REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 37 OF 2001

TIMOTHY MUKURU GITHUGU ……...……. APPELLANT

VERSUS

WENDY KAMWENDE MUKURU …….. RESPONDENT

RULING

This appeal arises from the orders contained in a ruling delivered on 2nd October 2001 by the lower court in CMC Divorce Cause No.91 of 2000.

In that ruling, the learned trial Magistrate ordered that the Respondent pays school fees for the children directly to their school, that he also pays house out for the house the petitioner and children reside upon the petitioner availing specific amount of rent payable; that the custody of the children remains with the petitioner with respondent having access thereto and that the respondent meets the medical expenses of the children when need arises while the petitioner takes care of any matters in respect of the children not covered by the foregoing orders.

These orders were to remain in force, while or for as long as the main cause was pending. These orders were given on 2nd October 2001. As at the time this appeal was being argued, the same must have been in place as both counsel did not submit otherwise. This means that the main cause is still pending before the lower court. Aggrieved by the said orders, the respondent lodged this appeal. Of the 6 grounds the appeal that were contained in the memorandum of appeal, only five were canvassed during the hearing after the 6th ground was dropped. In a nutshell, the respondent complains that, the maintenance order was made without any or adequate evidence.The orders were null and void for unenforceability and want of certainty, they were speculative vague and arbitrary. Further the custody order was against the weight of evidence or lack of it and without considering the interests of the children.

The Learned counsel for the respondent would the court to set aside the said orders for the foregoing reasons. On the other hand, the learned counsel for the petitioner supported the orders saying they were clear and capable of enforcement. In any case the respondent has not attempted to comply with any such orders.

The orders given by the learned trial Magistrate were interim. Interim orders have the objective of addressing a pressing issue that may or is likely to impact adversely upon the aggrieved party. It is also clear that the orders depending largely on the financial ability or otherwise of the parties. In her ruling, the Learned trial Magistrate said “its notable that each party gave us little evidence as possible regarding their earnings”.

The petitioner had filed a supporting affidavit in which she set out the monthly expenses for both herself and the children. The trial magistrate observed that no evidence such as letter from school, receipt for payment of school fees or house rent, electricity or water bill to support the amounts stated. She also noted that school uniform is not bought on a monthly basis and so is school fees stated payable monthly. It was also not necessary to buy clothes monthly. She concluded “the list of expenses is not practicable. I am therefore unable to rely on it”. The foregoing notwithstanding, the learned trial magistrate made the orders complained of “relying on the scanty evidence availed the scanty evidence availed and for the interest of justice”. The learned counsel for the petitioner told the court that the respondent had not complied with any of the orders. There was no stay of the same. If there was I have not been told so. There was not, according to the record, no compliance on the part of the petitioner. That is, to provide the respondent with what he should pay.Again if that was done it has not been clearly stated. What is coming out is that the orders are difficult to comply with. Otherwise, in the absence of compliance on the part of the respondent, execution would have followed.

Orders of maintenance are capable of being made with mathematical precision. If for any reason there is any flacutation, there is review. The learned trial Magistrate lacked the evidence to make binding order. In the absence of such evidence she was not bound to make any orders and should not have made any.

With respect, I agree that the orders as they stand are uncertain vague and unenforceable. They must be set aside. It is so ordered.

I know it is the duty of every man to maintain his family. This however should be done with correct evidence at hand. In cases of this nature, the learned trial magistrate was required to call for affidavits of means from both parties with, where possible, proper documents annexed. Where the details are insufficient, the court is entitled to seek more particulars. That way the ends of justice shall be met.

Having said so I make the following orders:-

(a) This appeal is hereby allowed and the orders made in the ruling of 2nd October 2001 set aside.

(b) The original record shall now be returned to the lower court for hearing before another Magistrate of competent jurisdiction.

(c) The said lower court shall either hear the parties on the application for maintenance after asking them to file affidavits of means within a particular time or hear the parties on the main cause and make final orders thereunder.

(d) As matters/orders sought relate to the welfare of the parties but more so the young children, priority should be given in listing the cause for hearing.

(e) Each party shall bear own costs.

Orders accordingly

NAIROBI

M. MBOGHOLI

JUDGE

31st July 2003