



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 34 OF 2017**

**ALLAN NJAU WAIYAKI.....APPELLANT**

**VERSUS**

**EDDIE WAIYAKI HINGA.....RESPONDENT**

*(Being an appeal from the decision of the Honourable Resident Magistrate H.M. Mbatia (Mrs.) delivered on the 9<sup>th</sup> May 2017 in Children's Case No. 459 of 2016 Allan Njau Waiyaki –vs- Eddie Waiyaki Hinga)*

**JUDGMENT**

1. The appellant Allan Njau Waiyaki is the son of the respondent Eddie Waiyaki Hinga and Joyce Waiyaki. The respondent and Joyce divorced on 6<sup>th</sup> August 2013 in **Kiambu Divorce Cause No. 6 of 2012**. The appellant is about 30 years old. When the ruling (dated 9<sup>th</sup> May 2016) subject of this appeal was delivered, he was 27. He was pursuing a Master's programme at the University of Salford, Manchester. The programme is Master of Arts in Terrorism and Security Studies. The respondent had educated him up to the completion of his undergraduate studies. He obtained a Bachelor's degree in International Studies and Politics.

2. The appellant wanted to complete the Master's programme which he had deferred. His mother paid Kshs.2,664,775/= towards it. He was left with Kshs.2,880,000/= to pay. He went to the Children Court at Milimani seeking that the respondent be ordered to maintain him until he completes his education by paying Kshs.2,880,000/= to cover the entire period of the studies, and he refunds the Kshs.2,660,775/= to the mother. He was basing his claim on parental responsibility owed to him. Aware of **sections 28 and 91 of the Children Act (Cap 141)**, the appellant had sought extension of parental responsibility. There is no dispute that up to the age of 22 when the appellant completed his undergraduate studies, the respondent had educated and maintained him.

3. The respondent's case was that the appellant was now an adult, above 18 years, whom he had educated and maintained up to age 22 in 2012; and that he had no further parental responsibility over him. In any case, he stated, the appellant was a shareholder and director in Ratama Holdings Ltd, a company that deals in petroleum business having been granted retailer status by Vivo Energy Kenya for Highview General Station along Mbagathi Road and later Shell Madaraka Service Station. He deposed that the company had remitted Kshs.2,930,172/= to the appellant on diverse dates.

4. The trial court heard the application and determined that the same could not be allowed. This was because extension of parental responsibility could only cover a situation where the child had turned 18 and needed his parents to support him to continue with his education. In this case, the court observed, the appellant had been educated and maintained until he had completed his undergraduate studies. The court noted as follows:-

**“The applicant would only be deserving of extension of parental responsibility if he filed this application after he had not turned 18 and needed support to pursue his bachelor's degree or when his father abandoned him before completing his bachelor's degree.”**

The application was dismissed with costs.

5. This is the finding that aggrieved the appellant and which he is challenging in this appeal. In arguing the appeal, his counsel submitted as follows:-

**“Despite the fact that the appellant has attained the age of majority he is still dependent on the respondent as his father to complete his education. The Appellant is not in any gainful employment. The respondent has educated the appellant up to**

**this point. The parents have set high standards for their children, they have a responsibility to promote their social progress and better standards of life for their children especially children who are willing and who are self-driven like the Appellant. It is against the Appellant's right to education for the Respondent to discontinue his education prematurely. The Respondent is a man of means and he has the ability to educate the Appellant."**

6. On his part, the respondent agreed with the court. It was submitted on his behalf that the Children Court is for children, and that the court had no jurisdiction to entertain an application brought by an adult who had filed a claim for extension of parental responsibility 9 years after he had attained 18 years.

7. I am aware of the responsibility of this court to re-evaluate and reconsider the evidence tendered before the trial court and be able to reach my own conclusions, bearing in mind that I did not see the parties (**Selle –v- Associated Motor Boat Company [1968]EA (23)**). Secondly, the appellate court should not interfere with the decision arrived at by the exercise of discretion by the lower court unless it is satisfied either that the lower court had misdirected itself in some matter and as a result arrived at the wrong decision, or that it is manifest from the case as a whole that the lower court was clearly wrong in the exercise of its discretion and that, as a result, there was injustice (**Choitram –v- Nazari [1984] KLR 327**).

8. The **Children Act** is a law that makes provision for parental responsibility over children. Under **section 2** of the **Act**, the children envisaged are those who are under the age of 18. The parents are under obligation to provide for their children, and to ensure that their rights under the **Act** and under **Article 53(1)(b)** of the Constitution are provided for. It follows that where the child reaches 18 he or she is no longer entitled to be provided for by the parents.

9. However, under **section 28** of the **Act**, parental responsibility over the child may be extended by the court beyond the date of the child's eighteenth birthday –

**"if the court is satisfied upon application or on its own motion, that special circumstance exist with regard to the welfare of the child that would necessitate such extension being made."**

The request for extension may be applied for after the 18<sup>th</sup> birthday of the child.

10. The application in the lower court was made under **sections 28** and **91(b)(i)** of the **Act**. Under **section 91(b)(i)** a maintenance order may be applied for, with leave, when a person has attained the age of 18 where –

**"the person is or will be involved in education and training which will extend beyond the person's eighteenth birthday".**

11. My reading of **sections 28** and **91(b)(i)** of the **Act** is this. A child is in school or training at the expense of his parents. He attains the age of 18, and the programme he had enrolled for has not ended. At that point the parents stop paying or threaten to stop paying. He will go to the Children Court to seek an order for extension of parental responsibility to force the parents to see him through the completion of that programme. At the conclusion of that programme, parental responsibility will cease. His parents will now be dealing with an adult who is supposed to fend for himself.

12. In this case, the appellant was provided for by the respondent upto the completion of his undergraduate studies. The respondent did this without compulsion of an order of extension of parental responsibility.

13. The appellant went for extended parental responsibility long after he was 18, and when there was no continuing programme that the respondent was providing, or was responsible for.

14. The respondent may be a rich father. However, in the circumstances of this case, he had no obligation to pay for the appellant's Master's programme.

15. There was another reason, although the trial court did not deal with it, why the application could not succeed. The appellant was a shareholder and director of a company that was fully engaged in petroleum business, and which was giving him an income. The appellant was therefore self-reliant, on top of being an adult who had no business depending on his father.

16. In conclusion, I find no merit in the appeal. I dismiss it with costs.

**DATED and DELIVERED at NAIROBI this 23<sup>RD</sup> day of SEPTEMBER, 2019.**

**A.O. MUCHELULE**

**JUDGE**