



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISII

Civil Appeal 33 of 2008

FRANK OMWANGE OMAREAPPELLANTS/APPLICANTS

SHALOME JOY OMARE

(Suing through the next Friend DUBINE NYABOKE SIRO)

-VERSUS-

KENNEDY JAMES OMARE OKORE.....RESPONDENT

R U L I N G

The applicants are children of tender years. They are children of the next friend and the respondent who are married but estranged since about November, 2007. The applicants through the next friend filed *Kisii CMCC Children's Case no. 38 of 2009* in which an application for injunction was made. The trial magistrate heard the application which was dismissed and custody of the applicants granted to the respondent. It is that decision that is being challenged on appeal in this court. This court granted stay of that order pending the appeal, which means the children are with the next friend (their mother).

The present application has been brought under *sections 82,83,88 91 and 97 of the Children Act, 2001 and sections 3A and 63(e) of the Civil Procedure Act* for an order that an interim maintenance of a sum of Kshs. 8000/= per month be provided to cater for the applicants' shelter, education, accommodation, medical care, clothing and subsistence. It was on the ground that since the couple separated the respondent has failed to assist the next friend in the support and maintenance of the applicants. The prayer is for 1/3 of the monthly income of the respondent (Kshs. 8000/= a month) which was indicated as Kshs. 32,252/65. The respondent was said to be employed by Roto Moulders Ltd and earning that amount.

The respondent swore a replying affidavit in which he stated that he was employed by Roto Moulders Ltd up to June, 2008 when the employment was terminated. He joined Polytanks Ltd in July 2008 on contract which was terminated on 30/9/2008. He exhibited the letter of termination, which is marked 'KOO1'. Since then, he says, he does not have a stable job and therefore cannot afford Kshs. 8000/= a month. He stated that he was willing to provide school fees and medical care for the children when due and asks that the responsibility to take care of the children be shared between the parents. He swore that the children do stay with his parents during school holidays and some weekends and that he has provided for them during those occasions.

There was no further affidavit by the next friend, which means that the fact that the respondent is no longer employed and therefore does not have a steady (monthly) salary is not in dispute.

I listened carefully to Mr. Oguttu for the applicants and Mr. Ombachi for the respondent as they submitted on this application.

Under *section 4(2) of the Children Act* the primary consideration in determining this application shall be the best interests of the applicants. The children are at Green Hill Academy in Kisii and stay with the mother (next friend). The court is enjoined by *section 90(a) of the Act* to consider that the maintenance of these children is the joint responsibility of the respondent and the next friend. The next friend in her supporting affidavit did not indicate the financial needs of the applicants, or on what basis it was considered that Kshs. 8000/= per month would suffice. Under *section 94(1) (a) of the Act*, the court has to consider the income or earning capacity of the respondent. The court should not make an order that would be in vain.

I agree with Mr. Oguttu that the respondent cannot abdicate his responsibility to the children just because he is not in salaried employment.

After consideration of the law and the facts that the application has revealed, it is determined that a sum of Kshs. 5000/= per month should be paid by the respondent every month towards the maintenance of the applicants. It is so ordered. The respondent shall pay costs of the application.

Dated, signed and delivered at Kisii this.11th Day of November, 2009

A.O.MUCHELULE

JUDGE

11/11/2009

11/11/2009

Before A.O.Muchelule-J

Court clerk-Mongare

Mr. Ombachi for Respondent

Mr. masese for Mr. Oguttu for appellant

Court: Ruling in open court.

A.O.MUCHELULE

JUDGE

11/11/2009