



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 38 OF 2018

AAA.....APPELLANT

AND

NBA.....RESPONDENT

(Being an appeal from the Ruling and Order of the Senior Resident Magistrate

Hon. Z. W. Gichana) delivered on 1st day of March, 2018)

JUDGMENT

1. The Appellant **NBA** and **AAA** are husband and wife. I will refer to them as such as it is not clear whether the divorce proceedings before the Kadhi have been heard and determined yet.

2. From proceedings in the Children’s Case No. 1129 of 2017, High Appeal No. 64 of 2017 and Kadhi’s Case No. 68 of 2017 referred to by the parties, a myriad of issues are pending determination as between them, which include the matrimonial home, House No. [xxxx] Nairobi, divorce, custody of the children and maintenance.

3. Both lower court files are active, so are the two appeals. Notable is that the two appeals deal with separate issues. Appeal No. 64 of 2017 deals with an appeal arising from orders of the Kadhi dated 2nd October, 2017 which read as follows:

i. That this honourable court be and is hereby pleased to grant an order against the Defendant to vacate House No. [xxxx]Estate and move to L.R. No. Nairobi/Block [xxxx] at Donholm Phase 8 (eight), which is owned by the Plaintiff pending the hearing and determination of the suit.

ii. That this honourable court be and is hereby pleased to issue a temporary injunction restraining both parties, their servants and/or their agents from leasing, transferring through sell and/or charging House L.R. No.[xxxx] Estate pending the hearing and determination of the suit.

4. The interim order of the Children’s Case being appealed from in this cause is as follows;

i. That the defendant shall continue providing school fees and school related expenses.

ii. That the orders issued restraining the Defendant and his agents from alienating and/or evicting the children and the Plaintiff from house No. [xxxx] Estate to remain an issue of the superior court.

iii. That the order that the Defendant does provide interim monthly maintenance be and is hereby enhanced to Kshs.85,000/= per month payable with effect from 15th March 2018 and on such succeeding date on the proceedings months.

iv. The children do remain in their mother’s custody care and control.

v.

vi.

5. It is prayer 1 & 2 of the 2nd order (Children’s Court) that the

Appellant has appealed against in this court on several grounds which are summarised as follows:

- **The trial court failed to consider the evidence in favour of the Appellant when ordering him to pay Kshs.85,000 per month towards upkeep and maintenance of the children**
- **The trial court erred in failing to total up costs of maintenance and upkeep of the children and splitting the expenses between both parents.**
- **The orders were punitive as both parties have an obligation towards the children.**
- **The trial court failed to consider the existence of the case before the Kadhi Court being case No. 68 of 2017 and High Court Appeal No. 1129 of 2017.**

6. The first issue to be noted is that the orders being appealed from are interim orders that were issued by the Children’s Court pending hearing and determination of the suit.

Secondly, the issue of custody and maintenance of the children was also raised in the suit pending determination before the Kadhi though there is no indication whether the same has been heard and orders issued.

7. In arriving at its determination this court is minded of the holding in **Mbogo & Another versus Shah (1968) E.A. 93** where the Court of Appeal stated:

“It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising that discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice.”

8. Notable also is that the record of appeal is incomplete as the proceedings of the lower court were not included. In order to acquaint itself with the circumstances leading to the order being appealed against the court called for the lower court’s file and what is evident is that before arriving at the order being appealed against the trial court had on the 18th of September, 2017 called for affidavit of means of the parties. Further on the 15th of January 2018 the trial court allowed the parties to file further affidavits. The Appellant did not comply, In his ruling the trial magistrate observed that only the respondent herein had filed her affidavit of means.

In making a determination the trial Magistrate also noted the existence of the two suits both dealing with issues arising from the parties marriage and maintenance of their children. And in arriving at his decision, he was of the view that the (Appellant) had failed to discharge the burden placed on him, as he failed to provide sufficient evidence in support of his allegations that he adequately provided for the children as the evidence he placed before court failed short of proving so.

The trial court went ahead and formed the opinion that failing to grant orders for maintenance in the circumstances would go against the best interest of the children.

9. On my part having considered the pleadings and evidence on record I cannot agree more with the finding of the trial court.

In as much as there is evidence that there are two sets of proceedings between the parties, and though the issue of maintenance was equally raised before the Kadhi, it is noteworthy, that the Kadhi’s Court completely failed to consider the immediate needs of the children and appeared to have concentrated on the property issue. And to stay the Children’s Court proceedings in favour of the Kadhi Court’s Case or to overturn the Children Court’s order will be a travesty of Justice, against the best interest of the children herein as this will leave the children exposed and caught up in the fight between two adults who ought to take care of their needs.

This is an instance where technicalities cannot be allowed to override substantive justice.

10. In any event the Appellant failed to comply with the trial court’s order to provide his affidavit of means, secondly his annexures clearly did not persuade the trial court neither do they persuade this court to order otherwise.

11. The order being appealed from is an interim order pending hearing and determination of the suit, the Appellant still has an opportunity at the hearing to remedy the situation. As things stand now the appeal must fail. It is dismissed with costs to the Respondent.

DATED, SIGNED and DELIVERED at NAIROBI THIS 16TH DAY OF MAY, 2019.

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ALI-ARONI

JUDGE