



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

DIVORCE CAUSE NO.5 OF 2010

F.O.O.....PETITIONER

VERSUS

A.M.M.....RESPONDENT

RULING

1. The application before court is dated the 27th of May, 2011. It is by way of Notice of Motion under Sections 1A, 1B, 3A, 80 & 100 of the Civil Procedure Act Order 45 1(1) & 3(2) of the Civil Procedure Rules and Sections 99 & 100 of the Children's Act. The same is by the petitioner **F.O.O.** It seeks for the following orders:-

- 1. That the application be certified urgent and be heard ex-parte in the 1st instance;**
- 2. That there be a stay of execution of the order of the court made on 28/04/2011 pending the hearing and determination of this application inter-parties;**
- 3. That the interim orders made on 28/4/11 be reviewed and/or varied;**
- 4. That in the alternative the interim orders made on 28/4/11 be set aside;**

5. That the cost of this application be provided for.

2. The application is supported by the affidavit of the applicant and the grounds that; the applicant is not able to pay the monthly sum ordered by the court as his net pay is Kshs.16,570/=; that there is an error in the court assuming that school fees is payable per month, the respondent misled the court by forging documents and the respondent failed to disclose material facts;

3. The applicant also filed an affidavit of means in it he states that he has been paying for school fees, the children are insured, and that the respondent has another source of income she did not disclose to the court.

4. The respondent objected to the application by filing grounds of opposition dated 26th October, 2011 as follows:

1. That the application is based on falsehoods;

2. That the respondent is now unemployed and

income less;

3. That the petitioner's salary is pegged to the dollar and is now earning in excess of Kshs.230,000/= per month;

4. That the petitioner has borrowed loans, taken advance from his salary merely to shirk his responsibility to his children and frustrate the Honourable Court's order;

5. That the petitioner has not complied with the court order herein and should not be heard before he purges the contempt;

6. That the applicant seems to expect of the Honourable court to allow his whims and fancies rather than comply with the Honourable Court's orders.

5. The Children's Act places responsibility for bringing up

Children on both parents. Section 24(1) of the Children's

Act No.8 of 2001 provides:

“ where a child's father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.”

Section 23(1) & 2 of the same provides

“23(1) In this Act, “parental responsibility” means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.

(2) The duties referred to in sub-section (1) include in particular –

(a) the duty to maintain the child and in particular to provide –

(i) adequate diet;

(ii) shelter;

(iii) clothing;

(iv) medical care including immunization; and

(v) education and guidance;

6. The respondent avers that she is currently unemployed. This has not been challenged by the applicant save that the respondent has side businesses. I have looked at the annexures in support of the said business the amounts referred to are negligible. Suffice it to say that the respondent must seek for

means to sustain herself and the children also as she compliments the responsibility of the applicant.

7. The applicant filed his affidavit of means belatedly. In granting maintenance of Kshs.45,000/= the court based the same on the material then on record. However the court notes that despite being aware of their separation and his legal responsibility both to the 2 issues of marriage and his estranged wife the applicant has committed his salary to loans and advances.

8. Considering the income of both parties and taking all the circumstances of this case into consideration including the welfare of the issues of the marriage and the respondent the court hereby sets aside order 5 of its order issued on 28th of April, 2011 in its place the court now orders as follows:

- 1. The applicant will pay the sum of Kshs.20,000/= for the upkeep of the 2 issues of the marriage and the respondent.**

- 2. The applicant will continue to pay school fees for the two minors at schools to be agreed upon by the parties herein.**

- 3. The applicant will continue to offer a medical cover for the said children pending further orders of the court.**

Orders accordingly.

Dated and delivered this 17th day of February 2012.

ALI-ARONI

J U D G E

In the presence of:

.....petitioner

.....respondent

