



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
CIVIL APPEAL NO. 71 OF 2012

J A.....APPELLANT

VERSUS

M N I.....RESPONDENT

RULING

On 11th September 2012 by Hon. Mr. A.K. Mwicigi made an order in Nairobi Children's Case number 1293 of 2011 in the following terms:-

1. That the respondent retains custody of the minor the subject of the court proceedings;
2. That the appellant does have a right to access the child within reasonable modalities to be agreed upon by the parties;
3. That the appellant pays the following per month to the respondent starting September 2012-
 - (a) Kshs.10,000.00 monthly child support,
 - (b) Kshs. 3,000.00 for house help expenses,
 - (c) Kshs. 8,000.00 for food, and
 - (d) Kshs. 5,000.00 for toiletries/shopping;
4. That the respondent provides shelter for child;
5. That the appellant caters for health care of the child, including cost of immunization; and
6. That the parties share the cost of clothing, with the appellant contributing Kshs.5,000.00 for year towards this expense, the appellant's share for 2012 being payable immediately.

The appellant was aggrieved by the said order and lodged a memorandum of appeal in this cause on 9th October 2012. The main grounds of appeal are:-

- (a) That the court concluded that the appellant was liable to the respondent without credible proof;
- (b) That the award of the sum of Kshs.31,000.00 was without credible proof and was excessive in the extreme; and

(c) That the respondent's contribution was not factored in nor were the appellant's means considered.

The memorandum of appeal was followed up on 23rd November 2012 with a Notice of Motion, of even date, seeking stay of execution of the orders of 11th September 2012 pending the hearing and determination of the appeal. The application is premised on **Sections 80 and 167** of the Children Act. It is supported by two affidavits, one sworn by the appellant and the other by his advocate. The appellant argues that the sum of Kshs.31,000.00 awarded by the court was excessive and in any event he is not in a position to pay the same as he only earns Kshs.30,000.00 gross and Kshs.26,624.00 net per month. In any event the orders were made *exparte*.

The said application was served on the respondent. She filed a reply through her affidavit sworn on 5th February 2013. She asserts that the appellant is the biological father of the child as attested by a DNA test done on the orders of the court. She avers that the matter in the lower court came up for hearing on 5th September 2012, a date taken by consent of both parties, but the appellant and his advocate did not attend court on the appointed date and the matter proceeded *exparte* and the orders of 12th September 2012 were thereafter made. The respondent asserts that the figure of Kshs.31,000.00 is not excessive, and that the appellant, being the proprietor of S A C (particulars withheld), is a man of means capable of making that monthly payment ordered by the court. She concludes that a stay order would not be in the best interests of the child.

The matters being raised in the application dated 23rd November 2012 are the same issues that are the subject of the Memorandum of Appeal dated 9th October 2012, that is to say that the sum of Kshs.31,000.00 was excessive, the award was not supported by nor founded on credible evidence, and that it was beyond the means of the appellant. I cannot venture to discuss the merits of the Motion without getting into the merits of the appeal which would amount to determining the appeal at the interlocutory stage. That by itself is sufficient reason for dismissing the present application.

The subject of the appeal is a child. The orders made by the Children's Court were for the benefit of the said child. The said court is enjoined by the Children Act to act in the best interests of the child. This is a child of tender years. It would appear that he was born in 2011. I cannot find any basis at all for staying orders meant for the welfare of such a child.

The provisions of the Children Act on a child's rights, a parent's duties and the best interests of the child militate against the making of such orders. **Section 6** of the Act gives the child a right to parental care. **Section 23** of the Act states that parental responsibility includes the duty to maintain the child and in particular the duty to provide him with adequate diet, shelter, clothing, medical care including immunization, and education. The child's right to these things is fundamental and a contravention thereof entitles the child to access the High Court under **Section 22** of the Children Act for the enforcement of the said right. Under **Section 4** of the Act, a court seized of a matter where the rights of the child are the subject is required to treat the interests of the child as a primary consideration.

From the facts of this case, the appellant has been adjudged to be the parent of the child in question. By virtue of **Section 6** of the Children Act, the said child has a right to be cared for by the appellant. By dint of **Section 23** of the Act, the appellant has parental obligations towards that child – in particular to provide him with adequate diet, shelter, clothing, medical care including immunization, education and guidance. It would appear that the appellant has been in contravention of **Section 6** and has not met his obligations under **Section 23**. The suit before the children's court was informed by that background. The court in determining the matter was guided by **Section 4** and the resulting orders were made in the best interests of the child. The orders were intended to ensure that the child enjoyed the rights granted to him under **Section 6** of the Act and to ensure that the appellant fulfilled his obligations to the child under **Section 23** of the Act. The child's rights under **Section 6** are fundamental rights as stated hereinabove. The parent's obligations under **Section 23** are mandatory. This court cannot suspend these rights and duties under any circumstances. The court cannot suspend the child's right to be cared for by the appellant nor the appellant's duty to provide for and support the child. A stay order cannot obtain against an order which secures the child's fundamental rights. I cannot and will not grant such an order.

The appellant's remedy lies in prosecuting the appeal he has lodged against the order made on 11th September 2012 so that the appellate court can examine the said order on its merits and either vary it or set it aside.

The application by way of Motion dated 23rd November 2012 is for dismissal and I hereby dismiss it. The respondent is entitled to and I hereby award her the costs of the application. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 30th DAY OF August, 2013.

W. M.MUSYOKA

JUDGE