REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCA NO. 72 OF 2004

A F …… PLAINTIFF

VERSUS

H A ……..…….. 1ST DEFENDANT

H I ……..….. 2ND DEFENDANT

RULING OF THE COURT

The applicant herein, A F, who is also the appellant, was the defendant in Isiolo Children's case No. 2 of 2004. The children's case was filed by the now divorced wives of the applicant, H A and H I who are the biological mothers of the ten (10) children specified in the plaint. The plaintiffs sought two main orders as follows:-

> (a) An order compelling the defendant to provide for the children with education, up-keep and all needs directly without involvement and/or interruption from the plaintiffs.
>
> (b) A permanent order of injunction restraining the defendant, his agents, servants, assignees and or anybody acting on his behalf from threatening, embarrassing, scandalizing, defaming the plaintiff or interfering in any way with the education and upkeep of the children.

The plaintiffs also asked for costs of the suit.

Together with the plaint the plaintiffs filed a chamber summons dated 1.3.2004 under order 39 Rule 2(1), (2) and (3) of the Civil Procedure Rules, Rules 12(5) and (7) of the Children's Act (No. 8 of 2001) General Rules and Regulations vide Legal Notice No. 77 of 20.5.2002, Section 25(1) of The Children's Act seeking the following orders:-

> (1) That the honourable court be pleased to make an order compelling the respondents to pay the children's school fees directly to the school instead of giving the applicants the money for the school fees on behalf of the children pending the hearing and determination of the suit.
>
> (2) That the honourable court be pleased to make an order compelling the respondent to directly provide the children's basic needs without going through the applicants pending the hearing and determination of this suit.

The grounds on which the application was based were that the respondent was the father of all the ten (10) children enumerated in the plaint and that the respondent who was an employee of Isiolo County

Council earning a salary of over Kshs. 13,000/= and owning over one hundred (100) heads of cattle was capable of maintaining and paying the children's fees.

The application was heard before Omburah, SRM on 25.6.2004 and ruling delivered on 5.8.2004. In the ruling the learned magistrate found that all the children who were either attending school/college still needed the care and support from both their parents, their ages notwithstanding. The learned magistrate also found that the children were not self supporting and that they all had a right to live, eat and get educated. The learned magistrate allowed the application dated 1.3.2004 as prayed, details of which I have already set out herein above. The respondent was to comply with the orders immediately to avoid further suffering of the children.

The applicant has appealed against that ruling and in the meantime has brought this application dated 3.11.2004 under Order 41 Rule 4 of the Civil Procedure Rules in which the applicant seeks an order of stay of execution of the ruling/order dated 5.8.2004 in Isiolo PM's Children's case No. 2 of 2004 and also prays that the respondents herein pay the costs of the application.

The grounds upon which the application is premised are that the applicant has been ordered by the court to support his children some of whom are married and that the applicant has been ordered by the court to pay fake and astronomical fees to people who are outside the age bracket prescribed by the Children's Act.

In his affidavit in support of the application, the applicant has deponed that both the respondents are his estranged wives. That the ten (10) children are not his. He denied that he should support the children who he alleges are not in need of any school fees. That by requiring the applicant to meet all the financial needs of the children the respondents have abdicated their parental responsibility towards the children. Further that because the case was prematurely determined at interlocutory stage, the orders sought should be granted to him so that he can adduce evidence in support of his case. The applicant annexed copies of pleadings and order of the court issued on 7.10.2004.

The application is opposed through the replying affidavit made and sworn by H I, the 2nd respondent on the ground that during the hearing of the application before the lower court the applicant did not deny that the children were his and further that seven out of the ten children are still in school, at Isiolo Girls, Mwangaza Primary and Kizito Primary. That the applicant is a man of means and that having brought the children into the world, he cannot run away from his responsibility to them especially when they are still in school. That the applicant has not shown what prejudice he would suffer if orders sought are not granted.

Mr. A. Anampiu for the applicant submitted that unless the order sought is granted, the applicant is likely to be committed to civil jail as there is an application pending in court seeking such orders. This is the Notice of Motion dated 26.10.2004 and filed in court on the same day. That it is only one of the children, namely J A who is in school but that even then, he is fully supported by Plan International. The applicant did not however annex evidence of such support. That the rest of the children fall outside the definition of "**child"** under the Children's Act. That the case in the lower court has been prematurely determined to the detriment of the applicant. That the respondents should also play their part in paying school fees for the children and also maintaining them.

Mr. Momanyi for the respondents relied on the replying affidavit and added that the application is fatally defective for having been brought under the wrong section of the law. That the applicant has not even shown that he is paying fees for any of the children, including those he admits are in school. That all the children are staying with the respondents.

I shall first of all deal with the issue of competence of the application which has been brought by way of chamber summons under Order 41 Rule 4 of the Civil procedure Rules. In his reply to Mr. Momanyi's submissions, Mr. Anampiu submitted that the fact that the application was not brought by way of Notice of Motion does not go to the root or substance of the application. It is my humble view that this court has the responsibility to decide all cases, and especially cases under the Children's Act, according to

substantial justice without undue regard to technicalities of procedure, remembering always that the welfare of the child/children is paramount in all cases. In this regard, I am satisfied that the applicant can safely fall back onto the provisions of Order 50 Rule 12 of the Civil Procedure Rules which provides:-

> **"(12) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule."**

Order VI Rule 12 would also buffet the applicant against any objection by the respondents on grounds of want of form. The rule provides as follows:-

> **"(12) No technical objection may be raised to any pleading on the ground of any want of form."**

The next issue for determination is whether the applicant is entitled to an order of stay. In ordinary civil matters, the two principles that would dictate whether an order of stay may be granted or not are first, whether the applicant has an arguable point to be canvassed at the appeal and two whether if the order sought is not granted, then the appeal if it succeeds, would be rendered nugatory. As this is a children's case, I would have to go beyond those two principles and refer specifically to the Children's Act. Section 4(2) of the Children's Act provides that:-

> **"4(2) In all actions concerning children, whether undertaken by public or private, social institutions, courts of law, administrative authorities or legislative bodies the best interests of the child shall be a primary consideration."**

The case here involves the payment of school fees for the children who belong to both the applicant and the respondents. Although the applicant has sworn in the affidavit in support of his application that he denies paternity of all the children, it is instructive to note that all that the applicant said in the lower court was that the children in question are not children as defined by section 2 of the Children's Act. Further that he saw no reason why the applicants/respondents should abdicate their parental responsibility over the children. He wanted the case to go to full hearing so that he could prove to the court that most of the **purported** "children" were not covered by the Act. With respect, the applicant's denial that he is the father of the 10 children is an afterthought. Secondly, the respondents herein have shown that the following children are in school:-

1. N A.

2. Ak A.

3. R A.

4. J A.

5. M A.

6. R A.

7. I A.

Letters and other documents from the respective schools/colleges have been annexed to the replying affidavits and that evidence remains unchallenged by the applicant. Some of the children may well be over 18 years but that fact alone does not deny them parental care. In the persuasive authority of the case of DIANA NDELE WAMBUA v. DR. PAUL MAKAU WAMBUA (Nairobi HCC Cause No. 30 of 2003 – unreported – the Court (Koome J) dealt with the question of whether a father of a 22 year old pursuing a university degree, and with no means of her own to raise fees for the degree programme, was still under parental responsibility for such a child. It had been argued on behalf of the respondent (father) in that case

that his legal responsibility over his daughter's education ceased when she attained age 18 and further that such responsibility ceased when the girl completed form 4 which the respondent considered was basic education. Although the application therein dealt only with the applicant being granted leave to file an application for an order of maintenance, the learned judge, after dealing with all relevant issues concluded that the applicant would be granted leave and she proceeded to grant the leave.

In deciding the issues before me, I have also referred to the United Nations Convention of the Rights of the Child, which form part and parcel of the Children's Act in its preamble. The Act is intended partly to give effect to the principles of the convention on the Rights of the Child and the African Charter on the Rights and Welfare of the child and for connected purposes. Section 7(2) of the Act provides that:-

> **"(2) Every child shall be entitled to free basic education which shall be compulsory in accordance with article 28 of the United Nations Convention on the Rights of the child."**

Article 28 of the United Nations Convention on the Rights of the Child provides:-

> **"(1) States parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity they shall, in particular:-**
>
> **(a) Make primary education compulsory and available free to all.**
>
> **(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need:**
>
> **(c) Make higher education accessible to all on the basis of capacity by every appropriate means."**

It is worth noting that the rock upon which the Children's Act is seated is the United Nations Convention on the Rights of the Child, and to an extent also on the African Charter on the Welfare and Rights of the Child. Article 4 of the African Charter, dealing with the best interests of the child provides as follows:-

> "**(1) In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.**
>
> **(2) In all judicial or administrative proceedings affecting a child who is capable of communication his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings and those views shall be taken into consideration by the relevant authority in accordance with the provisions of the appropriate law."**

After considering submissions by learned counsels for both parties, the pleadings before me, the law as provided in the Children's Act, and the various International Legal Instruments to which Kenya is a signatory, I am satisfied that it would not be in the best interests of the children in this case to grant the order sought by the applicant. It has been demonstrated to this court that seven out of the ten children are actually in primary school and that one other child Adan Fugicha Abdilatif was admitted to the Eldoret Polytechnic for Kenya Accounting Technician Certificate course 1 and 2 in May 2004 while one Y A Fugicha was, on 31.1.2004 invited for a training opportunity for 6 months at the Samburu Serena Safari Lodge beginning 1st July 2004 to December 24, 2004. It seems to me and from the evidence placed before me by the respondents, that these opportunities for training may have been lost, because the applicant has refused to pay fees, alleging that the children are adults. This is in contravention of the United Nations Convention on the Rights of the Child, and especially article 28 thereof. The evidence before me has persuaded me of the impartiality of the respondents who only desire that the applicant pays the fees directly to the schools/institutions which the children attend.

Mr. Anampiu has argued that though some of the children may be attending middle level colleges, the applicant is not under an obligation to support them because they are not children under the children's Act and that the respondents did not apply for extension of the applicants' parental responsibility as provided under section 28 of the Act. Firstly, section 28 confers upon this court the jurisdiction to extend such responsibility. Secondly the Constitution of Kenya also confers upon this court unlimited original jurisdiction in all matters both of a civil and criminal nature. For this reason, I exercise that jurisdiction and extend the applicant's parental responsibility to his children aged over 18 years but still attending school/college and for as long as they are undergoing such training. With respect therefore, to allow this application would be to lock out the children from school come the new academic year which is just around the corner.

I also find that contrary to what the applicant has alleged that the respondents have abdicated their parental responsibility just because they are asking the applicant to pay fees and provide maintenance for the children the respondents are bearing their part of the burden. The respondents have deponed that since the latter part of 2003, the applicant has neglected to meet the needs of the children and that since then the respondents have continued to provide for the upkeep and education of the children. The applicant must share in this responsibility. He cannot be heard to be preaching water when he is drinking wine.

Finally, some remarks on the applicant's pending appeal. Order 41 Rule (1) of the Civil Procedure Rules provides as follows:-

> **"(1) Every appeal to the High Court shall be in the form of a Memorandum of Appeal signed in the same manner as a pleading."**

The applicant has filed what he calls a "Petition of Appeal". Mr. Anampiu for the applicant may need to reconsider whether he will proceed with the appeal as it is in its present form despite the mandatory provisions of order 41 Rule 1.

In short, the applicant's application dated 3.11.2004 is dismissed. This being a family matter involving children and their parents, I make no orders as to costs.

It is so ordered.

Dated and delivered at Meru this 20th day of December 2004.

RUTH N. SITATI

Ag JUDGE

20.12.2004