



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CIVIL APPEAL NO. E005 OF 2021

JMM.....APPELLANT

VERSUS

IN THE MATTER OF PARENTAL RESPONSIBILITY AND MAINTENANCE OVER

1. GMM

2. JMM

3. EMM

(CHILDREN SUING THROUGH THEIR MOTHER AND NEXT FRIEND

ZMK.....RESPONDENT

Being an Appeal from the Ruling of Hon. I.G. Ruhu Resident Magistrate Mwingi Law Courts delivered on the 17th day of December 2020

J U D G E M E N T

1. This is a children's matter where JMM, the Appellant herein, is aggrieved by an interlocutory maintenance order made in **Mwingi Principal's Magistrate's Court Children's Case No. Exxx of 2020**. In that case, ZMK, the estranged wife of the Appellant and the Respondent herein, filed suit in the cited children's court faulting the Appellant for neglecting his three children who are the issues of marriage between the two of them.

2. The two got married on 11th November 2006 through a church wedding at a church in Buruburu Nairobi and had lived together for about 14 years when differences arose forcing the Respondents and their three children to move out of their matrimonial home in Nairobi and relocate to Mwingi.

3. The Respondent upon lodging a children's case at **Mwingi Principal Magistrate Court** seeking maintenance and enforcement of parental responsibility against the Appellant filed an interlocutory application dated 29th October 2020 seeking for the following orders namely: -

(i) That the Honourable Court is pleased to order for interim maintenance order of Kshs. 100,000 per month with effect from November 2020 pending hearing and determination of the suit.

(ii) An order that the defendant does cater for the school fees and medical expenses of the minors.

(iii) That the defendant is ordered to deposit Kshs. 250,000 in an interest-earning account for the welfare of the children.

(iv) Any other order.

4. The children's court upon hearing both parties vide a ruling dated 17th December 2020, gave the following interim orders pending determination of the suit;

(i) That the appellant pays Kshs. 30,000 per month with effect from November 2020 to cater for food, clothing, and shelter for the minors.

(ii) That the Appellant to retain the minors in the medical cover under his employment and that the same to include both inpatient

and outpatient services.

(iii) That the appellant to pay school fees required to accord the minors their right to education and the school fees to be paid directly to N E School where the minors are enrolled.

(iv) The appellant is granted unrestricted visitation rights and access to the said minors if he so wishes to exercise that right from 10 am to 5 pm over the weekend when the minors are not in school and with liberty for the parties to apply to adjust the times for their joint convenience as well as that of their children.

(v) The parties to engage Rev. Hermann Katutu or any other religious leader of their choice to resolve their issues out of court.

5. The appellant as I have observed above felt aggrieved by the above decision and preferred this appeal raising the following grounds namely;

(i) **That the Learned Magistrate erred in law and fact in concluding that the Appellant should pay for maintenance of the minors to the exclusion of the Respondent despite the law being clear that maintenance should be shared equally between the parents.**

(ii) **That the Learned Magistrate erred in law and fact by concluding that the Respondent was not eligible to pay maintenance of the minors since she is not in gainful employment.**

(iii) **That the Learned Magistrate erred in law and fact by condemning the Appellant to pay to the Respondent the sum of Kshs. 30,000 as maintenance which amount is extremely high and punitive against the Appellant as two of the minors are in boarding school and do not need food, clothing, and shelter which should be catered to by the Kshs. 30,000 ordered by the court.**

(iv) **The Learned Magistrate erred in law and fact by condemning the appellant to maintain the 2nd born by the name JMM despite the Appellant disputing paternity of the said minor.**

(v) **The Learned Magistrate erred in law and fact by not allocating the Appellant (should be Respondent) any responsibility despite being an equal party to the life and wellbeing of the minors.**

(vi) **The Learned Magistrate erred in law and fact by considering extraneous matters in arriving at his Ruling and disregarding grounds and submissions tendered by the Appellant's counsel.**

6. In his written submissions dated 18th June 2021 through learned counsel B.M. Mangata & Co. Advocates, the Appellant has faulted the ruling of the trial court asserting that the said court misread and misinterpreted the provisions of **Section 23 of the Children's act** concerning the meaning of "**parental responsibility**". He contends that the parental responsibility is a joint responsibility and that while he, not denying that he should contribute towards the upkeep and maintenance of the children, the mother (Respondent) herein, should be made to equally contribute. He cites the provisions of **Section 94(1)** which stipulates the considerations by which the court should be guided when an order for maintenance to support his contention. He also relies on **Article 53 (1) (e) of the Constitution of Kenya** in its contention that both parents should equally exercise some parental responsibility for their children. He contends that the amount of Kshs. 30,000 he was ordered to pay monthly is excessive and punitive.

7. He contends that while he has no issue with two children (1st and 3rd born), he has an issue with the paternity of the second-born JM and that is why he submits that he has asked for a DNA test to ascertain the paternity of the said subject.

8. He further submits that the Respondent was not given any responsibility to contribute towards the maintenance of the minor contrary to the cited provisions of **Section 23 of the children's Act**. He relies on two decisions in **E.M.M versus M.O.O [2016] eKLR and M.O.A. versus H.A.O [2021] eKLR**. In the first decision, the court was of the view that while a party applying for parental responsibility may have uncertain income, she has to demonstrate efforts made to also provide for the upkeep of the children. In the 2nd decision, the same principle is evident when the court held that, while both parents may not enjoy equal financial ability, each ought to exhibit some seriousness in making some contribution as a sign of good faith so that the action is not geared merely to overburden the other parent to punish him.

9. The Appellant contends that his monthly income is Kshs. 80,000 and besides the maintenance order, he has other financial obligations like servicing loans and paying rent. He questions why he has to pay Kshs. 30,000 when the children wear school uniforms most of the time and are in school. He contends that, the children are hardly at home and having paid school fees that cater for tuition, food, uniform, and boarding, there is no other need to pay further Kshs. 30,000 when the Respondent has not demonstrated any efforts she is making towards parental responsibility. In his view, he is being ordered to pay twice for the same thing and asks this court to review the amount ordered from Kshs. 30,000 to 10,000 per month.

10. The Respondent has opposed this appeal submitting that the amount ordered to be paid is reasonable in comparison to the needs of the three children. She contends that all the children were born while the parties were married and that the Appellant assumed parental responsibility over all of them.

She submits that the best interest of the minors must be the primary consideration in this matter. According to her, the Appellant is seeking an order which is detrimental to the well-being of the minors and that the minor's health, welfare, and happiness will be put at risk if this appeal is allowed.

11. The Respondent contends that the Appellant is seeking excuses not to provide for 2nd born child on grounds that he is not the father, yet

he acknowledged in his pleadings that he is the father of all the children. She contends that under **Section 24(5) of the Children Act**, the appellant cannot avoid parental responsibility for all children.

12. The Respondent submits that she is unemployed at the moment and that is why she sought a temporary shelter. She prays that this court be guided by **Section 94 of the Children's Act** which provides that the financial position of each party ought to be taken into account. She relies on the decision of **S.O versus L.A.M. [2009] eKLR** to support her contention.

13. This court has considered this appeal and the response made. As I have observed above, this appeal relates to a children's matter and in children's matters, the primary consideration is the interest of the child. Matters related to children matters are well spelt out in the **Children's Act** and the **Constitution of Kenya 2010**.

Under **Article 53 of the Constitution of Kenya**, the constitution provides;

Every child has the right

“(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.”

14. It is therefore clear that the question of parental responsibility is equally shared between both parents whether they are married or not. It matters not if the parents are estranged or not. The provisions of **Section 94(1) of the Children's Act** provide guidelines in obtaining the rights & protection of the interests of children. The **Sections** state; ‘

a) The income or earning capacity, property, and other financial resources which the parties or any other person in whose favor the court proposes to amend an order, have, or are likely to have in the foreseeable future.

b) The financial needs, obligations, responsibilities which each party has or is likely to have in the foreseeable future.

c) The financial needs of the child and the child's current circumstances;

d) The financial needs of the child and the child's current circumstances;

e) The income or earning capacity, if any, property and other financial resources of the child;

f) Any physical or mental disabilities, illness, or medical condition of the child;

g) How the child is being or was expected to be educated or trained;

h) The circumstances of any of the child's siblings;

i) The customs, practices, and religion of the parties and the child.

j) Whether the Respondent has assumed responsibility for the maintenance of the child and if so, the extent to which and the basis on which he has assumed that responsibility and the length of the period which he has met that responsibility;

k) Whether the Respondent assumed responsibility for the maintenance of the child knowing the child was not his child, or knowing that he was not legally married to the mother of the child;

l) The liability of any other person to maintain the child.

m) The liability of that person to maintain other children.

15. In this appeal, this court is in effect being called upon to determine whether the trial court was properly guided when it made the ruling on interim maintenance.

As a general rule or guideline, the trial court was obligated to take into account the income or earning capacity and financial abilities of both parties before rendering a decision. The trial court was also required to consider the financial needs and other requirements of the children.

16. At this stage, it may be difficult for this court to interrogate some of the issues raised because the matter had not moved to full trial where the issues would have been interrogated. The Appellant has for example stated that he earns only Kshs. 80,000 per month but the Respondent insists that he earns more than that. Given that contestation, the only way of ascertaining the actual income of the Appellant is by interrogating the payslips or other sources of income.

17. The Respondent submits that the Respondent as the mother to the children should also contribute something which is well-founded going by the provisions of **Article 53 (1) (e) of the constitution** but the Respondent has responded that she relocated to her parents' home albeit temporarily after she was forced out of the matrimonial home and that currently, she is unemployed. I find the contention sound because if it is true that she has no source of income, then any order directing her to make some financial contribution would not only be in vain but would prejudice the best interest of the children. It is in the best interest of the children in my view not to interfere with the maintenance

order at this stage, until the trial takes place when all the issues regarding the financial abilities of both parents will be fully interrogated and determined.

18. I am not persuaded by the Appellant's contention that he has reasons to challenge the paternity of one of the children. That contention in my view is an aforethought and an attempt to escape parental responsibility in light of clear provisions of **Section 24(1) of the Children's Act**.

19. The Appellant claims that circumstances have since changed from the time the ruling was delivered and that the children have gone to boarding school.

In my considered view, if that is factual, the appellant should have simply invoked **Section 99 of the Children's Act**. The Children Court is seized with jurisdiction & discretion to vary the orders made to suit the expedencies currently obtaining. **Section 99 of the Children's Act** provides;

“The court shall have the power to impose such conditions as it thinks fit to an order made under this section and shall have the power to vary, modify or discharge any order made under Section 98 concerning the making of any financial provisions, by altering the times of payments or by increasing or diminishing the amount payable or may temporarily suspend the order as to the whole or any part of the money paid and subsequently revive it wholly or in part as the court thinks fit.”

There is nothing that prevents the Applicant from moving the trial court for any order that is just to both parties. It is important to note that at all times the primary consideration is not the hardship occasioned by a maintenance order or any other consideration but the best interest of the child as stipulated under **Section 4 of the Children's Act & Article 53(2) of the Constitution**. In **LAO versus OK Arap M [2019] eKLR** the court moved to vary a maintenance order and observed as follows:-

“The court in the exercise of its power may impose conditions, vary modify or even discharge a maintenance order for the making of a financial provision. The Court may also increase or decrease or change the times of payments of the amount payable under a maintenance order. Additionally, the court has the power and discretion to temporarily suspend the whole or any part of the maintenance amount and subsequently revive it wholly or in part as it deems fit. For a party to be deserving of an order of variation of a maintenance order, it must be demonstrated that such variation is in the best interest of the child.”

In the premises, this court finds no merit in this appeal because the appellant has not demonstrated that it is in the best interest

of their children to vary the interim orders given by the trial court. This appeal for that reason is disallowed but I will not make any order as to costs.

DATED, SIGNED, AND DELIVERED AT KITUI THIS 4TH DAY OF OCTOBER, 2021.

HON. JUSTICE R.K. LIMO

JUDGE