of 31<sup>st</sup> January 2014. The appellant filed her affidavit of means on 4<sup>th</sup> March 2014, while the respondent filed his on 7<sup>th</sup> April 2014.
3. Prayer 1 of the application dated 15<sup>th</sup> September 2010 seeks variation of the orders made on 6<sup>th</sup> March 2009 by increasing of the amount of monthly maintenance from Kshs.10,000.00 to Kshs.63,554.00 or such other sum as I may deem fit. Prayer 2 seeks that the respondent be ordered to pay a sum of Kshs.200,000.00 being half of the cost needed to set up a home for the appellant and the children.
4. In her affidavit of means, the appellant avers that she earns a net salary of Kshs.100,000.00 per month and has no other source of income. She lives with her father at Parklands Highridge where she contributes to the household expenses. She puts her total monthly expenses at Kshs.96,000.00, covering school fees, fuel and travel, household expenses and savings.
5. The respondent on his part avers to be engaged in business. He puts his total monthly expenses at Kshs.55,000.00 being for upkeep of the appellant's children, household expenses, water bill, vehicle maintenance and fuel. He puts the monthly income from his business at between Kshs.36,000.00 and Kshs.71,000.00. He has attached various documents to support his case.
6. He has commented on the affidavit of means filed by the appellant. He says the sum claimed of Kshs.45,000.00 for household expenses is on the higher side given that the appellant lives with other individuals apart from the children and that the appellant does not contribute to the household budget as her parents are wealthy. On school fees, he says that the same are not payable monthly, but termly. He states that the children attend a school which was too expensive for him and he was not in any event consulted when they were moved to the new school. On school transport he pleads that the amount claimed is unjustifiable for the children attend a school close to their residence and that he helps in picking and dropping them home. On the savings, he protests that the same is not for the benefit of the

children but that of the applicant. He states that he increased the monthly upkeep contribution to Kshs.15,000.00 without a court order in 2012 and says that he is ready to keep paying the said sum of Kshs.15,000.00 emphasizing that he cannot afford paying more than that. He states that the appellant earns much more than she has disclosed and as evidence of that he alleges that she recently bought an expensive car.

7. The reason for the proposed variation is stated in the appellant's affidavit sworn on 15<sup>th</sup> September 2010. She states that the children are growing and their needs are accordingly changing. To that affidavit she has attached a schedule of the children's current and proposed needs. The monthly estimate is put at Kshs.127,109.00, it works out as follows:-

**Monthly expenses**

Kshs.

Clothing	6,000.00
Food	25,000.00
Entertainment and allied expenses	15,000.00
School/story books	3,000.00
Househelp	5,000.00
Rent	40,000.00
Electricity and Water	8,000.00

**Annual Expenses**

	Kshs. Per year	Kshs. Per month
Birthdays and other occasions	40,000.00	3,333.00
School fees and transport	183,200.00	13,308.80
Medical care (AAR)	101,610.00	8,468.00

**Kshs.127,109.00**

8. It is now five (5) years going to six (6) since the orders of 6<sup>th</sup> March 2009 were recorded. Five years is a long time for children of tender years. They grow fast and their needs change equally fast. There is therefore basis for variation of the maintenance figure fixed in 2009. There is also the element of the effect of inflation on the Kenyan money. No evidence was led on this but it is a matter that the court can take judicial notice of. The amount fixed in 2009 is available for review and I shall review the same.

9. The school fees and school related expenses should ideally not be lumped together with the household and other expenses. It should be a shared responsibility between the parties. I shall order that the school fees be shared equally between the parties, but the respondent shall be the expenses for the children's school transport. He complains that the children are now enrolled in a school too expensive for his pocket. The answer to this would be that it would not be in the best interests of the children to remove them from the said school at this time but it should be ordered that the children shall remain in the said school and shall not be removed to another school without the prior consent of the respondent or leave of court.

10. On household expenses, the respondent complains that the appellant has a high income and does not cater for the household needs of the children as their needs are met by their wealthy maternal grandparents. To my mind this is a hollow argument. The children should not in the first place be living with their maternal grandparents. It is the primary duty of their father to provide them with shelter and to cater for their other needs related to food, clothing, medical care, entertainment, among others. The fact that the children are living with their mother's wealthy relatives is no excuse for their father to fail to provide for them.

11. In that respect, I shall enhance the maintenance figure as it relates to household and related expenses, which should cover housing, food clothing, entertainment, story books, house help, electricity and water, among others. I award a global sum of Kshs.61,000.00 per month broken down as follows:-

	<u>Kshs.</u>
a. Clothing	3,000.00
b. Food	10,000.00
c. Entertainment and related expenses	15,000.00
d. Househelp	7,000.00
e. Rent	22,000.00
f. Electricity/Water	<u>4,000.00</u>
<b><u>Total</u></b>	<b><u>61,000.00</u></b>

12. I have noted that the respondent's submissions that he does not earn much from his business. He has stated some figures and attached some documents to justify his position. These are documents relating to his business. The documents reflect sales and purchases of stock. I note however that these are not audited accounts. What has been placed before me are not proper accounting documents and I will therefore not give much credence to them.

13. On medical care, both parents should share the responsibility. The figure proposed in 2010 was Kshs.101,616.00. Due to passage of time I will enhance it to Kshs.150,000.00. The respondent shall provide cover of up to Kshs.75,000.00 per year for both children, with the other half being borne by the appellant.

14. On the second prayer, I have already noted that it is unacceptable that the children should be living with their material grandfather. The said relative has no responsibility to provide shelter for the children of a living father. It is imperative that proper accommodation be provided for the children. I have already made provision towards rent. On the setting up of accommodation for the children, it was proposed in 2010 that a sum of Kshs.400,000.00 be provided for the purpose. Due to passage of time I do hereby enhance the amount to Kshs.450,000.00. The respondent's contribution to that amount should be Kshs.225,000.00. This is a one- off once payment.

11. For avoidance of doubt, I do hereby allow the application dated 15<sup>th</sup> September 2010 in terms of prayers 1 and 2. The varied orders on the maintenance of the minor shall be as follows:-

- a. The parties shall share the children's school fees equally, with the respondent settling his share directly at the school;
- b. That the respondent shall meet all the other school related expenses of the children;
- c. That the children shall remain at the school where they are presently enrolled and shall not be transferred to any other school without the prior consent of the respondent or without leave of court;
- d. That the respondent shall pay a sum of Kshs.61,000.00 monthly to the appellant for the maintenance of the minors; the amount being payable not later than on the 3<sup>rd</sup> day of the succeeding month;
- e. That the respondent shall provide annual medical care or cover for the minors at Kshs.75,000.00, with the appellant providing an equivalent;

- f. That the respondent shall pay, within 30 days, a sum of Kshs.225,000.00 towards the setting up of a home for the children;
- g. That there shall be liberty to apply; and
- h. That costs shall be in the cause.

**Dated, signed and delivered in open court at Nairobi on 28<sup>TH</sup> day of November 2014.**

**W. MUSYOKA**

**JUDGE**

**In the presence of Mr. Mwenda for Mrs. Mbugua advocate for the applicant.**