



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
CIVIL APPEAL NO. 61 OF 2018
SKT.....APPELLANT
VERSUS
PC.....RESPONDENT

(Being an appeal from the decision of the Honourable Resident Magistrate H.M. Mbatia (Mrs.) delivered on the 3rd May, 2018 in Nairobi Children Court Case No. 551 of 2018)

RULING

1. The appellant SKT and the respondent PC have two sons, born on 7th June 2011 and 28th December 2014, respectively. It would appear that the parties stayed together for a while before they separated. The children were left with the respondent.

2. The respondent filed a cause before the Children Court to complain that she was alone taking care of the children, because the appellant had avoided his parental responsibility over them. She sought an order to have the appellant to exercise and discharge his parental responsibility by providing for the maintenance of the children.

3. With the cause was an application seeking the same order. In the supporting affidavit, she stated that she had single-handedly been providing for the children and now wanted the appellant to take up his part of the task by providing for the following:-

- a. house – 40,000/=
- b. insurance – 10,000/=
- c. shopping – 16,000/=
- d. market – 6,000/=
- e. gas – 2,000/=
- f. consumable – 5,000/=
- g. bills – 5,000/=
- h. miscellaneous – 10,000/=

Total – Kshs. 94,000/-

4. On 31st May 2018 the application went before Hon. H. M. Mbatia (RM). The respondent was present in person. The appellant was also present and was represented by M/s Waitere who was holding brief for M/s Muigai. M/s Waitere addressed the court as follows:-

“The defendant has been paying school fees and providing maintenance. She prays for 2 weeks to file the documents.”

“She” refers to M/s Muigai who was asking for time to file documents. By this time no defence or replying affidavit had been filed. On her part, the respondent stated as follows:-

“The defendant was providing maintenance of Kshs. 37,000/- per month in addition to school fees. However, he has not paid the maintenance since February. He has paid Kshs. 17,000/-.”

The appellant then stated:-

“I have been having financial problems and I told her that I would pay.”

5. The court then wrote a ruling. Leave of 15 days was granted to the appellant to file defence, etc, in preparation for the hearing of the main cause on 22nd October 2018. In the interim, the following orders were made:-

- a. the respondent to have custody of the children and the appellant to have access during school term, and the school holidays to be shared equally;
- b. the appellant to continue providing school fees and the related expenses for the elder minor;
- c. the appellant to continue providing maintenance of Kshs.37,000/- to the respondent by the 6th of every month;
- d. the respondent to provide the shortfall because of parental responsibility is shared; and
- e. the appellant to pay the outstanding arrears within one (1) month.

6. The appellant was aggrieved by these orders and filed an appeal to challenge them. The substance of the appeal was that the court had delivered that interim determination before hearing the appellant’s case; that the court had purported to issue a ruling in the best interests of the children when those interests had not been ascertained.

7. It was directed that the appeal be heard by way of written submissions. The respondent filed, but the appellant did not. The respondent alleged that the non-filing of the written submissions showed lack of interest in the appeal. That cannot be true as the appeal has to be determined, and there was no application to dismiss it for want of prosecution. Counsel took direction to file written submissions on the appeal. The court will deal with the merits of the appeal.

8. It is the duty of this court to re-evaluate and reconsider the evidence before the trial court and to reach its own conclusions, bearing in mind that it did not have the benefit of seeing the parties as they testified (**Selle and Another –v- Associated Motor Boat Company Ltd and Another [1968]EA 123**). Secondly, an appellate court would not interfere with the decision arrived at by the exercise of discretion by the lower court unless it is satisfied either that the lower court had misdirected itself in some matter and as a result arrived at the wrong decision, or that it was manifest from the case as a whole that the lower court was clearly wrong in the exercise of its discretion and that, as a result, there was injustice (**Choitram –v- Nazari [1984]KLR 327**).

9. According to the respondent, the complaint that the appellant was not afforded a hearing before the ruling was without merit. That is because the appellant had addressed the court before the ruling. On the issue of the orders, it was submitted that there was an application on record seeking interim orders, and that is what the court had dealt with.

10. It is clear that at the time the application came up for hearing, the appellant had not filed a defence or a replying affidavit. Counsel who was holding brief for the appellant’s advocate was seeking time to file a replying affidavit, even as she stated that the appellant was paying fees and providing some maintenance. There was no indication of to how much fees or maintenance was being paid. The respondent stated that the appellant was paying Kshs. 37,000/- per month in maintenance in addition to fees, but that he had not paid since February. The appellant responded that he was having financial difficulties but that he would pay.

11. First, the appellant was entitled to be heard on the application for interim orders. He had not filed his replying affidavit, and therefore he had not placed his sworn evidence on record. He sought time to do so. There is no reason why the court could not adjourn, even if it was for only a few days, to allow that evidence to be placed on record. His complaint that he was not afforded an opportunity to place his evidence on record to rebut what had been deposed to by the respondent in her application is therefore merited. An opportunity to be heard includes the chance to appear, to be represented, and to present evidence and argument before a decision is made by the court.

12. Secondly, a decision to determine the quantum of school fees or maintenance can only be based on the needs of the child in question, but also after ascertaining the means of the parents (**GOO –v- LM [2018]eKLR**). There has to be proved income and means of the parents, and then that is matched with the ascertained needs of the child. There is no evidence that the court undertook any inquiry on these matters, and therefore the figures ordered were without basis. A court is enjoined to decide a matter based upon the consideration of all the evidence involved, and not to be arbitrary or whimsical. In a matter involving the maintenance of a child, the court has to insist on the parents placing before it their respective means and income. The court has to find out what the child’s actual needs are. The result of this inquiry is what should form the basis of the exercise of discretion on that part of the court in reaching the decision on the quantum of maintenance by either side.

13. In conclusion, I allow the appeal and set aside the interim orders that were made on 31st May, 2018.

14. Costs usually follow the event, but since the appellant did not demonstrate due interest in the appeal, I will not make orders as to costs.

DATED and DELIVERED at NAIROBI this 23RD day of JULY, 2019.

A.O. MUCHELULE

JUDGE