

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY AND PROBATE DIVISION

CIVIL APPEAL NO. 59 OF 2014

A M M.....APPELLANT

VERSUS

B M M.....RESPONDENT

(Being an appeal filed against the ruling delivered in Milimani Chief Magistrate's Court Divorce Case No. 165 of 2014 on 4th July 2014)

JUDGMENT

1. The appeal herein arises from orders made by the lower court in an interlocutory application where the appellant had sought maintenance for herself and her children from the respondent. The lower court denied the appellant the grounds that parties to a marriage had equal rights during marriage and thereafter and there was therefore no obligation on either party to maintain the other. On maintenance of the children, the lower court pointed to the Children Act which establishes the Children's Court and proposed that the matter ought ideally to have been placed before that court.

2. I have read through the proceedings before the lower court, the affidavits lodged herein as well as the submissions filed by both sides. I have taken note of the arguments made therein.

3. Under Article 45(3) of the Constitution, parties to a marriage are placed at par both in, during and at dissolution of the marriage. The object is that no party gets to gain an advantage over the other whenever they get into a marriage, so that at dissolution thereof each of the parties incurs no burden of providing for their former spouse. Each of them must make an effort to earn their keep, both during and after marriage. That is my understanding of the recent decisions in *Pamela Ann Walker Munro vs. Charles Michael Angus Walker* Cause No. 1 of 2010 and *WMM vs. BML* (2012) eKLR.

4. I note from the proceedings herein that the appellant is employed as a teacher. She is earning her keep, and therefore there may be no basis for ordering that she be maintained by the respondent. For the court to depart from the position stated in *Pamela Ann Walker Munro vs. Charles Michael Angus Walker* (supra) and *WMM vs. BML* (2012) (supra) there has to be a concrete case presented by the appellant. Such a case is best presented at the full hearing of the matter.

5. Regarding the children, matters touching on the custody and maintenance of children are provided for in the Children Act. The Children Act establishes the Children's Court and confers upon it the jurisdiction to resolve disputes on such matters. Ideally, the matter of the children herein ought to have been filed before the Children Court. The lower court therefore properly stated the position with regard to that.

6. I am of the view that the issues raised in this appeal can properly be articulated or canvassed at the lower court and should thereafter come to the High Court by way of a substantive appeal. I am persuaded by what Karanja JA said in *Charles W Rubia and others vs. Elizabeth Wanjiku Njonjo and another* CACivApp No. NAI 132 of 2014 (UR 107/2014) that:-

'The last criterion is particularly important when it comes to appeals against interlocutory orders when the substantive suit is still pending hearing and determination. This is so because this Court

should as much as possible eschew giving orders that fetter or shackle the trial Court from proceeding with a matter that is properly before it before its conclusion, unless of course there is a flagrant abuse of the Court process which this Court must address before the conclusion of the substantive suit, when there is imminent danger of subversion of justice if the hearing is not sopped.'

7. I am not persuaded that the lower court fell into error in declining to grant the orders that the appellant had sought before it. Consequently, I shall not interfere with its decision. I shall instead find that the appeal before me is without merit and dismiss the same with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 12TH DAY OF MAY, 2017.

W. MUSYOKA

JUDGE