



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

HIGH COURT CIVIL APPEAL 45 OF 2017

A M K.....APPELLANT/APPLICANT

VERSUS

S D M.....RESPONDENT

JUDGMENT

PLEADINGS

By an application filed under certificate of urgency on 19th July 2017 by the Appellant/Applicant, he sought the following orders;

a) That pending hearing of application and/or appeal of the Children Court decision by Hon. Z.W. Gichana, SRM in **Nairobi Children case Number 120 of 2013** in the judgment delivered on 15th June 2017, this Court grants stay of execution and any orders that this Court deems fit.

The Appeal/Application is grounded on the following facts and law;

- a) The Appellant and Respondent were married in 2001 and separated in 2011.
- b) The have between them issues of their marriage as follows;
 - i) J K M -16 years old
 - ii) F M – 12 years old
 - iii) N M- 9 years old

The Appellant in the memorandum of appeal claimed that the Trial Court erred by failing to consider all issues presented for determination, the evidence presented by parties, increased payment of maintenance to Ksh 30,000/- without considering his income and did not take into account his submissions.

The Appellant sought therefore the orders from the judgment set aside and instead this Court grants orders that the Appellant caters for school fees and school expenses for the children and medical expenses; if and when medical concerns arise, the Respondent caters for food, shelter and clothing for the children and the Respondent pays costs for Lower Court and this Court's costs and any other order this Court deems fit.

The Appellant stated that the orders from judgment of 15th June 2017 ordering him to pay school fees and school expenses, provide comprehensive medical cover and pay for psychotherapy support/Counselling lessons and provide maintenance of Ksh 35,000/=has burdened him as he is struggling to cater for the children in this family whilst he has another family comprised of partner and 4th child.

The Appellant claimed in the Affidavit of means presented before the Trial Court that he is a Freelance, Chef and he works for [particulars withheld] Enterprises Limited and earns Ksh 70,000/- Ksh 80,000/- a month contrary to Plaintiff's claim that he is owner/runs [particulars withheld] Enterprises Limited.

The Appellant claimed that the Respondent /Plaintiff is self -employed designer and proprietor of [particulars withheld] Designs and not

unemployed as claimed by Plaintiff/Respondent.

The Respondent/Plaintiff filed Replying Affidavit on 12th October 2017 to the Applicant/Appellant' application and Appeal as follows;

- a) The Appellant filed application of 17th July 2017 after filing the memorandum of appeal on 14th July 2017 and the same was fixed for hearing on 20th September 2017. Yet she was served with the application on 15th September 2017 for hearing on 20th September, 2017.
- b) On 12th October 2017, the Plaintiff/ Respondent this issue of service and was granted ample time to file reply and the matter was extended to 2nd November, 2017.
- c) The Application/appeal are devoid of merit, tainted with blatant lies and an abuse of court process and meant to deny the children the fruits of their lawfully obtained judgment.
- d) The Appellant/applicant lied to Court that he is a man of straw in fact he is Sole Proprietor of [**particulars withheld**] Enterprises under Registration Number [**particulars withheld**] registered on 13th June 2008.
- e) The Appellant/Applicant won a contract with Davis & Shirliff Limited for catering services for Ksh 900,000/=
- f) The Appellant/Applicant won a Consultancy job at Airport landing Hotel- Embakasi.
- g) The Plaintiff/Respondent attached school fees late Payment Reminder of 18th September 2017 from [particulars withheld] School for M N M for Ksh 144,000/= and for D F M for Ksh 165,000/=

On the hearing date on 16th November, 2017, the Plaintiff/Respondent appeared in person. The Appellant through Counsel stated that that the appeal is based on the increased maintenance amount for the children now at Ksh 35,000/- which is too high coupled with other payments for the children and his financial status and obligations as per the affidavit of means.

The Plaintiff/Respondent reiterated that The Appellant runs a thriving business while she is has a struggling business and at the same time taking care of the 3 children. She said incurred debts, there school fees arrears, for 5 months the Appellant failed to pay medical costs and she struggles to provide food, shelter and clothing for the children.

The Appellant's lifestyle is not one based on alleged Ksh 70,000/- - Ksh 80,000/- a month as he runs a car a business and takes care of another family. Her children waited for the Trial Court's judgment for 5 years and now are deprived of their right. Yet their children are sent away from school due to arrears of school fees.

The Plaintiff/Respondent worked with Appellant until 2011 when they separated and since then despite great effort at 43years old without a degree she was not successful to get a job.

ANALYSIS & DETERMINATION

LAW;

The law on upkeep welfare and best interests of the child (ren) is espoused in **Article 53 (1) (e) and (2) of Constitution of Kenya, 2010;**

(1) Every child has the right—

(e) 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; and

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

Section 4 (3), 23, 24, & 94 of Children Act,2001 on parental responsibility to the child (ren) stipulate-

“(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.”

“94. (1) The Court may order financial provision to be made by a parent for a child including a child of the other parent who has been accepted as a child of the family and in deciding to make such an order the court shall have regard to the circumstances of the case and without prejudice to the generality of the foregoing, shall be guided by the following considerations—

- (a) The income or earning capacity, property and other financial resources which the parties or any other person in whose favour the court proposes to make an order, have or are likely to have in the foreseeable future;**
- (b) the financial needs, obligations, or responsibilities which each party has or is likely to have in the foreseeable future;**
- (c) the financial needs of the child and the child’s current circumstances;**
- (d) the income or earning capacity, if any, property and other financial resources of the child;**
- (e) any physical or mental disabilities, illness or medical condition of the child;**
- (f) the manner in which the child is being or was expected to be educated or trained;**
- (g) the circumstances of any of the child’s siblings;**
- (h) the customs, practices and religion of the parties and the child;**
- (i) whether the respondent has assumed responsibility for the maintenance of the child and if so, the extent to which and the basis on which he has assumed that responsibility and the length of the period during which he has met that responsibility;**
- (j) whether the respondent assumed responsibility for the maintenance of the child knowing the child was not his child, or knowing that he was not legally married to the mother of the child;**
- (k) the liability of any other person to maintain the child;**
- (l) the liability of that person to maintain other children.”**

From the above provisions of law and in light of the impugned judgment of 15th June 2017, I find that the Trial Court legal reasoning was in consonance with laid down law. The Trial Court relied on the cases of..... that espouse...

In addition, Article 53 (1) (e) COK 2010 does not mean 50% / 50% financial contribution by each parent but for each parent to contribute equally to the child (ren) parental responsibility which is 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 (ren) to ensure wellbeing and welfare of the child(ren).

The Plaintiff/Respondent as the resident parent will focus on day to day nurturing and guidance of the children until they Appellant exercises visitation or alternate access to the children during agreed intervals. Therefore financial contribution cannot be equal as the financial and other circumstances of each parent are taken into account based on the affidavit of means filed.

In the instant case the Defendant/Appellant filed affidavit of means and stated his financial position. This Court found the affidavit of means inconclusive because ideally the affidavit of means should include income earning capacity and other financial resources by each party/parent; the financial needs, obligations and responsibilities by each party /parent and propose contribution which each party has made or intend to make for the welfare of family/child (ren) including looking after the children through day to day care and support.

Unfortunately, that details required were not included in the Appellant/Defendant’s affidavit of means and the Plaintiff did not file any for the Court to consider. Therefore the ground that the Appellant claimed the Trial Court did not consider his affidavit of means, this Court finds that in the absence of relevant details, the Trial Court did not rely on the affidavit of means as it was not detailed or sufficient enough to enable the Court to make informed decisions.

Secondly, the Appellant adduced evidence in the Trial Court that he is a Free lance Chef earning between Ksh. 70,000/= - Ksh 80,000/= per month and each month he spent close to Ksh 50,000/= for children’s expenses and was left with a paltry Ksh 25,000/= .However, during the hearing of the application and appeal in this Court, the Respondent/Plaintiff informed this Court that the Appellant was/is sole proprietor of a business [particulars withheld] Enterprises Limited registered in his name and conducting lucrative business as she named the 2 contracts the Appellant had/has. Clearly, the Appellant misrepresented facts regarding his financial resources and he did not controvert the Respondent’s assertions as pleaded in her Replying affidavit and oral submissions in Court. The Appellant failed to disclose actual earnings either by payslip, cheque or bank statement and failed to disclose material facts regarding his financial status that he is a Chef by profession but ran/runs a business in the name and style [particulars withheld] Enterprises Limited. Until and unless he produces to the Trial Court the Registration certificate of the business as registered in 2008 as Number [particulars withheld]; this court deems him to have misrepresented material facts or failed to disclose material facts to the Trial Court and now this Court.

There must be full and frank disclosure to the court of all material facts known to an applicant.

In *UHURU HIGHWAY DEVELOPMENT LIMITED VS CENTRAL BANK OF KENYA & 2 OTHERS [1995] ECLR*, the Court of Appeal approved and applied the case of *BRINK'S-MAT LTD VS ELCOMBE (1988) 3 ALL ER 188* where the court set out the principles in determining the question of non-disclosure as follows:

“In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following:

- a) The duty of the applicant is to make a full and fair disclosure of the material facts.**
- b) The Material facts are those which it is material for the Judge to know in dealing with the application made; materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisers...**

The fact on non disclosure by the Appellant means that he approached the Court with unclean hands and is not worthy of any orders on appeal and application from the Court.

Finally, The Appellant pleaded that he is unable to meet the maintenance of his children with the Plaintiff as he has another family that includes a 4th Child. Whereas the law does not prohibit one making choices about their lives, however, the consequences of such choices should not adversely affect the 3 children by being deprived of their entitled parental responsibility from the Appellant; all children should be equally catered for. Therefore, the Appellant ought to arrange his financial affairs to cater for both families.

DISPOSITION:

i) Due to material non-disclosure by the Appellant/Applicant that he is the registered owner of the business [particulars withheld] Enterprises Limited as opposed to Free Lance Chef earning meagre Ksh 70,000/-=Ksh 80,000/= as he pleaded in the affidavit of means, the appeal and application are dismissed with costs.

ii) The Judgment and orders of 15th June 2017 are upheld and to be complied with forthwith.

DELIVERED DATED AND SIGNED IN OPEN COURT ON 17TH SEPTEMBER, 2018

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

RESPONDENT IN PERSON:

COUNSEL FOR APPELLANT: