**ADESANOYE**

**V.**

**ADESANOYE**

IN THE FEDERAL SUPREME COURT

15TH APRIL, 1971

SUIT NO. SC. 184/1970

**LEX (1971) - SC. 184/1970**

**CITATIONS**

2PLR/1977/1 (SC)

(1971) All N.L.R124

**BEFORE THEIR LORDSHIPS**

ADETOKUNBO ADEMOLA, C.J.N.,

CHARLES OLUSOJI MADARIKAN, J.S.C

UDO UDOMA, J.S.C.

**BETWEEN**

FESTUS IBIDAPO ADESANOYE

**AND**

COMFORT MOROLAYE ADESANOYE

**ORIGINATING COURT(S)**

LAGOS STATE HIGH COURT

**REPRESENTATION**

F.O. AKINRELE - for the Respondent/Appellant

F.R.A WILLIAMS - for the Petitioner/Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

EDUCATION AND LAW:- Education of children of divorced parents – Use of court orders to secure same – How treated

FAMILY LAW – MATRIMONIAL CAUSES:- Divorce and ancillary claims – Whether Court can grant arrears of maintenance prior to the date of the petition - Appeal against custody and maintenance decision

FAMILY LAW – MATRIMONIAL CAUSES:- Ancillary claims - Order for maintenance and custody – Treatment as interlocutory orders – Justification – Whether such orders, though on the face they appear final, are subject to subsequent revision, suspension or modification by the court which pronounces them

CHILDREN AND WOMEN LAW: *Women and Divorce* - Ancillary claims – Award of custody of children and maintenance – *Children and Divorce proceedings –* Security of education and wellbeing of children of divorced parents – Legal orders relevant thereto

**PRACTICE AND PROCEDURE ISSUES**

APPEAL:- Matrimonial causes – Interlocutory matters – Why order for maintenance and custody is treated as interlocutory - When leave to appeal is required

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The appellant was the respondent in an undefended petition for dissolution of marriage by his wife as petitioner. The petition was heard and a decree nisi was ordered. The appellant’s appeal was not against the dissolution of his marriage with the respondent but against the orders made by the learned judge for custody of the children as well as their maintenance.

DECISION(S) APPEALED AGAINST

The orders made by the judge include, among others: are as follows:-

1. Award of the custody of the two children of the marriage to the respondent.

2. Order that the respondent should be responsible for the payment of the school fees for the two children.

3. Order that the respondent should pay for the maintenance of each child (on the 1st day of each month), a sum of £15 for their upkeep, clothing and other necessities.

4. With regards to the orders for maintenance, these would include arrears, in the case of the younger child, as from 23rd January, 1964 at the rate of £15 per month and the second child (older) as from September 1969.”

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

[Issue for determination was not expressly highlight in the final judgment of the court but the grounds for same were viz:

(a) That the learned trial judge erred in law and on facts in ordering maintenance “in the case of the younger child as from 23rd January, 1964 at the rate of £15 per month when the evidence and the pleadings show that the said child had not been born at that date.

(b) That the learned trial judge erred in law in awarding custody of the children mentioned in the petition to the “respondent” presumably petitioner without any investigation as to the arrangement for the children and any recording as to the satisfactoriness of such arrangement or that it is best in the circumstances.

(c) That the learned trial judge erred in law in awarding the sum of £15 each in case of the children, without evidence as to the needs and requirements of each child or alternatively in not directing himself to the disparity in age and need of the two children.

*BY RESPONDENT*

[Chief F.R.A Williams for the petitioner filed a notice raising a preliminary objection “that the part of the decision `appealed from was interlocutory and no leave to appeal therefrom was obtained as required by law.”]

*AS ADOPTED BY COURT*

[Resolved appeal based on the preliminary objection of the Respondent]

DECISION OF [CURRENT] COURT

1. If it is desired to appeal from an interlocutory order made in open Court, leave must generally be obtained

2. The reason why order for maintenance and custody is treated as interlocutory is the want of finality because it is subject to revision by the court which made the order. Such orders, though on the face they appear final, are subject to subsequent revision, suspension or modification by the court which pronounces them.

**MAIN JUDGEMENT**

**ADEMOLA, C.J.N** **(delivering the judgement of the Court):**

The appellant in this matter was the respondent in an undefended petition for dissolution of his marriage by the wife petitioner. It appeared he did not enter appearance nor file a defence, his application for leave to stay the hearing was dismissed on the ground that the husband/respondent deliberately did not conform with the rules of court and in any case showed no intention to defend the petition. In the event, the petition was heard and a decree nisi was ordered. The appellant has not appealed against the dissolution of his marriage with the respondent but he has appealed against the orders made by the learned judge for custody of the children as well as their maintenance.

The orders made by the learned judge are as follows:-

“I order a decree nisi, to be made absolute within three months from date. I award the custody of the two children of the marriage to the respondent. I also order that the respondent should be responsible for the payment of the school fees for the two children at Adrao International School at Victoria Island Lagos, and Corona School, Ikoyi respectively. In addition I order that he should pay for the maintenance of each child a sum of £15 for their upkeep, clothing and other necessities. The maintenance should be paid on the 1st day of each month. I award costs assessed at 75 guineas in favour of the petitioner inclusive.”

The orders were made on the 25th November, 1969. It would appear that after making these orders, counsel for the petitioner asked for arrears of maintenance. The learned judge then added the following to his judgement and orders:-

“With regards to the orders for maintenance these would include the arrears in the case of the younger child as from 23rd January, 1964 at the rate of £15 per month and the second child (older) as from September 1969.”

The appeal before us is in respect of these several orders.

The three grounds of appeal are as follows:

(a) That the learned trial judge erred in law and on facts in ordering maintenance “in the case of the younger child as from 23rd January, 1964 at the rate of £15 per month when the evidence and the pleadings show that the said child had not been born at that date.

(b) That the learned trial judge erred in law in awarding custody of the children mentioned in the petition to the “respondent” presumably petitioner without any investigation as to the arrangement for the children and any recording as to the satisfactoriness of such arrangement or that it is best in the circumstances.

(c) That the learned trial judge erred in law in awarding the sum of £15 each in case of the children, without evidence as to the needs and requirements of each child or alternatively in not directing himself to the disparity in age and need of the two children.

Chief F.R.A Williams for the petitioner filed a notice that the petitioner (respondent in the appeal) would at the hearing raise a preliminary objection “that the part of the decision appealed from was interlocutory and no leave to appeal therefrom was obtained as required by law.”

In regard to the objection taken on the ground that custody of children and maintenance are interlocutory matters, Mr. Akinrele for the husband respondent said that the Court should do what is right and just in the matter. We hold the view that maintenance and custody are interlocutory matters-see Rayden on Divorce, 10th Ed. at page 791 note (a). Orders for alimony, maintenance etc. or for custody are deemed to be interlocutory orders for the purpose of appeal. At page 785 paragraph 13 of Rayden (supra) it is said:-

“Any order made in Chambers is interlocutory for the purpose of an appeal, and an order for custody is interlocutory, even though made in open Court. See Directions made in 14th October, 1952.”

The case Chinchen v. Chinchen (1950) W.N. 22 C.A. is a case in point. This was followed by the case In re. W. (an infant) (1953) 2 All E.R. 1337 and also Re. W. (Infants) (1956) Ch. 384; (1956)1 All E.R. 368 C.A., where it was held that “if it is desired to appeal from an interlocutory order made in open Court, leave must generally be obtained from the judge or from the Court of Appeal, except under the Supreme Court of Judicature (Consolidation) Act 1925 section 31(l)(i)-liberty of the subject or custody of an infant.”

This Court of course is not bound by the above provisions of the Supreme Court of Judicature (Consolidation) Act 1925. The reason why order for maintenance and custody is treated as interlocutory is the want of finality because it is subject to revision by the court which made the order. Such orders, though on the face they appear final, are subject to subsequent revision, suspension or modification by the court which pronounces them. (See Spencer Bower and Turner Res judicata 2nd Ed. at pp. 138, 172 and 173).

We were willing to give Mr. Akinrele leave to argue the appeal, but Chief Williams having conceded ground (1) of the grounds of appeal and also that the judge was clearly in error in the addendum he made to his judgement, the petition for divorce not having been filed till October 1969 there was no case of granting any arrears of maintenance prior to the date of the petition, we saw nothing more to argue on the appeal since the matter of custody of the children and the grant of allowance to the children were NOT contested in the court below. Both counsel however agreed before us that the balance of maintenance allowance due on the date of hearing of the appeal (16th February, 1971) was £350.

The appeal is therefore dismissed with 55 guineas costs to the wife who is the respondent before us.

Appeal dismissed.