

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCCA. CAUSE NO. 12 OF 2011

J W K.....APPLICANT

VERSUS

J M.....RESPONDENT

RULING

The application dated 23rd April 2012 is by the appellant. There are four principal prayers in the application. They can be collapsed into one main prayer – the maintenance of the children of the dissolved marriage between the appellant and the respondent pending the hearing and disposal of the appeal filed by the appellant.

The parties were previously married to each other. The marriage was dissolved by a decree of the lower Nairobi CMC DC NO. 198 of 2009. The divorce cause was heard in proceedings where only the respondent testified. The petition for dissolution of the marriage was allowed and custody of the minor issues of the marriage was granted to the respondent. It is these orders made in the divorce cause that are the subject of the appeal.

Thereafter the appellant moved this court on 16th March 2011 seeking several orders touching on the minors. The application was determined by Maraga J. (as he then was) on 15th November 2011 in a ruling erroneously titled "judgment". The court awarded interim custody of the children to the appellant during the pendency of the appeal. The orders were formally extracted and custody of the children yielded by the respondent to the appellant.

I have carefully gone through the application as well as the rival affidavits filed by the parties. I have also studied the entire record. I have noted that the petition in the lower court was by the respondent. I have also noted the appellant in her cross- petition sought an order for the maintenance of the children. The appellant did not participate in the hearing at the lower court as the divorce cause had been certified undefended. The issue of maintenance did not therefore arise at trial. The order made by the lower court was on custody, and that is the issue the appellant is now contesting before this court. The maintenance issue is therefore not one of the issues to be canvassed at the hearing of the main appeal.

The parties are before an appellate court. The matters being raised in the application dated 23rd April 2012 are normally very highly contentious ones. A final order on maintenance would usually be granted following a full trial. There would be no occasion for the parties to fully ventilate themselves on the matter on appeal through an interlocutory application. The Children's Act has created the Children's Court and vested it with jurisdiction to exhaustively address issues of this nature. It is my view that the parties before me are better off at the Children's Court so far as the matter of maintenance of the minors is concerned. This court is seized of this matter in its appellate jurisdiction, addressing the issue of maintenance, which in any event was not determined by the lower court, would be tantamount to exercising original jurisdiction in an appeal.

I therefore decline to grant the orders sought in the application dated 23rd April 2013. I hereby dismiss the said application. There will be no orders as to costs.

DATE, SIGNED and DELIVERED at NAIROBI this 7TH DAY OF JUNE, 2013.

W. MUSYOKA

JUDGE