



REPUBLIC OF KENYA



KENYA LAW
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IK v LK (Civil Appeal 16 of 2019) [2024] KEHC 9100 (KLR) (Family) (19 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9100 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL 16 OF 2019
MA ODERO, J
JULY 19, 2024

BETWEEN

IK APPELLANT

AND

LK RESPONDENT

(Being an Appeal from the Judgement of the Children’s Court at Nairobi, By Hon. T. B Nyangena, S.R.M dated 7th December, 2018 in Children’s Case No. 356 of 2005)

JUDGMENT

1. Before this Court for determination is the Memorandum of Appeal dated 15th February, 2019 by which the Appellant IK seeks the following orders:-
 - “ 1. That the appeal be allowed.
 2. That the orders issued by the Magistrate on 7th December, 2018 be set aside.
 3. That the costs of this Appeal be provided for.”
2. The Respondent LK opposed the appeal. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated 27th April, 2023 whilst the Respondent relied upon her written submissions dated 20th April, 2023.

Background

3. The Appellant and the Respondent got married to each other in the year 1999. Their union was blessed with two (2) children a boy and a girl who were born in the years 2000 and 2002 respectively.



4. In the year 2004 the couple separated. The Respondent approached the court and obtained 'interim orders' that the Appellant pay maintenance of Kshs. 20,000/= per month.
5. The Respondent again approached the court seeking to be paid arrears of maintenance amounting to Kshs. 294,066. She also sought to be awarded a custody of the two (2) children.
6. Further the Respondent sought to have the interim maintenance orders reviewed upward to Kshs. 40,000/= per month in view of the increase in the cost of living.
7. This appeal arises from the judgement which was delivered on 7th December, 2018 by Honourable T. B Nyangena, Senior Principal Magistrate, in which the following orders made:-

- “ 1. That Joint Legal custody is hereby granted to both parties.
2. That the plaintiff to have custody meaning actual care and control.
3. That the amount in arrears on as put forward by the plaintiff be refunded to the plaintiff forthwith.
4. That the upkeep be raised to Kenya Shillings 20,000/= per month.
5. That no orders on costs.
6. That each party be at liberty to apply.”

8. Being dissatisfied with the above orders the Appellant filed this Memorandum of Appeal in which he raised the following grounds:-

- “ 1. That the learned Magistrate erred in law and in fact by ordering that the Appellant to provide interim monthly maintenance of Kshs. 20,000/= per month.
2. That the learned Magistrate erred in law and in fact by disregarding the evidence before the court that overwhelmingly weighed in favour of the Appellant.
3. That the learned Magistrate erred in law and in fact in not determining the total amount for monthly maintenance for the children and splitting the same between the two (2) spouses who are equally able to provide for the children.
4. That the learned Magistrate erred in law and in fact in failing to consider the Appellant's replying affidavit and submissions on record.
5. That the learned Magistrate erred in law and in fact in ordering the appellant to pay Kshs. 20,000/= for maintenance, provide medical and also pay school fees and related expenses without any affidavit of means of the parties.
6. That the learned Magistrate erred in law when she put the interest of the Respondent before those of the children contrary to the provisions of the Children's Act.
7. That the learned Magistrate erred in law and in fact in failing to consider that parental responsibility is the obligation of both parents.



Analysis and Determination

9. I have carefully considered this appeal as well as the submissions filed by both parties.
10. In *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] E.A 123 the court stated as follows:

“.....this court is not bound necessarily to accept the findings of fact by the Court below. An Appeal to this court is by way of retrial and the principles upon which this [Appeal] court acts are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.....”
11. The Appellant submitted that when the suit came up for hearing on 19th September 2018 both children had attained the age of majority being eighteen (18) years. He asks that in the circumstances this court ought to review the entire evidence and arrive at a conclusion in the matter.
12. The Respondent on her part urges the court to uphold the findings of the lower court and in particular the finding that the Appellant ought to pay a maintenance of Kshs. 20,000 per month given the current inflationary trends.
13. Both the *Constitution* of Kenya 2010 and the *Children Act*, 2022 contain provisions governing the maintenance of Children. Article 53 of the *Constitution* of Kenya provides:-

“(1) Every child has the right -

 - a. To parental care and protection which includes equal responsibility of the mother and father to provide of the child, whether they are married to each other or not;
14. The Appellant through his Affidavit of means dated 21st February, 2020 stated that his monthly gross pay was Kshs. 240,000. On the other hand the Respondent earns a gross pay of Kshs. 104,000 and was to provide for food, shelter, clothing and the other miscellaneous expenses for the two (2) children.
15. Having perused the judgement delivered by the trial court. I am satisfied that the court did properly apply the legal principles on maintenance. The court took into account the increased cost of living since the year 2016 when interim orders of maintenance had been made. The court also considered, the Affidavits of means filed by both parties, the needs of the children as well as their best interests. The orders made by the trial court were binding on the Appellant who has not denied that he failed to remit the amounts as ordered. Accordingly, I am not inclined to interfere with the findings that the Appellant was in arrears of Kshs. 294,066.
16. It is not in dispute that the children who are the subject matter of this appeal were born on 19th February 2002 and 16th January 2000 respectively, therefore they are now both over the age of eighteen (18) years. In order to qualify for maintenance an application must be made by or on behalf of both children for extension of parental responsibility. This was not done.
17. Regarding the orders that the Appellant pay an enhanced monthly maintenance of Kshs. 20,000, this order was made in December 2018 when the elder child had already attained the age of eighteen (18) years. Since no application for extension of parental responsibility had been made by or on behalf of this older child I find that the said orders of maintenance have no basis and must be set aside.



18. The younger child who was born in the year 2002 was seventeen (17) years old when the orders of maintenance were made. I therefore find that the said orders bound the Appellant until the said child attained the age of eighteen (18) years.
19. Finally this appeal only partially succeeds and this court now makes the following orders;-
- (1) The orders made by the learned trial magistrate on 7th December, 2018 are hereby upheld save that
 - (2) The Kshs. 20,000 ordered to be paid for monthly maintenance shall only be applicable in respect of the younger child until he attains the age of eighteen (18) years.
 - (3) The Appellant to clear within thirty (30) days the arrears of maintenance amounting to Kshs. 294,066 as directed by the trial court.
 - (4) This being a family matter each side will meet their own costs.

DATED IN NYERI THIS 19TH DAY OF JULY, 2024.

.....

MAUREEN A. ODERO

JUDGE

