



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CHILDREN APPEAL NO. 132 OF 2019

GKM.....APPELLANT/APPLICANT

V E R S U S

HMK.....RESPONDENT

As mother of minors: MN

PN

SK

JM

CW

MW

BM

MW

MK

BM

RULING

1. Through a Complaint dated 3rd April 2019 and filed the same day, HMK suing on behalf of their children namely; MN, PN, SK, JM, CW, MW, BM, MW, MK and BM sought the following orders against her husband GKM;

- a) A custody order vesting the legal and actual custody of the minors upon the plaintiff**
- b) A declaration that the defendant shall henceforth bear parental responsibility of the minors**
- c) Cost of the suit**
- d) Any other relief that this Honourable Court may deem fit.**

2. Contemporaneously filed with the Complaint was a Notice of Motion of even date seeking that; the defendant do pay outstanding school fees for the children amounting to Kshs. 250,000/-; school transport arrears of Kshs. 109,000/-; maintenance expenses calculated at Kshs. 222,000/-; the defendant to pay school fees for the children from second term and, actual custody of the children.

3. The application was premised upon grounds set out on the face of it and an affidavit sworn on 3rd April 2019 by the applicant. It was the applicant's averment that she got married to the respondent/defendant sometime 2001. That during the subsistence of their marriage, they were blessed with ten (10) children (the plaintiff's herein) nine (9) of whom are in school. That sometime 2016, the couple separated thus leaving the plaintiff with the children.

4. That every effort by the plaintiff seeking financial support from the defendant did not bear any fruit as he refused and totally neglected the children thus abdicating his parental responsibility leaving the entire burden to the plaintiff. That at the time of filing the suit, the school fees balances had accumulated to a sum of Kshs. 250,000/- plus transport expenses to the tune of Kshs. 109,000/-.

5. The plaintiff further claimed financial support in various expenses *inter alia*;

a) Rent	-	Kshs. 40,000/-
b) Food	-	Kshs. 40,000/-
c) House help	-	Kshs. 10,000/-
d) Water	-	Kshs. 7,000/-
e) Electricity	-	Kshs. 10,000/-
f) School Transport	-	Kshs. 20,000/-
g) Clothes	-	Kshs. 30,000/-
h) Medical	-	Kshs. 10,000/-
i) Needs for children of tender ages	-	Kshs. 20,000/-
j) Entertainment	-	Kshs. 20,000/-
k) Others including sanitary towels	-	Kshs. 15,000/-

6. She asserted that the respondent is a well-established businessman with various investments in [particulars withheld] Resort, Real Estate and Family Land in Kitengela.

7. On 16th April 2019, the court ordered the parties to share out the outstanding school fees of Kshs. 250,000/-. In response to the application, the respondent filed a replying affidavit denying that he was married to the plaintiff. He however changed and admitted that he was engaged in a relationship with the plaintiff and together got four children. He denied paternity over some six (6) children and demanded for DNA test to rule out any doubt as he suspected his wife to have engaged in extra marital affairs with other men.

8. On his part, the respondent claimed that he was a retired man a waiting for his retirement package hence had no financial means to meet the expenses ordered. That he was married to one T under statute hence an extra family with four (4) children to support. He claimed that the applicant was a person of means earning a salary of Kshs. 156,000/- per month besides income generated from dairy farming a business he had established for her before she got employed.

9. After analyzing the averments by both parties and submissions by the plaintiff's counsel, the learned Magistrate delivered her ruling dated 18th October 2019 allowing the application pending the hearing of the main suit which she referred for arbitration. Among the orders made were;

i) The defendant is at liberty to carry out DNA tests on all the minors at his cost. Nevertheless, he should bear in mind that Section 24(5) of the Children's Act provides that a person who has parental responsibility for a child at any time shall not cease to have that responsibility for the child.

ii) The plaintiff shall retain custody of the minors and the defendant is granted unlimited access to the children upon prior arrangement with the plaintiff.

iii) The parties shall share the cost of the minors' school fees and school related expenses equally, at their current schools, since all the children are in public schools. In the event of a transfer, the parties must discuss and agree on the school.

iv) The plaintiff shall provide medical care for the children because she has a medical cover provided by her employer. In addition, she pays extra premiums for the other children.

v) The defendant shall provide home clothes for the children quantified at Kshs. 1,000 per child per month.

vi) Parties shall share the cost of rent, electricity and water equally, once the plaintiff produces her rent receipts for the last six (6) months.

vii) Parties shall also share the cost of food equally. I quantify food at Kshs. 150/- per child per day. Accordingly, since the first two children are in boarding school, the cost of food during the school term shall be Kshs. 36,000/-. However, during holidays, it shall be Kshs. 45,000/-. In the circumstances, the defendant shall remit Kshs. 18,000/- per month during the school term and Kshs. 22,500/- during school holidays.

viii) All amounts in paragraph v, vi and vii above, shall be remitted by the 5th of every month, with effect from 5th November 2019.

ix) The plaintiff is at liberty to take out a Notice to Show Cause for payment of the outstanding school fees arrears ordered on 16th April 2019.

x) Last but not least, I refer this matter to Mediation. Mention on 18th December 2019.

10. Aggrieved with the said Ruling, the defendant filed a Memorandum of Appeal dated 4th November 2019 citing the following grounds:-

i) That the learned trial Magistrate erred in law and fact by failing to apportion responsibility based on respective earnings of the parties herein. Notably, more responsibility was apportioned to the Respondent yet he was not employed, retired, with a struggling business, no pensionable income and with a young family to support who are largely dependent on him.

ii) That in arriving to the said decision, the trial Magistrate totally ignored the fact that the Appellant had another family and more particularly a wife and four children who are totally dependent on him for financial provision and care. Notably two of the said children were children of tender years one was in High School and a special needs child with unique needs.

iii) That the trial Magistrate erred in law and fact in failing to make a determination that it was in the best interests of the said issues that a paternity test be conducted in order to ascertain paternity and apportion responsibility.

iv) That the learned trial Magistrate erred in law and fact in failing to take into account the inconsistencies of the Respondent's financial means. Notably she had pleaded that the [particulars withheld] Business collapsed in the year 2016, yet one minor admitted that the said business was still operational as at the 11th day of December 2018.

v) That the trial Magistrate erred in law and fact in arriving at the said decision when it disregarded the fact that the Appellant had a special needs child with unique needs, in need of the Appellants protection and care. Consequently, any adverse strain in the Appellant's finances would impact him negatively.

vi) That the learned trial Magistrate erred in law and fact in making a determination that parental responsibility is joint and equal and in doing so failed to take into account the fact that orders of maintenance must be pegged on proved income and ascertained needs.

vii) That the learned trial Magistrate erred in law and fact in failing to take into account that the Appellant was the primary breadwinner of his family. Noting that although the Appellant's wife was working, she had taken numerous loans to alleviate the financial strain in the family and the said loans were still outstanding.

viii) That the learned trial Magistrate erred in fact and law in making a determination as follows:-

a) The Appellant to remit the sum of Kshs. 18,000/- per month during school term and Kshs. 22,500/- during the holidays;

b) The Appellant meet the clothing needs assessed at Kshs. 10,000/- per month.

c) The parties cost share the rent, electricity and water a month yet the same was beyond the means of the Appellant.

In doing so, the trial Court ignored the following:-

a) That the Respondent was being paid a Housing allowance of Kshs. 35,000/-.

b) That the Respondent had pleaded that her monthly rent was Kshs. 40,000/- per month yet the same was contested and beyond the Appellant's capability noting that he had another family.

c) That the Respondent had pleaded Kshs. 10,000/- as her water electricity and electricity yet the same was beyond the capacity of the Appellant noting that he was since retired, with no pensionable income and the primary breadwinner of his family.

d) That the precedence that Courts have set as regards to clothing, in particular, clothing needs are paid annually or quarterly as opposed to monthly.

ix) That the trial Magistrate erred in law and fact in failing to take into account the fact that the Appellant had gone to great lengths in establishing the Respondent's financial security and that of the minors during the time the Appellant was financially stable. The financial constraints pleaded by the Appellant were caused by her financial imprudence. That the Respondent had misappropriated Kshs. 3,450,000/- advanced to the Respondent by the Appellant in the year 2014.

x) That the learned trial Magistrate erred in law and fact in making a determination that the Appellant would nevertheless shoulder the responsibility of the minors regardless of the outcome of the DNA results. In doing so, the trial Magistrate overlooked the fact that the court can only invoke parental responsibility where the natural parents of the children and the

children are their biological children.

xi) That the learned trial Magistrate erred in fact in making a determination that the Appellant had two issues who were minors which was contrary to the affidavit evidence pleaded by the Appellant. The Appellant had three minors and a special needs child.

xii) That the trial Magistrate erred in law and fact in failing to accord the Respondent more financial responsibility yet she is a woman of means.

xiii) That the Ruling and/or order of the Court did not take into consideration the submissions and further replying affidavit filed by the Appellant on the 28th August 2019.

xiv) That the learned trial Magistrate erred in law and fact in admitting the Respondent's pay slip yet the same violated Section 19(5) of the Employment Act which requires that the deductions shall not exceed two thirds of the Respondent's income. Notably, the Respondent's salary was Kshs. 156,840/- yet her net pay was Kshs. 45,883/- which was far below the statutory minimum deductions allowed.

11. Simultaneously filed with the Memorandum of Appeal is a Notice of Motion of even date seeking;

1. The application herein be certified as urgent, and service thereof be dispensed in the first instance.

2. Pending the hearing and final determination of the application inter parties, this Honourable Court be pleased to issue a stay of the ruling, order and proceedings arising from the Children Cause No. 453 of 2019 by the Honourable H. M. Mbatia (Ms.)

3. Pending the filing, hearing and final determination of the appeal, this honourable court be pleased to issue a stay of the ruling, order and proceedings arising from the Children Cause No. 453 of 2019 by the Honourable H. M. Mbatia (Ms.)

4. This Honourable Court be pleased to set aside and/or review and vary the ruling granted by the trial court on 18th day of October 2019 and all consequential orders arising from the said suit and the appellant/applicant be allowed to continue paying as half of school fees and school related expenses for the child pending the hearing and final determination of the instant suit herein.

5. Such other orders that this Honourable Court may deem just and fit.

6. Costs of this application be provided for.

12. The application is supported by grounds on face of it and an affidavit sworn by the applicant/appellant on 4th November 2019. The matter was certified urgent on 5th November 2019 and directions to serve made.

13. In response, the respondent (plaintiff) filed Grounds of Opposition on 28th November 2019 opposing the application on grounds -

i) That Article 53 of the Constitution of Kenya 2010 places equal responsibility on parents to provide for their children. Therefore, the applicant's application is an attempt to run away from the trial court's orders which were issued in line with this Constitutional provision. As such, the applicant cannot be allowed to use this ill-conceived application to continue disobeying the orders of the court dated April 17, 2019; and October 18, 2019.

ii) That the applicant is disentitled to the orders sought in this application because he is already in contempt of the orders of this court dated April 17, 2019; and October 18, 2019.

iii) That unless the Appellant purges his contempt of the aforementioned court orders, this court cannot hear him on any other application.

iv) That the Appellant is yet to abide by the court orders dated April 17, 2019; and October 18, 2019. In the very unlikely circumstances that his application is allowed, the appellant should be ordered to deposit security and to pay the minors' school fees for the next school term to preserve the best interest of the minors.

v) A grant of stay of execution pending appeal will be irretrievably inimical to the provisions of Article 53 of the Constitution in particular, the requirement that at all times the best interest of the child should prevail; and the guarantee that a child has a right to education, basic nutrition, shelter and healthcare.

vi) That the Appellant's application is ill-conceived and just another ploy by the Appellant to circumvent the orders of the court dated April 17, 2019; and October 18, 2019 and to continue occasioning the minors herein more harm.

vii) That the Appellant's appeal appears to mistake the interim orders of the lower court for orders to be made in the main suit.

14. During the hearing, the applicant basically adopted averments contained in the affidavit in support of the application stating that; he is not a person of means having retired from his employment; the respondent is a person of means who is earning a monthly salary of Kshs. 156,000/- besides income from business which he established for her; he has another family with a wife and four (4) children who depend on him; the appeal will be rendered nugatory unless the order of stay is allowed; he will be subjected to substantial loss which cannot be compensated monetarily; the court disregarded the issue of paternity; his health will be in jeopardy due to stress related with the demand to meet exorbitant orders of the court and, that the appeal has high chances of success.

15. In her oral submissions, M/s Kamau appearing for the appellant submitted that the appellant was ready to meet necessary expenses for four (4) children only out of the ten (10) arguing that their paternity was in dispute.

16. On her part, Mr. Omoke appearing for the respondent opposed the application reiterating the Grounds of Opposition. He submitted that Article 53(2) of the Constitution recognizes the best interest of a child principal and the need for equal parental responsibility. He opined that the children are entitled to basic provision which cannot await determination of an appeal.

Determination

17. I have considered the application herein, response thereto and oral submissions by both counsel. The only issue that arises is whether the applicant has met the threshold for grant of stay of execution orders.

18. The law governing grant of stay orders pending appeal is Order 42(6) (2) of the Civil Procedure Rules which provides:-

“(2) No order for stay of execution shall be made under sub-rule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and, (b)-such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant. (3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”

19. From the record, the impugned orders were made on 18th October 2019. The application herein was filed on 4th November 2019 and the appeal on 18th November 2019. There is no doubt, the application and the appeal were filed within reasonable time. Regarding depositing of security, this is not *per se* a monetary claim to require deposit of security. The suit revolves around provision of basic necessities for the children hence do not warrant deposit of security.

20. Having dealt with the two elements, I am left with the issue of whether the applicant is likely to suffer substantial loss. It is trite that grant of stay orders is a discretionary issue which must be exercised judiciously and reasonably bearing in mind the paramount consideration of Article 53(2) of the Constitution which underpins the best interests of a child. A higher court will only interfere with the trial court's discretion if proved that the trial court misdirected itself in the matter thereby arriving at a wrong decision. See **Mbogo vs Shah (1968) EA 93, 96.**

21. In the case of **Bhutt vs. Bhutt Mombasa HCCC No. 8 of 2014**, the court stated that, in determining an application for stay of execution in cases involving children, the general principles for the grant of stay of execution Order 42 rule 6 of the Civil Procedure Rules must be complemented by an overriding consideration of the best interest of the child in accordance with Article 53(2) of the Constitution.

22. In **M. N. vs P.A.S (2015)eKLR** the court stated that it is in very rare cases that courts would grant stay of maintenance orders in cases involving minors (children). where the duty to maintain a child is imposed on a parent by Statute, it is not in the best interest of the child to suspend a maintenance order particularly where parentage is not in dispute and that an expedited hearing of the main appeal might be a solution where there is a challenge in quantum of maintenance rather than staying the orders of the trial court pending appeal.

23. I am alive to the fact that at all material times the best interest of a child supersedes that of the parents unless there are exceptional situations or circumstances warranting variation of the orders granting provision of basic requirements to the child. I am totally in agreement with the finding in **Bhutt vs. Bhutt** (supra) where the court stated that:-

“The best interests of a child are superior to rights and wishes of parents, and they incorporate not just the physical comfort of the child but the welfare of the child in its widest sense.”

24. Similar position was held in the case of **Atwal vs. Amrit (2011)eKLR** the Court of Appeal stated that:-

“Article 53(1) (e) and section 24(1) Children Act allow both parties to have equal parental responsibility for the child. Neither has a superior right to the other. The court held that the rights and wishes of parents and fact of parenthood although relevant and important are subordinate to the best interest of the child.”

25. In the instant case, what hardship will the appellant suffer if he paid school fees and provides for maintenance for the children whom he has all along supported since birth till 2017 when he separated with their mother. He has not furnished the court with any affidavit of means. He has not shown any possible alternative in paying school fees for the children.

26. It is a basic right for the children to go to school. They must as well eat, have shelter, clothing and medication. What will happen if the order is suspended? I have noted that the children are in fairly affordable schools. To suspend payment of school fees which is equally shared will be akin to stopping children from going to school which will again attract criminal charges for child neglect.

27. Regarding Order No. 1, the applicant was granted the prayer he wanted for DNA to be done on the children he doubts their paternity. This cannot stop their maintenance in the interim as he has been providing for them for a period exceeding 12 months since their birth. As regards custody, he does not claim custody of any of the children. Concerning medical care the respondent has taken full responsibility through her medical cover.
28. Turning on purchase of clothes at Kshs. 1,000/- per month I do not find any basis upon which the honourable court pegged the amount at Kshs. 10,000/- per month for the ten (10) children. I would however stay order No. 5 pending hearing and determination of the appeal.
29. Turning to utilities, the court ordered equal sharing upon production of proof by way of receipts for the last six (6) months. Obviously these are not the kind of utilities that can be suspended.
30. As concerns food expenses also shared equally at Kshs. 18,000/- per month during school days and Kshs. 22,500/- during school holidays calculated at Kshs. 150/- per child per day, this is a matter to be deliberated extensively on appeal which must be expedited. In the interim children must eat and I do not find it prudent to suspend the same especially when I do not have an affidavit of means for each party.
31. I do not find any substantial loss to be suffered on the part of the applicant when actually all responsibilities have been shared equally between the two parents in fulfilment of Article 53(1)(e) of the Constitution.
32. Unless in the exceptional circumstances e.g sickness thus incapacitating a party from earning a living or unreasonably high or excessive amount ordered which is beyond the means of a party which the trial or appellate court should consider on its own merits, basic provision for a child should not be withdrawn or suspended. The best interest of a child shall forever prevail as a matter of priority over and above anybody's interest.
33. In the circumstances of this case, the applicant has not discharged his burden of proof on a prima facie basis that he is likely to suffer substantial loss if stay orders are not granted.
34. Regarding the appeal being rendered nugatory, the same is not correct. The court will still determine on the quantum orders made and there is nothing to lose in paying school fees for one's children or buying food. The court will still determine whether the amount ordered is inordinate in the circumstances of this case. Children matters are unique in nature and before an appellate court interferes with the trial court's orders, it must as well balance the interest of a child against that of a parent with priority given to the child. By the very nature of these matters, stay orders in children matters are an exceptional rather than the rule.
35. Accordingly, it is my conviction that the applicant has not met the threshold necessary for grant of stay orders and the application is dismissed with no order as to costs. Parties to fix the hearing of the appeal on priority basis.

DATED, SIGNED and DELIVERED at NAIROBI this 6TH DAY OF FEBRUARY, 2020.

J. N. ONYIEGO

JUDGE