



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 13 OF 2020**

**N.M.C.....APPELLANT**

**AND**

**L.T.....RESPONDENT**

*(Being an appeal from the Judgment and orders of the Resident Magistrate (Hon. H.M. Mbatia (Mrs.) delivered on 12<sup>th</sup> February 2020 in Nairobi chief Magistrate's Court Children Case No. 5 of 2019)*

**RULING**

1. In **Children Case No. 5 of 2019** at Milimani the respondent L.T. sued the appellant seeking a mandatory order vesting the actual custody, care and control of their three children to her with the appellant having supervised and controlled access. She further sought that the appellant be compelled to provide fully and adequately for the children's maintenance including food, education and clothing, and that she provides for their shelter and medical cover. Her case was that they had been married since 2009 but that the appellant had deserted the matrimonial home, taking the youngest of the children with him. He had taken away the children's documents and personal belongings. He had failed to provide for the children.
2. With the suit was a motion seeking him to provide for the youngest child; he be ordered to pay the children's fees and related items; that she be given actual custody, care and control of the children, with the appellant having supervised and reasonable access; and that the appellant be ordered to pay Kshs.20,000/= per month for the children's upkeep.
3. The appellant filed a replying affidavit to deny that he was married to the respondent. He, however, acknowledged that he had two children with the respondent. He stated that he had left staying with the respondent on 27<sup>th</sup> November 2018 when she threatened to kill him and the children. He stated that on 12<sup>th</sup> December 2018 he had gone to the house and found only their youngest child. He was informed that the respondent had taken the other child to his parents' home in Kakamega. He took the child and its belongings. He stated that he was educating the children, and was not opposed to sharing custody, access and maintenance with the respondent. His salary was Kshs.22,803/= per month, he stated, and asked the court to consider that when determining his contribution to the minors welfare and upkeep.
4. In his statement of defence he sought that the parties do equally share custody, access and maintenance of the children. He asked that he pays Kshs.5,000/= per month towards the children's food, and that clothes and medical cover to be shared. He asked to pay fees and the respondent to provide shelter.
5. The trial court orally heard the parties and on 12<sup>th</sup> February 2020 delivered a judgment in which it decided that:
  - (a) the respondent to have actual custody of the children, with the appellant having access on alternate Sundays between 7.00 am and 6.00 pm;
  - (b) the respondent to buy clothing;
  - (c) the appellant to provide school fees and related expenses;
  - (d) both parties to provide medical care; and
  - (e) the appellant to pay to the respondent Kshs.12,000/= on 30<sup>th</sup> of each month towards the children food.

6. The appellant filed an appeal on 26<sup>th</sup> February 2020 to challenge the findings by the trial court. In particular, he complained that the trial court was wrong in doubling his monthly contribution towards food from Kshs.6,000/= to Kshs.12,000/= when his salary was only Ksh.23,000/= per month. His case was that the trial court had not considered the parties' financial abilities. For instance, that the respondent's salary was higher than his by Kshs.2,000/= per month. Lastly, he complained about the fact that sole custody of the children had been given to the respondent on the basis that she was not remarried and he was remarried and was living in one bedroomed house who could not have overnight access to the children.

7. In the application dated 6<sup>th</sup> October 2020, the appellant sought the stay of the execution of the decree and orders in the judgment pending the hearing and determination of the appeal. In particular he asked to be allowed to continue paying Kshs.6,000/= towards food per month. In the supporting affidavit, he reiterated that he was a fitness instructor earning Kshs.22,800/= but that following the corona pandemic he was reduced to being a glass-mat attendant earning less than Kshs.25,000/= per month. It would appear that he had fallen into arrears to the tune of Kshs.42,000/= which had forced a notice to show cause to be taken out before he had paid.

8. The response by the respondent was that, whereas the appellant was ordered to pay Kshs.12,000/= monthly towards food, the court had ordered her to take care of the children's other needs. She stated that as of June 2021 the appellant had not paid Kshs.54,000/= towards food. She stated that the lower court had considered the parties' means, and the fact that either party had been affected by the corona pandemic.

9. The court received the written submissions by Mr. Kamau for the appellant and the respondent in person. I have considered them.

12. Under **Article 53(2)** of the Constitution and **section 4(2)** and **(3)** of the **Children Act (Cap 141)**, this court is obligated to bear in mind that the best interests of the children are the primary consideration in dealing with this application.

10. Secondly, in considering whether or not to stay the orders contained in the judgment subject of the appeal the court will consider that the children's right to food, medical care, education, clothing, shelter and so on, constitute a shared obligation of the appellant and the respondent, who are parents to the children. The right to each of those items is not only statutory but is also constitutional. The appellant is seeking, in the application for stay, that these rights be suspended until such time that the appeal has been heard and determined. That would not be in the best interests of the children. To be specific, the children are now used to the provision of Kshs.12,000/= per month towards their food. If the amount is halved, this will affect both the quantity and the quality of the food that the children will have. That will not be in their best interests. In short, I do not find merit in the application. I dismiss it with costs.

**DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021.**

**A.O. MUCHELULE**

**JUDGE**