



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 59 OF 2014

A M M.....PETITIONER

VERSUS

B M M.....RESPONDENT

RULING

1. The applicant has moved this court of by way of summons dated 30th July 2014. She seeks in the main orders that the respondent be commanded to pay maintenance to the applicant and the children of the marriage pending hearing and determination of an appeal that the applicant has filed herein.
2. A memorandum of appeal was filed herein on 31st July 2014, dated 30th July 2014. The appeal arises from a decision of the Chief Magistrate's Court in Milimani Chief Magistrate's Court Divorce Cause No. 165 of 2014. The impugned decision was made by D. ole Keiwua, Principal Magistrate, on 4th July 2014.
3. The decision of 4th July 2014 was on an interlocutory application dated 26th May 2014 where the applicant sought maintenance and several other orders. After going through the arguments presented by way of written submissions the lower court dismissed the application on the grounds, among others, that on the question of maintenance, and particularly on being maintained to the standard that she was accustomed to, the court needed to have had received oral evidence from the parties.
4. In the memorandum of appeal, the applicant raises several grounds some of which are as follows:-
 - a. That the lower court erred in failing to order maintenance for her and the children of the marriage;
 - b. That the court erred in finding that it had no jurisdiction to order for maintenance of the children;
 - c. That the lower court erred in holding that it ought to have been given oral evidence to establish claim for maintenance and
 - d. That the lower court erred in finding that the applicant failed to ask to cross-examine the appellant.
5. The issues raised in the application dated 30th July 2014 are essentially the same as those raised in the appeal.

6. I note that I am being invited to order maintenance for the applicant and the children. I find that I cannot venture to deal with maintenance pending appeal without getting into the substance of the appeal at this interlocutory stage. This would disadvantage the parties for they are yet to substantively argue their appeal.

7. Order for maintenance is an ancillary order that ought to be made by the court seized of the divorce matter. The divorce proceedings are still pending before the lower court, which is the proper court to order maintenance. The issue has come to me by way of appeal. I cannot deal with it at interlocutory stage, I can only address my mind to it at the hearing of the appeal itself.

8. I need not to say more. The summons dated 30th July 2014 is misconceived. I hereby dismiss it with no order as to costs. The applicant is directed to expedite the disposal of her appeal where the matters she is raising in the Summons shall be addressed.

9. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 19th DAY OF December 2014.

W. MUSYOKA

JUDGE

In the presence of Mr. Ndolo advocate for the applicant.

In the presence of Miss. Muruka for Mr. Ngugi advocate for the respondent.