

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NUMBER 60 OF 2012

P K R.....APPELLANT

VERSUS

J J B.....RESPONDENT

RULING

The appeal herein was lodged by the appellant on 27th August 2012. He challenges a decision made by the Hon. D K Kuto in Children's Case No. 275 of 2012 on 26th July 2012. He lists several grounds, but the principal issue turns on parental responsibility. He alleges that he assumed parental responsibility over the child the subject of the proceedings in circumstances shrouded in fraud perpetrated by the respondent, a fact which the trial court failed to take into account.

Thereafter the appellant filed an interlocutory application by way of a Motion dated 11th September 2012. The Motion seeks that certain orders be made pending the hearing and determination of the appeal. The principal prayer in the Motion is that the decision of 26th July 2012 be stayed pending appeal. The order targeted in the application is to the effect that he should provide half of the school fees and school related expenses for the minor pending the hearing and determination of the suit before the Children's Court. He argues that he assumed parental responsibility over the subject child in a fraud practised by the respondent and consequently he ought to be discharged of that responsibility. The supplementary ground is that he is facing financial constraints and therefore he lacks capacity to provide for the said child. The central plank of his case is that he is not the biological father of the subject child, a fact that he discovered recently as the respondent had not disclosed the matter to him before these issues were placed before the court.

The respondent has replied to the application, through her affidavit sworn on 19th September 2012. Her case is that the subject child was born within wedlock and she appears to imply that she is therefore a child of the marriage. She alleges that the appellant cannot sire children, due to low sperm count, and the couple had mutually agreed that she could conceive with someone else. She pleads that there was no fraud as she conceived the subject child with the consent of the appellant. She asserts that the appellant is only trying to run away from his responsibilities. She says that she cannot afford school fees and school related expenses for the child without the appellant's support.

Both parties have filed written submissions. They have dealt at length in the submissions with the issue of parental responsibility.

The central issue in the Motion before me is the same one raised in the appeal itself. It is common ground that the appellant had assumed parental responsibility over the subject child. It has now emerged that he is not the biological father of the said child. He would like to be discharged from the burden of supporting that child on that ground. The respondent argues that the said child was born within wedlock and therefore the appellant is bound to provide for the child. The appeal will turn on whether the appellant is entitled to the discharge from parental responsibility that he is now seeking.

It is my view that I should not address my mind to the issue of discharge from parental responsibility at this stage, for doing so would amount to predetermining the appeal. I say so as it is clear that that same

issue is still pending before the trial court. The Children's Court has yet to pronounce itself finally on the matter. The appellant is effectively inviting the court to deal with the matter summarily. I do not believe that that would be in the best interests of the child.

The application dated 11th September 2012 is clearly not merited. I will not discharge the appellant from his parental responsibilities to the subject child at this stage. Let him present the arguments that he has articulated in this application at the hearing of the main appeal. The application is hereby dismissed. There shall be no orders as to costs.

SIGNED DATED and DELIVERED in open court this **26th** day of **September, 2013**.

W.M MUSYOKA

JUDGE