



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 75 OF 2019

IN THE MATTER OF

JAR (SPECIAL NEEDS/MINOR) SUING THROUGH HER MOTHER AS NEXT FRIEND)

GK.....APPELLANT

VERSUS

ENG.....RESPONDENT

(Being an Appeal from the Judgment dated 24th June 2019 delivered by Hon. N.M. Kyanya Nyamori

(RM) in Children's Case No. 212 of 2017 Thika Law Court between ENG (suing as mother and next of Friend) –v- GK.)

RULING

1. JAR is a special child who suffers from down syndrome. The appellant GK is the father and the respondent ENG is the mother. In Children Case No. 212 of 2017 at Thika Law Courts, the child through the mother sued the appellant seeking extended parental responsibility beyond the 18th birthday. She was successful in getting extension. The court apportioned responsibility between the parents as follows:-

(a) the respondent was to have custody of JAR.;

(b) the respondent was to provide –

(i) grooming and entertainment Kshs.5,000/= per month;

(ii) househelp Kshs.5,000/= per month; and

(iii) clothing Kshs.5,000/= per month;

(c) the appellant was to provide accommodation; water and electricity Kshs.10,000/= per month; food Kshs.30,000/= per month; school fees; and medical cover.

2. The appellant was aggrieved by this judgment that was delivered on 24th June 2019 and on 4th July 2019 appealed to this court. The main complaint in the appeal was that the court had failed to properly deal with the question of parental responsibility between them and had ended up being unfair to him. His case was that the respondent was a businesswoman with means who had come out lightly, leading him to bearing the greater burden of taking care of the child. The other complaint was that the court had wrongly failed to consider the written submissions of his counsel despite the same having been filed.

3. In the application by way of notice of motion dated 13th August 2020 the appellant sought leave to amend the Memorandum of Appeal. In the annexed amended Memorandum of Appeal, he sought to plead that: -

“1A. THAT the learned trial magistrate erred both in fact and law in failing to find that the Honourable Court had no jurisdiction to entertain the matter since the issue in question is of the age of majority.”

4. Although the respondent opposed the application, under **Order 42 rule 3(1)** of the **Civil Procedure Rules** the appellant may amend his Memorandum of Appeal without leave at any time before the court gives directions under **rule 13**. Directions before hearing have not been given. Ideally, therefore, the application was not necessary. It is also trite that amendments of pleadings are usually freely allowed at any time before delivery of judgment (**Kampala Coach Ltd –v- Daldi Traders Auctioneers, HCCC Misc. Application. No. 561 of 2013**). What is important is the consideration whether the amendment will allow for the real questions in controversy between the parties to be raised by the pleadings. The court will guard against the amendment causing injury to the opposite party, except such as can be sufficiently compensated for by costs.

5. I allow the application. The amended Memorandum of Appeal shall be filed and served within (7) days from the day of this ruling. The appellant has been indulged and therefore will pay costs of the application.

6. The appellant filed another application dated the same dated 13th August 2020 seeking the stay of execution of the orders of extended parental responsibility over the child until the appeal is heard and determination.

7. In the replying affidavit the respondent attacked this and the amendment application as being intended to stop the execution process that is underway before the trial court. The respondent attacked the merits of the reason behind the amendment. As to whether the trial court had jurisdiction to extend parental responsibility under **section 28 and 91** of the **Children Act** is something that the appeal will deal with.

8. As for the question of stay of the orders of the trial court, this court will not lose sight of the fact that the dispute deals with a child with special needs who cannot remain unattended for even for a day (**Z.M.O. –v- E.I.M. [2013]eKLR**). Staying the order of maintenance would substantially violate the child's rights. It is for these reasons that the application for stay is dismissed with costs.

9. The notice of preliminary objection dated 14th August 2020 by the respondent has no merit. This is because **Order 42 rule 6** of the **Civil Procedure Rules** allows for application for stay of execution of orders and decrees pending appeal, the merits of the application notwithstanding. Secondly, **Order 42 rule 3** of the **Civil Procedure Rules** allows for amendments of Memorandum of Appeal. It follows that the objection taken out by the respondent has no merit and is dismissed with costs.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 16TH DAY OF DECEMBER 2021.

A.O. MUCHELULE

JUDGE