



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 31 OF 2014**

**IN THE MATTER OF THE ESTATE OF JOHN NJENGA MUBEA (DECEASED)**

**D M.....APPLICANT**

**VERSUS**

**R N M .....RESPONDENT**

**JUDGMENT**

**PLEADINGS**

The Court was moved by a Memorandum of Appeal filed on 20<sup>th</sup> May, 2014 by the Appellant against the judgment of the Children’s Court of 2<sup>nd</sup> May, 2014 in Children Case No. 1156 of 2012.

The grounds in a nutshell are that the Learned Magistrate erred in Law and in fact by finding that defendant/appellant has parental responsibility over the children of the Respondent namely;

- 1. M D W (20years old)
- 2. E M (16 years old)

The Court found that the Plaintiff/Respondent and the Respondent/Appellant had cohabited while there was no evidence that such cohabitation led to acquisition of parental responsibility as provided for in **Section 25(2) of the Children Act.**

The Court did not prove paternity of the child/children to the appellant nor was there acknowledgement of paternity. The appellant never paid maintenance for the children at any time.

The appellant sought that the judgment of the Children’s Court be substituted with the order of dismissal of the suit and the appellant be awarded the costs of the appeal.

On 25<sup>th</sup> September, 2014 the appellant filed yet another application under certificate of urgency against an application for stay of execution order made on 23<sup>rd</sup> September, 2014 in the Children’s Court. The appellant was ordered to deposit Kshs.150, 000/= as Court security and conditional stay and on 23<sup>rd</sup> September, 2014. The Trial Court ordered Ksh.120, 000/=of the Ksh.150, 000/=be released to the

Plaintiff/Respondent to cater for school fees of the minor child.

The Appellant was apprehensive that if the money was released and the appeal is heard and determined the Respondent would not be in a position to refund the money back to the Appellant.

On 11<sup>th</sup> October, 2014, at the outset the Court ordered for the Original Court file **Children Case 1156 of 2012 from the Children's Court**; to be availed the application to be served on the Respondent. A Temporary stay of execution of the orders of the judgment was granted until the hearing and determination of the appeal on a hearing date to be obtained from the Registry.

On 16<sup>th</sup> January, 2015, the Respondent informed the Court that she expected to be given money by the order of the Magistrate's Court to obtain funds to pay school fees for the minor child from the Appellant. She came to the High Court and realized there were orders to stay execution of the judgment, she wanted money and take the child to school she was in debt with arrears of school fees. The appellant abandoned her in 2012 and she fell ill. He left her and the children when the minor was in Standard eight (8). He is now in Form IV and in need of school fees to complete 'O' levels education.

The Court ordered a hearing notice be served to the appellant for interpartes hearing on 23<sup>rd</sup> January, 2015. The Respondent served the hearing notice to the appellant's advocate and it was received under protest. The Respondent told the Court that the minor is in imminent danger of not joining Form IV class and registering for the end of year examinations. The time was running out so the matter ought to be expedited.

The Court found that despite service of the hearing notice the appellant and her Counsel did not attend Court. There was no information of any reason for the Court to consider or at least a proposal or the way forward especially a convenient date to attend Court and pursue the appeal in the interests of the child. Therefore in the absence of the appellant despite service, the Court allowed/granted release of the money Ksh.150,000/= for school fees and expenses.

The appellant thereafter filed another application under certificate of urgency on 10<sup>th</sup> February, 2015 objecting to the exparte orders releasing the Ksh.150,000/= for payment of school fees and expenses for the minor child. The Court scheduled the interpartes hearing for the four (4) applications on 26<sup>th</sup> June, 2015 but the same proceeded on 6<sup>th</sup> March, 2015.

## **HEARING**

The appellant reiterated the grounds of his appeal and applications with focus on the proceedings and judgment of the Children's Court.

With regard to the Ksh. 150,000/= security and conditional stay through his advocate Ms. Thungu; he emphasized that the money was not for maintenance of the child but for right of appeal and conditional stay of execution of the Children's Court orders.

He was opposed to the release of the funds by the Magistrate's Court and secondly by this Court. The appellant appealed against the order to maintain a child whom he had no parental responsibility. The appellant should not be compelled to take care of a child that he has no responsibility over. The Respondent should confirm to the Court that she can refund the money if called upon to do after the appeal.

There are no official documents from the school that the minor attends to confirm that the said funds Ksh.150,000/= are commensurate to the school fees owing and that the amount shall be used only for the purpose of paying school fees and school expenses.

The issue of parental responsibility must be canvassed first so as to determine the Appellant's position with regard to paying maintenance for the children of the Respondent.

The Respondent on the other hand informed the Court that she and the Appellant lived together as man and wife for seven (7) years. In that time the appellant recognized her two (2) children as his own children. This is evidenced by the following actions of the appellant towards the children.

- a. The Appellant lived with E M in Bahati; Nairobi while he went to school and did KCPE exams.
- b. He registered E M at the school for KCPE exams in his name as evidenced by the KCPE certificate produced in court.
- c. The NHIF membership card data summary also produced in Court depicts the Respondent and her two (2) children as family of the appellant. Later; the Respondent changed the details and excluded them. The original printout with their names and the appellant was produced in Court.
- d. In 2008, after the Appellant and Respondent had their own child S who was born on 7<sup>th</sup> April, 2008 and she died the same year, during the funeral ceremony, the funeral pamphlet indicated the family of the deceased child as the appellant and Respondent father and mother of the deceased and the deceased was their 3<sup>rd</sup> child. The Respondent explained this meant that the Respondent recognized the other two (2) older children.
- e. E M birth certificate was to be produced in school when he sat for the KCPE exam. The birth certificate shows E M, as the child and D M M and R N. M as father and mother of the child. It had both names of the Appellant and Respondent as parents of E M.
- f. The Children Court record shows the matter was heard interpartes in the Children's Court and relatives on both sides testified and documents were produced culminating to the judgment of the Court. The input of the judgment was that although the Respondent is not the biological father of the E M, he acquired parental responsibility under **Section 25 (2) of the Children's Act**.

The Respondent informed the Court that E M was languishing at home not in school due to lack of school fees. The Children's Court ordered the Respondent to pay school fees from 2012. She produced official documents of the fee structure of the school when her son pursues Education. The Appellant through the advocate replied that, the fact that the appellant's name is in the birth certificate is not sufficient evidence of parental responsibility.

The names of the Respondent and the children on the NHIF documents were not by the appellant and it is questionable how the Respondent obtained such information. The NHIF print out by the appellant with the proper information is the one attached to Supplementary Affidavit marked "MM". The person who enjoyed the NHIF health benefit is the Respondent when she was admitted in hospital during the birth of their child S now deceased.

The documents filed in Court for school fees show the amount is much less than the monies deposited as security for the appeal Ksh. 150,000/= so even if the Court were to release the amount the same would have been far in excess of the school fees claimed. The Respondent has not proved by production of receipts that she took and paid for the child his school fees.

The Court outlined in detail the submissions by both Appellant and Respondent so as to lay down the respective claims and the issue for determination.

## **ISSUES**

1. Does the Appellant have parental responsibility towards the children of the Respondent?
2. Is the Respondent entitled to the Ksh. 150,000/= deposited for security pending appeal as school fees for E M?

There are three (3) applications to be heard and determined.

- a. The memorandum of appeal filed on 20<sup>th</sup> May, 2014 against the judgment of the Children's Court in Children's Case No. 1156 of 2012. The Court granted stay of execution of orders.
- b. The Certificate of urgency application filed on 25<sup>th</sup> September, 2014 being an application for stay of execution order made by the Trial Court on 23<sup>rd</sup> September, 2014 pending hearing and determination of the appeal. In this application the Trial Court ordered deposit of security pending appeal of Ksh. 150, 000/= and thereafter allocated Ksh. 120,000/= of the amount to the Respondent for school fees.
- c. There is the certificate of urgency application brought on 9<sup>th</sup> February, 2015 by the Respondent asking the Court to revoke the stay of execution order issued on 1<sup>st</sup> October, 2014 and release Ksh.120,000/- for the school fees of the child that is Form IV and time is running out as he has not paid school fess.

## **LAW**

The law on stay of execution is as follows as provided by **Order 42 Rule (1) and (2) of Civil Procedure Rules 2010.**

*(1)''.....the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside''.*

*(2) No order for stay of execution shall be made under sub rule (1) unless;*

*(a) "the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; ....."*

The import is that the stay of execution is granted where the Court is satisfied that substantial loss that may result to the applicant and where the order is made without unreasonable delay. The applicant in the instant case deposited Ksh. 150,000/= as security pending appeal.

## **DETERMINATION**

At the centre of the matter and of priority is the child E M who lacks school fees to undertake and successfully complete Form IV education. The Appellant declined to pay school fees on the basis of lack of parental responsibility. At the Trial Court in the Children's Court and in this Court the Appellant denied parental responsibility to the child of the Respondent R N M.

## **TRIAL IN CHILDREN'S COURT**

On perusal of the Children's Court file; pleadings and oral evidence on record depicts the following facts;

The Respondent and Appellant knew each other and begun to live together in May, 2005 as man and wife under Customary Law. They lived with the Respondent's two (2) children. They visited the Appellant's mother in Nyahururu and the appellant introduced the Respondent and the two (2) children as his family.

They visited his relatives in Kirinyaga and came back with his mother and niece to their home and stayed with the children.

When the Appellant fell ill and was admitted in Kiambu hospital the Respondent took care of him. He was sent to different posts for work assignment the Respondent visited him. They got their 3<sup>rd</sup> child in 2008 who fell ill and died. The funeral was attended by the Appellants family.

They bought a farm in Juja and constructed their home. He lived with her son, E M at Bahati where he attended school in standard 7 and 8. The Appellant left her in 2012 and stopped any communication and financial support for her and the children. The Respondent's mother testified that the Appellant and Respondent came home and told them they were man and wife. They did not come back to pay dowry. The Respondent's sister also testified that she knew the Appellant as her sister's husband. She visited them in their home in Juja. During the funeral of their child she attended the funeral and they were at their home.

The Appellant also testified and denied that he was man and wife with the Respondent and he denied he had parental responsibility to the children of the Respondent. He claimed that they met in 2005 in a casual relationship as she reared the chicken.

They did business together and bought plots adjacent to each other but registered in joint names but did not have a marriage and did not live together. He denied all the documents that the Respondent produced in Court were to confirm that he was responsible for the children of the Respondent.

His brother in-law (DW II) and mother (DWII) testified in Court and denied that they knew the Respondent as a wife to the Appellant. The brother in-law intimated to the Court that he knew the Appellant was married to L M and they have two (2) children S G and C W. His mother denied knowledge of the Respondent at all.

The Trial Court upon evaluation of the submissions of all parties as the Court of 1<sup>st</sup> instance arrived at the conclusion that by virtue of **Section 25(2) of the Children's Act Cap 2001** the Appellant had parental responsibility to the children of the Respondent.

The evidence on record and the Trial Court's record leads to only one (1) reasonable and logical conclusion that the Respondent proved on a balance of probabilities that the Appellant and Respondent cohabited for seven (7) years, 2005 – 2012, they lived together with the Respondent's children. The Respondent proved by evidence in both Courts that the NHIF documents, birth certificate of E M have the Appellant names. This is evidence that confirms that the relationship was not a casual affair.

## **ANALYSIS**

The evidence on record confirms that the appellant lived together, operated a business together, bought property together and constructed a home a home together and more importantly the Appellant lived with the child E M in Bahati/Nairobi and went to school while the Respondent was in Juja building their home. These facts culminate to the conclusion that the Appellant and Respondent in spite of not undergoing a customary marriage, they held themselves out in society as man and wife.

The case of; **MARY WANJIRU GITHATU Vs ESTHER WANJIRU KIANI** eKL provides;

***“ A Court of Law is not precluded from presuming existence of a marriage even in circumstances when a party claims that the marriage in question was not celebrated under Customary Law of the Community of the parties involved in the particular marriage”.***

Parental Responsibility is defined in **Section 23(1) and (2) of the Children Act Cap 21** provides;

***1. In this Act, “parental responsibility” means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.***

***2. The duties referred to in subsection (1) include in particular;***

***a. The duty to maintain the child and in particular to provide him with –***

***i. Adequate diet;***

ii. **Shelter;**

iii. **Clothing;**

iv. **Medical care including immunization; and**

v. **Education and guidance**

Although the appellant is not the natural progenitor of the Respondent's children but by virtue of providing medical care as evidenced by NHIF documents, living with him at Bahati where he went to school and having school documents and birth certificate with his name as his father, conclusively illustrates that he had a relationship with the child. The relationship developed through the fulfillment of the child psychological and day to day physical needs at the most basic level of feeding, nurturing, comforting and loving him. Later the relationship grew to one of guiding, socializing, educating and protecting him.

The parent may not be the legal parent but he is the social and psychological parent. The Respondent demonstrated that until the Appellant ended their seven (7) years long relationship he had from all intent and purposes lived with the Respondent and taken care of the children.

This Court is guided to uphold to the interests of the child as it is stipulated in **Article 53(1) of the Constitution and Section 4(1) and 94(1) of the Children's Act 2001**. The older child has completed education. The issue remaining regards the younger child is even urgent as he is to obtain education and sit for final 'O' level exams this year.

The Court is alive to the fact that parental responsibility is shared and therefore as the Respondent provides food, shelter and clothing the Appellant should ensure payment of his school fees and school expenses.

The Courts when faced with similar issue of determination of parental responsibility have pronounced themselves as follows;

## **2 AK & MPE UWEZO FOUNDATION VS M.A & A.G**

### **PETITION NO 193 OF 2011**

The 1<sup>st</sup> Petitioner cohabited with the 1<sup>st</sup> Respondent for two (2) years before 2010 Constitution of Kenya was passed. When they fell out the Petitioner obliged to take care of his biological children but refused parental responsibility of the other two (2) children who were not his biological children.

The Court held that;

***“ that once one acquires parental responsibility as result of living under the same roof and providing for sustenance of children one cannot ran away from that responsibility”.***

The Court went to add;

***“Article 53(2) requires the best interest of the child be paramount consideration every matter concerning the child. A step parent must be held to have an obligation recognized in law to exercise parental responsibility as defined in Section 23 of the Children Act over his or her step children.***

***It would be an affront to morality and values of the Constitution for a party who has had a relationship with a child a kin to that of a father or mother to disclaim all responsibility and duty to maintain the child when he or she falls out with the parent of the child”.***

See also on parental responsibility the following authorities;

1. **BMM Vs FKN CIVIL APPEAL 32 OF 2008 (EMBU HIGH COURT)**
2. **FKW VS DNM MISC 85 OF 2014 (NYERI HIGH COURT)**
3. **ZW VS MGN MISC NO. 108 OF 2013 (NAIROBI HIGH COURT)**

From the foregoing, this Court is satisfied from the evidence adduced and on record that the judgment of the Trial Court was well reasoned and grounded on the issue the parental responsibility of the Appellant to the Respondent's child.

The Appellant's version is a mere denial of a long standing relationship spanning seven (7) years and the Court presumed a marriage by virtue of various activities they conducted and are deemed to be man and wife until the relationship turned sour.

### **FINAL ORDERS**

- a. **The stay of execution orders of 23<sup>rd</sup> September, 2014, 1<sup>st</sup> October, 2014 and 25<sup>th</sup> January, 2015 are hereby vacated.**
- b. **The judgment of the Children's Court in Children Case No. 1156 of 2012 is upheld.**
- c. **The Appellant to pay school fees and school expenses for E M forthwith and directly to the school and the Respondent to undertake food, clothing and shelter for the child.**
- d. **The security deposited of Ksh.150, 000/= for conditional stay of execution to be released to the Appellant if he pays school fees and school expenses for E M. In default the same be expended to pay for school fees and school expenses upon production of official documents from the school and the same paid directly to the school.**
- e. **Being a family matter each party to bear their own costs.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF JUNE 2015.**

**M. W. MUIGAI**

**JUDGE**

*In the presence of;*

*Ms Thungu for the Appellant/Applicant*