



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 33 OF 2016

(An appeal from the Ruling of the Principal Magistrate, Embu in Children Case No. 39 of 2013 dated 28/05/2016)

M N M.....APPELLANT/APPLICANT

V E R S U S

N W K.....RESPONDENT

R U L I N G

1. This is a ruling on an application 6/06/2016 seeking for orders for stay of the Principal Magistrate's orders made on 11/05/2016 in Embu CM Children's Case No. 39 of 2013.
2. The applicant in his affidavit sworn on 6/06/2016 states that he is a married pensioner going to 70 years of age and earning a meagre pension of KShs.10,737/= as a retired civil servant and cannot meet the monthly payment for maintenance of Kshs.10,000/= as ordered by the court on 20/05/2015 without the respondent being apportioned half of it in accordance with Section 90 of the Children's Act. He further states that the alleged cohabitation and paternity was not proved.
3. The applicant faults the magistrate for refusing to hear him in his application dated 5/04/2016 until he complies with the maintenance orders. It is further contended that the orders made on 11/05/2016 contradicts the orders made on 9/03/2016 and denies him his natural and constitutional right to hearing.
4. The applicant was represented by Njeru Nyaga & Company Advocates who filed submissions raising the issue of jurisdiction of the children's court to hear matters where parties are not married and where there is no parental responsibility agreement. It is further submitted that the applicant was denied his right of hearing under Article 50 of the Constitution.
5. The application was opposed by the respondent in her replying affidavit sworn on 12/07/2016. She depones that the applicant was given his right to be heard and that the issues of paternity and cohabitation were resolved before the maintenance orders were given. There was a DNA report dated 12/08/2015 which proved that the applicant is the biological father of the child called S K J aged 11 years.
6. The respondent further states that the applicant earns a monthly pension of KShs.10,737/= and has rental and farming income of over Kshs.50,000/=. He is therefore capable of meeting the monthly payments ordered by the court. It is contended that the application is designed to avoid complying with the court orders which exposes the child to suffering.
7. The respondent was represented by Fatuma Wanjiku and Co. Advocates. In the counsel's submissions, she argues that the order for maintenance was made about one year before filing this application and is still valid. She urged the court to consider the best interest of the child as was held in *Nairobi Civil Appeal No. 13 of 2013*. The respondent further states that the applicant has been filing numerous applications meant to cause delay in providing maintenance to the minor.
8. It is argued that the applicant has not satisfied the requirement of Order 42 Rule 6 of the Civil Procedure Rules under which the application falls. The applicant is required to prove that he is likely to suffer substantial loss in the event that the orders are not granted and should provide security for the judgment/decree. These requirements must be complimented by consideration of the best interest of the child.
9. The facts of this application are that the respondent obtained orders for maintenance of the minor in CM Children's Case No. 39 of 2013 for KShs.10,000/= per month. The payments were to be made on or before the 5th day of each succeeding month from 5th of June 2015 until the case was heard and determined. The applicant failed to comply with the said orders resulting in the orders made on 11/05/2016.
10. The orders read as follows:-

That the defendant do comply with orders dated 9/03/2016.....before the application dated 5/04/2016 can be entertained.

11. On the 9/03/2016, the applicant was directed to bear the costs of a second opinion DNA test to be conducted under the supervision of Embu Level 5 hospital Medical Superintendent. He was ordered to comply with the orders of 20/05/2015 which required him to pay monthly maintenance.

12. It is not in dispute that paternity of the child was established by the DNA test report dated 12/08/2015. Although the applicant on his own application obtained orders for a second opinion report, he has not demonstrated that any efforts have been made to comply with the court orders made on 9/03/2016.

13. Having applied for the orders, the applicant was under an obligation to comply with them since it was meant to serve his own interests. The failure to comply with the said orders means that the child will continue suffering and that he can be cited for contempt. Mere denials of paternity are of no effect and have been overtaken by events in view of the existence of the DNA report.

14. The application dated 5/04/2016 which the magistrate refused to hear until the applicant complied with the court orders seeks for stay of execution of the ruling of the court delivered on 9/03/2016 pending the hearing and determination of his application. The court cannot be faulted in its decision which culminates in efforts to enforce its own orders which had been made in the best interest of the child.

15. The effect of the orders sought in the said application order for maintenance. However, the respondent ought to seek for enforcement of the orders of the court for maintenance in the manner authorized by the law since no stay has been granted.

16. The applicant raised the issue of jurisdiction of the children's court to deal with maintenance where the parties are not married. He did not cite any legal provision in the Children's Act that denies the court jurisdiction where parties are not married. The maintenance of a child does not depend on whether the parents are married or not as stipulated in Article 53(e) of the Constitution.

17. The said Article 53 provides for the rights of children. The relevant provision herein is Article 53(1)(e) and (2) which provides:-

(1) Every child has a right –

(e) to parental care and protection, which includes equal responsibility of the mother and the father to provide for the child whether they are married to each other or not.

(2) A child's best interests are of paramount importance in every matter concerning the child.

18. The constitutional provisions provide a strong backing of the provisions in the Children's Act relating to the rights of a child and the responsibility of the parents.

19. This application was brought under Sections 1A, 1B and 3A of the Civil Procedure Act. Sections 1A and 1B are provisions relating to the overriding objective. Section 3A provides for unlimited inherent power of the court to make necessary orders for the ends of justice or to prevent the abuse of the process of the court. None of these provisions relate to procedure. The applicant ought to have used the relevant and specific provisions of the law.

20. I agree with the respondent that being an application for stay of orders pending appeal it ought to have been brought under Order 42 of the Civil Procedure Rules. However, in the interests of justice and in view of the overriding objective, the court will look at this application as relates to the appeal.

21. On perusal of the memorandum of appeal, I note that the main prayer in this application is one of the grounds of appeal. If this application is granted, it would result in allowing part of the appeal without the parties ventilating their arguments for or against that particular ground. The best approach should be to have this appeal admitted, the record prepared and served followed by the fast-tracking of the appeal.

22. It is my considered opinion that this application is not merited and it is accordingly dismissed with costs.

23. The appellant is hereby directed to fast-track the appeal for disposal.

24. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF MAY, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Abubakar for Fatuma for Respondent

Mr. Andande for Nyaga Njeru for Applicant