



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**MISCELLANEOUS CIVIL CASE NO: 11 OF 2020**

**AWW..... APPLICANT**

**V E R S U S**

**NM (Suing behalf of SWM - Minor) ...RESPONDENT**

**RULING**

1. This matter has been brought to my attention vide a letter dated 24<sup>th</sup> April, 2020 by Wanjiru Wambugu Advocate for the defendant AWW in Chief Magistrate's court at Kerugoya Civil Case No. 6 of 2020.

2. The letter is urging me to Review orders in the above case. A brief background on the matter is that, the defendant is the mother of SWM aged three years, while the Plaintiff NM is the father. The Defendant contends that she has been living with the baby since separating with her father, The Plaintiff has filed a suit Civil Case no. 6 of 2020 in the Chief Magistrate's court at Kerugoya, seeking orders of;

**1. Divorce.**

**2. Custody of the Child SWM**

3. The Plaintiff had filed an application under certificate of urgency, in which the trial magistrate granted ex-parte orders of status quo. Based on those orders: The Plaintiff took away the child **SWM** from the mother. This is because at the time the ex-parte orders were issued the mother was in custody of the child.

4. It is contended that the Defendant filed an application to set aside the orders citing amongst others the following grounds:

***a. Jurisdiction***

***b. The trial magistrate proceeded to make further orders of alternative custody of the child despite there being issues of jurisdiction and competency of the suit having been raised.***

The defendant managed to have custody of the child for a limited period.

5. However, on the 24<sup>th</sup> April, 2020 the defendant was served with a hearing notice at 11.30a.m, for the hearing of an application dated 27<sup>th</sup> March, 2020 which was initially scheduled for hearing on 23<sup>rd</sup> April, 2020 and hearing notice indicated that the hearing was to be at 12.30p.m or thereabout. This despite that they had raised the issue that the Court had no jurisdiction and the suit was not properly before it.

6. The Advocate and the defendant were unable to attend court due to the short notice, and the advocate was out of Kerugoya town and could not be reached.

**It is against that background that the Applicant is seeking revision on the grounds that:**

***a. Lack of jurisdiction of the Presiding Magistrate Under Section 73, 74 & 76 of the Children's Act as the said court is not Gazetted as one. The court is therefore acting without jurisdiction.***

***b. Under Section 85 of the Marriage Act which is very clear in prohibiting filing of matters relating to a child in a***

*Divorce Cause and instead directing matters to be filed in a children's court.*

*c. The court to take Judicial Notice that this being a very sensitive period due to the **Covid – 19** pandemic it is not to the interest of the child being pushed to and forth different places, environment and people.*

*d. Lack of authority as next of friend.*

**The court is asked to issue the following orders:**

***a. Find that the court has no jurisdiction to hear matters of child custody under Section 73, 74 and 76 of the Children's Act and Section 85 of the Marriage Act.***

*b. Set aside all the orders granted by the lower court.*

***c. Give such further orders as it may find just and to the interest of the child.***

7. The brief background of the is that the plaintiff and the defendant in the Civil case started cohabiting as husband and wife from the month of May, 2015. Thereafter they were blessed with one issue of the marriage, in the year 2016, who is the subject matter in this Revision.

8. In the Suit the defendant contends that the union between him and the defendant was locked with differences culminating in the plaintiff filing the suit, alleging that the defendant had treated him with cruelty, and seeking a declaration that the union between him and the defendant had irretrievably broken down and the same is null and void and stands as dissolved.

9. In the suit he prayed that he be granted the custody of the issue of the union, with the defendant having limited and supervised access. Together with that suit he had filed a Notice of Motion stated to be under the Marriage Act 2014 and the Children's Act Cap 141. Though no provisions were cited.

10. The Plaintiff was seeking among other orders that there be status quo, existing before the morning of 23<sup>rd</sup> March, 2020 in regard to the custody of the minor SWM be maintained pending the hearing and determination of the main suit. That the Court be pleased to order a Children's officer report, and the state of the minor, and supervise compliance of any orders granted therein.

11. It is based on that application the Court granted ex-parte orders and status quo, which the plaintiff used to take away the child from the mother, who by then had custody of the child.

12. I have considered the application. The applicant is invoking the supervisory jurisdiction of this court to call for lower court file and make orders as would be appropriate in the interest of justice.

13. The Constitution of Kenya gives the High Court jurisdiction to call for the records of the sub-ordinate courts and make such orders as it would deem appropriate to ensure the fair administration of justice.

Article 165 (6) and (7) of The Constitution states as follows:

***(6) The High Court has supervisory jurisdiction over the sub-ordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***

***(7) For the purpose of clause (6) the High Court may call for the record of any proceedings before any sub-ordinate court or person, body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.***

14. I have called for the Lower Court file that is Chief Magistrate's Court at Kerugoya Civil Case No. 6 of 2020, and upon perusal I have noted that the trial magistrate issued the order dated 27<sup>th</sup> Day of March 2020, which stated as follows:

a) That the application is hereby certified urgent.

b) That the court grants order (b) in the interim to the effect that the Respondent/Plaintiff return the minor SWM to the custody of the defendant/applicant.

c) That the custody and access be equally shared specifically two weeks, the child be with the father and the next two weeks with the mother.

d) The child having been with the father at the moment this order, shall commence on the 30<sup>th</sup> of March 2020 when the father shall hand over the child to the mother/plaintiff who will stay with her until the 20<sup>th</sup> of April, 202 when she shall hand over the child to the father.

e) That the matter be mentioned on the 23<sup>rd</sup> April 2020.

f) That the application proceeds for hearing after the court resume normal operations.

g) That in the meantime a social enquiry report be undertaken and the children's department to oversee the handing over of the minor in compliance with the orders.

15. The suit was filed as a Civil suit seeking declaration that the union between the parties has irretrievably broken down and that the plaintiff who is the father of the child be granted custody, and the defendant being the mother be issued with limited, supervised access.

16. The Children's Act has introduced special courts to handle matters involving children, and for a magistrate to handle children's matters there is a requirement that such an officer be gazetted by the Chief Justice to preside over cases involving children in any area of the Country. **Section 73** of The Children's Act provides that:

***“There shall be courts to be known as Children's court constituted in accordance with the provisions of this section for the purpose of:***

***a. Conducting Civil proceedings on matters set out under part 111, V, VII, VIII, IX, X, XI, XIII***

***b. ....***

***c. ....***

***d. Exercising any other jurisdiction conferred by this or any other written law:***

***Provided that:***

***i. ....***

***ii. The Chief Justice may by notice in the gazette appoint a magistrate to preside over cases involving children in respect of any area in the country.***

***iii. ....***

***iv. ....”***

17. This provisions means that it is only the court gazetted as provided under this section that will have jurisdiction to entertain matters where a child or children are involved.

*There two issues which arise: .*

***i. Jurisdiction.***

***ii. Revision.***

***(i) JURISDICTION***

- It is alleged that the trial magistrate acted without jurisdiction. From the proceedings before the trial court, I have noted that the issue of jurisdiction was raised by the counsel for the applicant. No Ruling was given by the trial magistrate on the issue. It has been stated that jurisdiction is everything and without it the court downs its tools, and that is why it is important that when the issue of jurisdiction is raised it is dealt with promptly by the trial court, so that it can inform the parties whether it has jurisdiction or not.

- From the record it is not easy to tell since this issue was not dealt with by the magistrate to determine whether or not it had jurisdiction. In the Case of: ***The Owners of Motor-Vessel Lilians -versus- Caltex oil Kenya limited 1989 KLR*** it was stated that: *Jurisdiction is everything and without it the court has no power to make one more step, and where the issue of jurisdiction is raised, it must be determined immediately irrespective of the evidential material before the court.*

Secondly the applicant has referred this court to Section 85 of the Marriage Act. (No. 4 of 2014). Which provides:

Order concerning children -

***“Custody and maintenance of children shall be dealt with in accordance with the Children Act (Cap 141) and any other written law.”***

The Act in its definition of *matrimonial proceedings* has stated that maintenance or custody of children must be instituted independently of a Petition for Divorce. A clear indication that: matters of custody and maintenance must be instituted in separate proceedings and not in Divorce proceedings.

Section 2 of The Act Provides as follows:

***“Matrimonial proceedings means proceedings instituted under part IX and include proceedings for the payment of maintenance of custody of children instituted independently of a petition for a declaratory decree or for annulment, separation or divorce.”*** So, though matrimonial proceedings include maintenance, or custody of children, they must be determined in separate suits. That is a suit which must be filed in accordance with the provisions of The Children Act.

The Preamble to the Children Act, states as follows:

***“An Act of parliament to make provisions of parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children to make provision for the administration of the children’s institutions to give effect to principals of the convention on the right of the child, and African charter of the rights and welfare of the child, and for connected purposes.”***

It is a clear intention of parliament that such matters involving children must be dealt with as provided under the Children’s Act.

Any matter involving a child where there are divorce proceedings, must be dealt with in separate proceedings from the divorce. So in the matter before me, it is clear that the trial magistrate made orders of custody in divorce proceedings, and denied the parties an opportunity to ventilate the matters concerning the child, in separate proceedings, in which case all the facts could be laid before the court for exhaustive determination. There was no thorough enquiry by the children officer.

It was incumbent that the trial magistrate to consider and give a determination on the issue raised by the Applicant that;

- (i) He had no jurisdiction.
- (ii) That the matter could not be raised in divorce proceedings.

He ought to have determined the issue of jurisdiction the minute it was raised before making any other order. Indeed where a court has to make an order concerning a child. The court ought to have considered whether the order was in the best interest of the child, which is the guiding principal while dealing with matters concerning a child as provided under **Article 53 (2)** of the Constitution which states:

***“ A child best interest are of paramount importance in every matter concerning the child”*** Further **Section 76 (1)** of The Children’s Act talks of the general principal in regard to proceedings of the Children’s court, and it provides that ***“ Subject to Section 4 where a court is considering whether or not to make one or more orders, under this act with respect to a child shall not make the order or any other orders unless it considers that; doing so would be more beneficial to the welfare of the child, than making no order at all.”***

**(ii) Revision**

This court has jurisdiction to review decisions made by the sub-ordinate courts, and its supervisory role over sub-ordinate courts, as provided under Article 65 (6) and ( 7) of the Constitution, I find that the proceedings before the trial magistrate were flawed as orders were made in violation of the **Children’s Act** and the **Marriage Act**. The magistrate lacked jurisdiction, to issue the orders, in the proceedings which were before him, and the trial magistrate also failed to address the issue of jurisdiction when it was raised before making any other orders and for this reasons, I will issue orders to review the proceedings before the trial magistrate.

**I make the following orders:**

1. All the orders issued in Chief Magistrate’s court Civil case no. 6 of 2020 are vacated and set aside.
2. The custody of the child be restored to the applicant, for the time being.
3. The matter concerning the custody of the child be filed in a separate suite in the Children’s court, and to proceed before a magistrate with jurisdiction, other than Hon. Wambo.

**Dated at Kerugoya this 28<sup>th</sup> day of April 2020.**

**L. W. GITARI**

**JUDGE**