

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 23 OF 2011

L.W.M.....APPELLANT

VERSUS

J.N.K.....RESPONDENT

RULING

The parties are husband and wife who have a pending divorce petition pending before the Chief Magistrate's Court- Divorce Cause No.[....]. Pursuant to an application made in that cause, on 11th June 2010 that court issued an order directing the Respondent to pay a sum of Kshs.60,000/= per month being maintenance for the Petitioner and their daughter. The Respondent defaulted in the payment of that sum. On 4th of February 2011, the Appellant filed an application and sought to enforce the order by attachment of the Respondent's properties or committal to civil jail. On 16th February 2011 the Respondent filed an application seeking the variation of that order. Both applications were heard together and on 28th April 2011 the subordinate court ordered the parties to share equally their minor child's school fees and education needs and directed the parties to take a date for the hearing of the divorce petition. This appeal is against that ruling.

Simultaneous with the filing of the appeal the Appellant has filed a Notice of Motion under **Article 53(1)** of the **Kenya Constitution 2010**, **Sections 1A, 1B** and **1C** of the **Civil Procedure Act Order 42 Rule 6** of the **Civil Procedure Rules and Sections 4, 23** and **24(5)** of the **Children's Act** and sought orders to reinstate the payment of the sum of Kshs.60,000/= per month as has earlier been ordered. In her affidavit in support of that application she has averred that the subordinate court's ruling of 28th April 2011 reversed without any justification the earlier maintenance order and as absolved the Respondent of his parental responsibility to their child.

In his replying affidavit the Respondent averred that having been maimed in an attempt by the Appellant and others to take his life, coupled with an order issued at the instance of Appellant in another case involving division of matrimonial property freezing his assets he is incapacitated and unable to comply with the maintenance order. He claimed that the family business he used to run has virtually collapsed and is therefore unable to pay any money to the Respondent. He further averred that the Appellant is not destitute as she runs a veterinary practice. According to him these are the factors that the subordinate court considered in the order of 28th April 2011. In his view therefore this application has no merit and should be dismissed with costs.

I have considered the above averments and the submissions by counsel for both parties. The application raises basically the same issues as those raised in the appeal itself. In my view its determination will in effect finalize the appeal. Apart from stating that the Respondent still runs the family business, there is nothing on record to show what, if at all, is the Respondent's income. The Appellant has not refuted the allegation that she runs a veterinary practice and that she is not destitute. I believe all these are matters that will be best canvassed during the hearing of appeal itself. In the circumstances I find no merit in this application and I accordingly dismiss it. Each party shall bear its own costs.

DATED and delivered this 13th day of July 2011.

D.K. MARAGA
JUDGE