



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 54 OF 2017

M A APPELLANT

VERSUS

B O S RESPONDENT

(An appeal arising from the ruling and order of the Hon. HM Mbatia (Mrs.) Resident Magistrate in Nairobi Children's Court at Milimani made in RMCCC No. 1425 of 2013 on 28th June 2012)

JUDGMENT

1. The appeal herein was initiated by way of a memorandum of appeal lodged herein on 30th November 2017 dated 29th November 2017, in which it was averred that the trial court had failed to separate matters pertaining only to the welfare of the child from those relating to the marital relationship of the parties hereto and thereby considered irrelevant fact and arrived at a wrong conclusion and acted not in the best interests of the child, treated as invalid a power of attorney for not having been filed in court yet a copy thereof was availed to court and its validity had never been challenged, misdirected itself in holding that the donee of the power of attorney had no personal knowledge of the issues in dispute and at the same directing her to file a separate suit in her name, and disregarded the appellant's submissions and the provisions of the Constitution on the best interests of the child. It is sought that the decision of the lower court be set aside, the power of attorney be deemed to be proper and the donee be allowed to act on behalf of the appellant in accordance with the power of attorney, and the costs of the appeal and in the lower court be awarded to the appellant.

2. The court file relating to the proceedings before the lower court has not been made available to this court. I have perused through the record of appeal filed by the appellant and noted that the same does not have copies of the pleadings that are before the lower court. This is a serious omission for the appellate court ought to have a complete record of what was before the lower court at the time that the impugned order was made. The complete record enables the appellate court to have a full view of all the issues that were before the trial court. I do not therefore have the benefit of the facts averred in the plaint and the response to those averments by the defence. I am left to pick bits and pieces from what is in the record before me.

3. From what I am able to reconstruct from the incomplete record of appeal, the factual background to this appeal is that the appellant herein is the mother of the child the subject of the proceedings. She initiated the cause in the lower court against the respondent, for orders that I am not able to pick out from the material before me. The appellant is apparently resident abroad, while the child is in Kenya, in the hands of another. She executed a power of attorney in favour of the person having the custody of the child for the purpose of prosecuting the suit at the lower court. The said power of attorney was challenged at the lower court on the grounds that the donee could not possibly deal with some of the issues pleaded in the pleadings and therefore she ought not be allowed to act in the proceedings on behalf of the subject child, specifically so as to testify in the place of the appellant. The plea by the respondent was allowed, hence the appeal.

4. In the impugned ruling the court ruled that the Evidence Act, Cap 80, Laws of Kenya, required that oral evidence must be direct, and held that the donee could not possibly provide such evidence as cross-examination was likely to be on personal matters as between the parties, which she had no personal knowledge of. Secondly, the court declined to follow a certain decision placed before it on the grounds that the court in that case allowed a donee to act in place of a donor who was elderly and hard of hearing, and that in any event the matter related to land, not a child. It was also ruled that all the other decisions cited were drawn from civil, criminal and company proceedings and none of them related to children, the Indian decisions were rejected on grounds that Indian law was not binding on the court. It was also said that court orders only apply to the parties and could not possibly be enforced on individuals who are out of the country.

5. A copy of the power of attorney in dispute is part of the record before me. It is general in nature. It was executed by the appellant herein on 28th August 2017 before a Notary Public in the State of Texas, United States of America. The donee is named as P B A. It bears official stamps on its face as evidence that it was registered in Kenya as required by the relevant law. With respect to the matter at hand clause 2 of the power of attorney is relevant. It says as follows –

‘To commence or prosecute or defend any action or actions, suit or suits, at law or equity in any of the Courts within the Republic of Kenya or relinquish compromise the same at pleasure, including but not limited to CHILDREN’S CASE NO. 1425 OF 2013, M A

versus B O S filed at and pending before the children's court in Nairobi on behalf of D O (A MINOR) and any other court proceedings touching on the Minor and to enforce any such orders and decrees as the court may grant from time to time for the benefit of the minor as if she were me.'

6. The only issue for me to consider is whether the trial court properly exercised discretion in the matter to disregard the power of attorney and to demand that the appellant personally attends court for the purpose of prosecuting the matter.

7. The starting point is that the case before the lower court is a children's matter. It is brought by the appellant for the purpose of enforcing the rights of the subject children. The Constitution 2010 and the Children Act, No. 8 of 2001, both state the principle of the paramountcy of the best interests or welfare of the child. In all cases concerning children, the courts are mandated to apply this guiding principle. So that whatever matter concerning children is placed before the court by the parties, the court has to have the principle at the back of its mind while it is making any decision in the matter. In the context of the instant case, the court, faced with the question as to whether to proceed to take evidence from a donee of a power of attorney or to put off the matter and require that the plaintiff who is abroad ought to attend personally for the purpose of giving evidence, was expected to apply the guiding principle in making that decision. The question then ought to be what would be in the best interests of the child in the circumstances, to proceed to hear the matter on the basis of the testimony of the donee or to wait for the plaintiff to come from abroad for the purpose of giving such testimony.

8. I have read and reread the ruling of 3rd August 2017 and it would seem that the trial court did not apply the paramountcy of the welfare of the child as against the arising issue as to whether to allow the donee to proceed and testify in the matter or to require that the appellant appears personally. The question should have been would it be better to advance the best interests of the child by having the donee testify or should that interest be best served by demanding that the appellant attends personally to prosecute her suit.

9. There appears to be no dispute that the appellant resides abroad, where she works. There is also no dispute that the parties herein were at the time of the impugned order, and are now, not in any form of cohabitation. It would appear in the circumstances that the appellant is abroad working for her own sustenance and that of her children. It would appear that she is conscious of her obligations with respect to the suit in the lower court, and after judging the circumstances that she is under decided to execute a deed to give power to the donee herein to have her prosecute the said suit so that there are no delays in relation to it which might affect the welfare of the children the subject of the suit. The power of attorney, in my view, should be seen in that context. The court faced with that situation, and being seized, as it was, with a children's matter, should have considered the best interests of the children the subject of the suit. I agree with the appellant that the said suit was really not about the appellant and the respondent but the children.

10. It is granted that the pleadings do raise issues about the nature of the relationship between the appellant and the respondent. Some of these issues are germane to final determination of the matter and the final orders that ought to be made in the case. It is granted too that the donee might not be in a position to testify on certain aspects of the matter, which turn on the intimate personal interaction between the parties.

11. However, the suit herein was initiated by the appellant. She should be the one to prosecute in her given circumstances. She has found herself residing abroad where she works, and possibly where she is unable to keep coming to Kenya every now and then. In her wisdom she has appointed someone to prosecute the suit on her behalf. What she has done is allowed in law. Whether the person appointed, the donee, would not be able to prosecute the suit as effectively or efficiently as the appellant is really not relevant. Whether she will or will not be able to respond to issues raised during cross-examination should also not be a matter of concern to the court, for a witness should only be required to respond to such issues as are within her knowledge. What lies outside her knowledge ought to be a no-go zone so far as her examination as a witness is concerned. The appellant has liberty to prosecute her suit in the best way that she can, and should the court find that she has not proved what she sought to establish through the suit, the suit should suffer the fate of dismissal. The appellant should be commended for making an effort not to delay the matter by making arrangements for its disposal notwithstanding that she is abroad.

12. On the rejection of the power of attorney by the court, I have also scrupulously read through the record of the lower as availed, and noted that the trial court did not make a finding that the document donating power to the donee had not been properly executed, or that it was deficient in any manner. I also note that the court declined to follow the decisions placed before it on varied grounds – that they did not relate to a children's cause, or were from a foreign jurisdictions, or founded from a law different from that which the court was to apply, among others. The principles stated in the cases that the trial court considered universally apply to powers of attorney regardless of whether the proceedings are civil or criminal, or relate to land or children. They state the law as it is on powers of attorney and prosecution of suits. In any event, the trial court did not identify what the law is with regard to powers of attorney executed for purposes of a children's cause before it dismissed the document placed before it.

13. It could be that the appellant did not move the court through the correct procedure with a view of relying on the power of attorney. Kenya is now under a new constitutional dispensation, by dint of Article 159 of the Constitution, 2010, where technicalities of procedure should not be allowed to impede access to justice. In this case, the appellant had executed a valid power of attorney, the donee was apparently only being stopped from testifying on account of the appellant not moving the trial court to recognize the power of attorney. That was a procedural technicality that could be surmounted through Article 159 of the Constitution. In the wider interests of substantive justice, the appellant ought to have been given opportunity to make right the wrong, if any, that she might have done with regard to not asking for the court's permission to rely on the power of attorney.

14. In view of everything that I have stated above, it is my conclusion that the trial court improperly exercised its discretion when it disallowed the donee to testify in the suit before it on behalf of the appellant. I shall accordingly allow the appeal in the terms proposed in prayers (a) and (b) of the Memorandum of Appeal dated 27th November 2017. The appellant shall have the costs of the appeal, but the costs in the Children's Court shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 27TH DAY OF APRIL, 2018

W. MUSYOKA

JUDGE