



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

HIGH COURT CIVIL APPEAL 87 OF 2013

(CHILDREN COURT CASE 443 OF 2013)

KMAPPELLANT

-VERSUS-

JM.....RESPONDENT

JUDGMENT

PLEADINGS

By Memorandum of Appeal filed by the **Appellant KM** against the Ruling delivered by the Trial Court on 13th September 2013, in favour of the Respondent **RJM**, mother of the child SMM The Appellant was/is aggrieved by the following;

- a) **The Court erroneously misdirected itself on finding that appellant had not disclosed his income whereas he had disclosed the same by way of affidavit of means and thus failed to consider the Appellant's financial status in reaching a decision.**
- b) **The Court misdirected itself in determining that Kshs. 35,000/= was an unqualified offer for payment by the Appellant.**
- c) **The Court disregarded the Appellants Replying Affidavit particularly on issues not rebutted by contrary evidence.**
- d) **The Court erred in law by confirming *ex parte* orders obtained by the Respondent on 4th April 2013 through material non-disclosure.**
- e) **The Court erred in law by finding the Appellant had failed to exercise due diligence to ensure the lease to the property was actually terminated whereas the appellant had shown through correspondence on the record the same being terminated.**
- f) **The Court erred in law and fact by finding the appellant had failed to exercise due diligence to ensure that the Respondent had vacated the premises whereas he had no legal obligation to do so**
- g) **The Court failed to exercise its discretion properly, fairly and judiciously in considering the application that was before her and disregarded the Appellant's submissions on the facts and evidence in support**

PROCEEDINGS

The Respondent did not file any response to the Memorandum of Appeal nor did they appear in court to defend the matter despite sufficient service. The appeal is therefore not contested. The appeal proceeded by way of written submissions.

SUBMISSIONS

In his submissions the Appellant affirmed the contents of the memorandum of appeal. He asserts that he never cohabited with the Respondent as husband and wife as he lacked capacity; he was married under statutory marriage to his wife. He reiterated that, due to financial obligations of taking care of 6 children and aged parents in the absence of salaried employment, his desire was to transfer the minor to a boarding school which had so far proven futile. He stated that the Respondent was in a position to sustain both herself and the minor. He contended that the Respondent was being dishonest in not disclosing her full financial capacity as he helped her establish a business.

He submitted that the Trial court did not consider the best interest of the child in reaching its determination. He relied on **Article 53(1) (e) of the Constitution** which provides for equality of both parents with regard to parents responsibility and also relied on **Section 90 of the Children's Act** to assert that he has been exercising his parental responsibilities as envisioned in the law.

The Appellant faulted the Trial Court in the exercise of its discretion in disregarding the financial status, obligations and responsibilities of the parties. In failing to consider the Appellant's salary and responsibilities, the court arrived at a wrong decision in awarding 35,000/= which was excessive. In that regard, the Appellant relied on **MBOGO & ANOTHER V SHAH (1968) EA 93 & KEN OMONDI & 2 OTHERS V JAMES OKOTH OMBURAH T/A OKOTH OMBURAH & COMPANY ADVOCATES (2013)eKLR.**

The Appellant submits that the Trial Court failed to consider his affidavit of means which was filed and duly served as evidenced in the record of appeal thus reaching an erroneous decision.

On the issue of rent arrears, the Appellant was aggrieved by the decision of the court in determining that he failed to exercise due diligence to ensure the lease was terminated. On his part he affirms the efforts taken to ensure the termination of the lease included correspondence between himself and the landlord and he gave sufficient notice. He considered this as due diligence thus he should not be liable to pay rent arrears as determined by the court. He submitted that the Respondent should take full responsibility as she was the sitting tenant after the lease was terminated.

The Appellant's submissions are on the burden of proof. He submits that the respondent failed to provide sufficient evidence to prove the allegations of certain facts pleaded. Further, non rebutted facts were still not considered by the court as true positions of fact. In this regard, it was his submission that the court erred in law by failing to give consideration of the appellant's uncontroverted facts which ultimately led to the erroneous decision. He supports his arguments by relying on the several decisions; **CHARTER HOUSE BANK LIMITED (UNDER STATUTORY MANAGEMENT) vs FRANK N. KAMAU (2016)eKLR, GITOBU IMANYARA & 2 OTHERS vs ATTORNEY GENERAL (2016)eKLR & ANTHONY FRANCIS WAREHAM T/A AF WAREHAM & 2 OTHERS vs KENYA POST OFFICE SAVINGS BANK (2004)eKLR.** All these decisions lay emphasis on the discharge of burden of proof and issues relating to unrebutted statements.

The Appellant submitted on is the Respondent's non-disclosure of material facts. He indicted the respondent for failing to disclose that she was operating a business as income generation activity. Further, she failed to disclose that when the Appellant vacated their residence she was in possession of several moveable chattels including a motor vehicle which was fully insured. It is his submission that even during the hearing of the matter at the *ex parte* stage, the respondent failed to disclose that the tenancy agreement to the property where she was residing had lapsed. He relied on the Court of Appeal case of; **BAHADURALI EBRAHIM SHAMJI V AL NOOR JAMAL & 2 OTHERS(1998) Eklr;** which provides that in *ex parte* proceedings, there must be full and frank disclosure to the court of all material facts known to the applicant. If the appellant places material on record to demonstrate non disclosure, the *ex parte* orders ought to have been set aside *ex debito justitiae*. He concluded by praying for the appeal to be allowed.

DETERMINATION

The Trial Court's judgment in part reads;

“Parental responsibility is shared as provided under Article 53 (e) of Constitution whether parties were married to each other or not. Section 6 provides that a child has a right to be cared for by both parents so the Applicant ought to share in responsibilities. Without proof of her income, it is only fair to apportion responsibilities as reasonably as possible.

The Respondent on the other hand has disclosed his other responsibilities to his children and elderly parents fact which remain uncontroverted.

Section 94 a, b, c, e, f, & g must be considered. Clearly, the child was accustomed to a certain standard of living and at tender, age cannot be moved to boarding school. Though the Respondent's financial ability has reduced, the child's needs must be provided reasonably. The Respondent has not disclosed what his current income is so that despite the change in financial circumstances; it was important that his ability is disclosed.

Be that as it may, the proposal to pay monthly sum of Ksh 35,000/= is not reasonable as the needs of the child are shelter, food, medical, clothing and education. Parties must share expenses”.

The exparte orders granted on 4th April 2013.

Under **Section 4 of the Children Act**, the paramount consideration in any matter concerning a child is the child's best interests. **Article 53(2) of COK 2010** provides that

“A child's best interests are of paramount importance in every matter concerning the child.”

On the best interests and welfare of the child being paramount as prescribed by law and adopted by Trial Court; this Court has nothing useful to add or amend. Secondly, the record of appeal confirms that the Appellant does not contest paternity nor parental responsibility.

The crux of the matter is how much should each parent contribute as parental responsibility to their child's upkeep, growth and development.

On the one hand the Appellant stated he filed affidavit of means as confirmed from the record Pg 148-151 and disclosed that unlike before he was not in formal employment and earned Ksh 50,000/- a month from a law firm as dormant partner. Therefore, the Appellant disclosed his

financial ability and obligations to 6 children, wife and aged parents. To this extent the appeal succeeds.

The 2nd issue is on the excessive burden based monthly payments of Ksh 35,000/- to be paid for upkeep of the child over and above school fees and expenses and medical cover for the children.

Article 53 (1) (e) of the Constitution provides that a child has a right 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.”

Article 53 (1) (e) COK 2010 does not mean equal financial contribution by each parent with mathematical precision, but for each parent to ensure and carry out parental responsibility by contributing equally to the child’s upkeep as defined by **Section 24 of the Children Act 2001** as provision of adequate diet, shelter, clothing, medical care and also nurturing and guidance of the child to ensure wellbeing and welfare of the child.

This Court takes into account the fact that the Respondent is the resident parent and will focus on day to day nurturing and providing guidance and support to the child until the Appellant exercises visitation or alternative access to the child during agreed intervals. Therefore; although the Appellant shoulders financial obligations to cater for 6 children wife and aged parents and is not in formal employment, he is legally bound to financially provide for the child in this instant case.

The Respondent did not disclose that she ran a business and was/is in possession of household goods and motor -vehicle left to her by the Appellant which this Court takes into account. The Respondent did not deny that she ran a business, she stated that the business was no longer viable.

The *ex parte* orders of 4th April 2013 were for the Appellant to pay arrears of rent for **Flat D12** State House Crescent. The Appellant terminated the lease as shown by correspondence; letter dated 26th October 2012 by Appellant to Landlord giving notice to vacate and landlord to take over possession from 1st January 2013. He enclosed cheque of Ksh 100,000/- for payment of rent upto 31st December 2012.

The Appellant gave requisite notice and the Applicant ought to have vacated the premises from 2013. Any rent arrears cannot be visited on the Appellant. The Court notes that the issue of rent arrears ought to be canvassed in the relevant Court and not the Children Court.

The Respondent in this appeal despite service failed to enter appearance and/or file any documents. As such the appeal is unopposed.

DISPOSITION

In light of the above circumstances disclosed by the record of appeal, this Court finds as follows;

Upholds the following orders of the Trial Court;

- 1) The parties have joint legal custody with the Respondent having the right to exercise reasonable and limited access of the child SMM on prior arrangement with the Applicant.**
- 2) The Respondent shall cater for the child’s school fees and school –related expenses at [particulars withheld]School and /or any other school that shall be agreed upon by the parties in writing and with leave of the Court.**
- 3) The Applicant should henceforth take up responsibility of shelter and is at liberty to move houses in the event the current house is beyond her means.**
- 4) The Respondent to take out a comprehensive medical cover for the minor in the meantime the Respondent to cater for medical expenses when the need arises.**

The Court Varies/amends and/or vacates following orders of the Trial Court;

- 1) The Respondent’s requirement to provide monthly upkeep of Ksh 35,000/- is hereby vacated as the Applicant being the resident parent shall provide shelter, clothing and food for the child.**
- 2) The *ex parte* orders of 4th April 2013 with regard to payment of rent arrears as per Prayer 1 of the application is vacated. The issue shall be canvassed in the appropriate forum.**

The appeal is partly upheld and partly dismissed. Each party to bear own costs.

DELIVERED DATED & SIGNED IN OPEN COURT ON 21ST JANUARY 2019

M. W. MUIGAI

JUDGE-FAMILY DIVISION

IN THE PRESENCE OF:

MR. DAR HOLDING BRIEF MR. MBALUTO FOR APPELLANT

AZIZI & CO. ADVOCATE FOR RESPONDENT