



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 105 OF 2018

ROO.....APPELLANT

VERSUS

LJA.....RESPONDENT

RULING

The application dated 5th November 2020 is for the Review or Variation of the Orders which this Court made in its Judgment dated 10th September 2020.

1. The Applicant has asked the Court to set aside the orders requiring him to pay Kshs 4,000/=.
2. Secondly, he wishes to have the custody of the children shared equally during school holidays.
3. The Applicant deems it unfair and unjustifiable that he has to pay Kshs 4,000/= to the Respondent when it is considered that he was already shouldering maintenance of the children.
4. And because the children attend boarding schools, the Applicant considers it reasonable that when the children were on school holidays, their time should be shared equally between the two parties herein.
5. When canvassing the application, the Applicant noted that in every matter affecting or concerning a child, the most paramount consideration is the child's best interest.
6. There is absolutely no doubt about that requirement outlined by the Applicant.
7. According to the Applicant, he was paying school fees for the minors and providing all other school-related expenses such as school uniforms, books, school transport and medical expenses.
8. However, the Respondent swore an affidavit, stating that the Applicant had not been paying school fees.
9. The Applicant did not provide the Court with any proof that he was paying for the various expenses which he cited. Therefore, there was no basis upon which this Court could verify that he was indeed making the said payments.
10. The Applicant asserted that the Respondent ought to share parental responsibility, by taking care of the children whilst the children were in her custody.
11. In his view, the order for payment of Kshs 4,000/= per month constituted an overburden to him, whilst the Respondent simply enjoyed the comfort of having custody, without shouldering any responsibility.
12. The orders for the payment of Kshs 4,000/= per month was made by the learned trial magistrate.
13. In the Judgment which I delivered on appeal, I declined to set aside or vary that order.
14. The Applicant has not demonstrated that there had arisen any new circumstances that would warrant a review of the Judgment, so that he could stop paying the sum of Kshs 4,000/=.

15. He indicated that he felt overburdened, but did not provide evidence to demonstrate the same.
16. In any event, the question as to whether or not the Applicant was meeting a more than justifiable share of parental responsibility cannot be equated to the best interests of the children.
17. When he complains that he is shouldering more than he should, whilst decrying the comfort of the Respondent, the Applicant was drawing attention to his own interest, not the interest of the children.
18. I have taken into account the uncontested fact that the Respondent was not in employment. She was living in her parents' house.
19. On the other hand, the Applicant is a lecturer at Maseno University. In those circumstances, the Applicant has failed to demonstrate how the best interests of the children would be met, if the court set aside the order requiring him to pay Kshs 4,000/=, to cater for the food of the minors.
20. As regards the request to equally share the custody of the children during school holidays, I find that the Applicant did not give any or any sound reason to warrant a review of the orders made.
21. If he deemed the said orders to be unfair and unjustifiable, as he said, the Applicant would be deemed to be saying that this Court erred when it made the orders in issue. In my considered view when a Judgment was unfair or unjustifiable, it calls for an appeal. I so find because if I were to come to the conclusion that my own judgment was either unfair or unjustifiable, I would have had no proper basis for arriving at the said decision in the first instance.
22. Although I lay no claim to infallibility, I believe that the judgment I delivered was fair and justified. Therefore, I find no merits in the application dated 5th November 2020, and I now hereby dismiss it, with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 15TH DAY OF JULY 2021

FRED A. OCHIENG

JUDGE