



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.19 OF 2017

O K.....APPELLANT

VERSUS

M E.....RESPONDENT

(Being an appeal from the Ruling in Kericho CM Children Case No. 28 of 2017 (Hon. B. Limo, RM))

RULING

Background

1. The subject of this appeal is a female child, A K C K, aged 14. The appellant is said to be her biological uncle, her father's brother. The respondent is her biological mother.
2. The record of appeal indicates that the matter commenced by a plaint dated 15th June 2017 filed by the child through her mother, the respondent, against her uncle, the current appellant, and her father, one J K in **Kericho CM Children's Case No. 28 of 2017-in the matter of A K C K (Child suing through the mother M E vs O K (Uncle) & J K**. The plaintiff alleged that the 1st defendant in that case, the present appellant, had chased her away from her father's house, while the 2nd defendant, the child's father, had failed to provide the child with shelter, which the child's mother is unable to provide. She prays that the 1st defendant be restrained from chasing the plaintiff from her father's home, and for the 2nd defendant to be compelled to provide her with shelter and maintenance and meet his parental obligations under the Children Act.
3. Simultaneously with the plaint, the plaintiff filed a chamber summons application seeking an order to restrain the defendants from chasing the plaintiff away from her father's ancestral home pending the hearing and determination of the application.
4. Hon. S. Ngetich heard the matter and in a ruling dated 6th July 2017, dismissed the application, noting that the suit was a roundabout way of making a claim on property, which was outside the jurisdiction of the court. He further observed that the appellant, the 1st defendant in the case, owed no parental responsibility to the child. Such responsibility lay on the respondent and the 2nd defendant before the lower court, if he was proved to be the biological father of the child. The respondent then brought the matter before Hon. B. Limo who, in his ruling dated 20th July 2017, reviewed the order of Hon. Ngetich and directed that the child shall continue to stay with the mother of the appellant, one E L , where she had a room, for 45 days. It appears that there was no application for review before Hon. Limo, and therefore, according to the appellant, no basis for him to make the orders that he did. It is this ruling that the appellant appeals against, and in respect of which he sought orders of stay by his application dated 26th

July 2017.

5. The matter came before me for directions on 10th October 2017 in the presence of the appellant, his Counsel, Mr. Koko, and the respondent who was in person. I gave directions on the hearing of the appeal, then adjourned the matter to chambers as there were allegations and counter allegations being made by the parties against each other touching on the welfare and status of the child.

6. After hearing the parties off record in chambers, I took the view that while the issues raised in the appeal are fairly straightforward, dealing with the question of the jurisdiction of the Children's Court to make the orders that it did on 20th July 2017, it would be difficult to reach a resolution of the matter in relation to the welfare of the child without an independent report from a children's officer. I therefore directed the Children Officer, Kericho, to visit the home of E L, the child's grandmother where the child was staying, and assess the situation and file a comprehensive report in court.

7. The report was duly filed, and the parties appeared before me on 17th October 2017 and addressed the court on the contents of the report. The report was prepared by Mr. Tom Vitalis Ochieng, the Sub-County Children Officer, Kericho East, Kericho West and Soin-Sigowet. The report indicates that the Children Officer interviewed the child's 87 year old grandmother, E L, the respondent, M E, the child, A K K , the appellant, O K and his brother, E K. He also interviewed Mr. E M the head teacher of [particulars withheld] Primary School, the school that the minor attends.

The Appellant's case

8. Mr. Koko for the appellant submitted that the court was dealing with a matter in which the respondent, the mother of the child, had brought a case seeking to compel the appellant and his mother, the grandmother of the child, to have responsibility over the child. He urged the court to be guided by the provisions of section 4 of the Children Act which provides that the best interests of the child should be the primary consideration when the court or any other institution makes any decision concerning the child.

9. He urged the court to take into consideration the factors that the Children's Officer considered in his report, as well as other factors that he did not, such as the fact that the child came to the school in the second term of 2017, which school she was going to before that, and why she was moved to the current school. He further noted that the court should consider the issue of school fees arrears which the head teacher had mentioned and which, if not paid, would lead to the child being denied a chance to sit exams, which would impact on her right to education.

10. Counsel also asked the court to note that when the child was interviewed, she stated that she goes to school at 6.00 a.m. and goes back home at 8.00 p.m., which is dangerous for a 14 year old female child. If she is to go to a school in Kericho, she should reside in a place close to the school where she is not exposed to insecurity. Counsel also asked the court to take into account the psychological effect the present wrangle is having on the child, who should be surrounded by love, compassion and care. Instead, she had been forced into an environment in which she is not wanted, and he urged the court to safeguard her from such psychological torture.

The Respondent's Case

11. In her response, the respondent took issue with the Children's Officer's report. She stated that she had not been interviewed by the Children's Officer as stated in the report. She had gone to his office on 12th October 2017 and he had told her that he did not need her views as he had already spoken to the appellant and his report was being typed. She submitted that the court should not rely on the report, and that there should be a second opinion from an independent body.

12. With respect to the welfare of the child, she denied that the minor went home from school at 8.00 p.m. stating that she arrives home at 6.30 p.m. as she leaves school at 5.00 p.m. She further stated that the child had been in [particulars withheld] School before she was transferred to [particulars withheld]

Academy in Kericho in second term of this year.

13. According to the respondent, the child had come to Kericho on 30th March 2017 when her father, J, was around and had instructed his mother's house girl, one Lilian, to open the gate for them. She further alleged that she had wanted her daughter to go back with her to Nairobi but E, the appellant's brother, had said that she should not, that it was their idea that the child should go to school in Kericho. She further contended that the appellant and his family had wanted the child initially as they wanted the respondent to also stay in Kericho, but they no longer wanted her as the respondent could not stay.

14. Nonetheless, the respondent maintained that she wanted the child, who is now in class 6, to remain with her grandmother in S until she completed her primary school education in 2019. She did not want to take the child back as she did not want her to change schools and interrupt her learning in the middle of the year.

15. The respondent further stated that if the father of the child could provide somewhere else for the child to live, she would not force the child to live with her grandmother. In response to a question from the court, she responded that she was not comfortable with the child being where she is. She asked that the child's father should be summoned to come and say what should be done with respect to the child, that the child is not her burden alone. She further stated that she wanted the court to compel the father of the child to get a house within Kericho where the respondent can stay with the child as she goes to school till she finishes class 8.

Findings

16. At the core of this appeal and the application before the lower court is the care and maintenance of the child, A K C K. The respondent and the appellant's brother, one J K, are apparently the biological parents of the child, though it appears that they were not married to each other. The child was under the care and custody of the respondent, until sometime in March this year. For reasons that are not expressly stated, the respondent decided to bring the child to Kericho, where the appellant's mother resides. I have already set out above the background to the present appeal.

17. I note that on 18th July 2017, the respondent appeared before the Chief Magistrate and requested for the file to be placed before the Children Court. It was placed before Hon. Limo who, after hearing the parties, summoned the appellant and his brother, the alleged father of the child, the appellant's brother, E, and the Children Officer, Belgut. When the matter came up before him, only E was present, and the court decided to give a ruling on the matter without examining the parties summoned.

18. In his ruling dated 20th July 2017, Hon. Limo directed that the child be placed at her grandmother's house, where she has a room, for a period of 45 days. She would be attending school from there, pending hearing and determination of issues of welfare, care and parental responsibility. He reviewed the orders granting custody of the child to the respondent on the basis of section 98 and 99 of the Children Act, pending further directions on these issues. He also directed that the mother would have unfettered access to the child and home visits, but would seek the permission of the grandmother, whom the court directed would be in charge of the child's temporary shelter, on the hours and days for such visits.

19. The court also directed the OCS, Kericho Police Station, to investigate and charge the appellant if he found that he had removed the child from her temporary shelter. These are the orders that precipitated the present appeal, and in respect of which the court granted orders of stay on 26th July 2017.

20. The present case presents an interesting scenario. The respondent, the mother of the child, resides in Nairobi, as does the alleged father of the child. The child was under the custody, care and control of the respondent for over 14 years, and was attending a school in Nairobi. In March 2017, however, the respondent brought her to Kericho, enrolled her at the [particulars withheld] School, Kericho, and brought a suit to have the appellant and the mother of the child's alleged father provide her with shelter at their home in Sosit. The alleged father of the child has not filed any documents before the court, nor has he ever appeared in the proceedings.

21. In the report filed by the children officer, he notes that the child is living in Sosiot, in her grandmother's compound, but in another house where she lives by herself. According to the Children Officer, the child stays in a small wooden house by herself, in which there are two beds, a table and a stool. The grandmother, E L, is old, aged 87 years, and is sickly. I note from a copy of her birth certificate that she was born in 1930. The other person who stays in the home is the appellant's brother, who is unmarried, and a house girl, Lillian.

22. The respondent cast doubts on the report of the Children's Officer, but in my view, it represents a fair assessment of the child's situation, and is in some particulars corroborated by the respondent herself. She confirmed that the child was in a school in Nairobi until the second term of this year; that she lives in a house by herself in her 87 year old grandmother's compound, and that she commutes to school in Kericho from Sosiot.

23. In her interview with the Children's Officer, the child stated that she leaves home at 6.00 a.m., and gets home about 8.00 p.m. From the available evidence, the child is living in an environment that is clearly strange and hostile to her. Her grandmother has stated that she is not able to care for her. Her uncle, the appellant, clearly does not want her in his mother's home. The respondent alleges that the other uncle, E, is the one who told her to take the child to the home in Sosiot. However, the Children's Officer indicates in his report that E says that the child should stay with her mother, not his elderly, sickly mother.

24. Under section 4 of the Children Act, the paramount consideration in any matter concerning a child is the child's best interests. Article 53(2) provides that ***"A child's best interests are of paramount importance in every matter concerning the child."***

25. Parental responsibility for a child is vested in the mother and father. While the Children Act provided under section 24 (3) that parental responsibility for a child born outside marriage vested in the mother unless the father acquired parental responsibility under the provisions of section 25 of the Act, the provision was declared unconstitutional in **High Court Petition No 193 of 2011 ZAK & Another vs Mpe Uwezo Foundation & Others**. In any event, Article 53 now makes it clear that regardless of the marital status of a couple, they have equal responsibility for any child born out of their union. Article 53 (1) (e) of the Constitution provides that a child has a right to ***"parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not."***

26. In the ruling of 20th July 2017, the Children's Court placed custody of the child under the grandmother and reviewed the order of Hon. Ngetich placing the child's custody in the respondent on the basis of section 98 and 99 of the Children Act. These sections provide as follows:

98. A court shall have power to make an order and to give directions regarding any aspect of the maintenance of a child, including but not limited to, matters relating to the provision of education, medical care, housing and clothing for the child; and in this behalf may make an order for financial provisions for the child.

99. The court shall have power to impose such conditions as it thinks fit to an order made under this section and shall have power to vary, modify or discharge any order made under section 98 with respect to the making of any financial provision, by altering the times of payments or by increasing or diminishing the amount payable or may temporarily suspend the order as to the whole or any part of the money paid and subsequently revive it wholly or in part as the court thinks fit.

27. The court is not, at this stage of the proceedings, rendering a decision on the correctness or otherwise of the decision of the Children's Court made on 20th July 2017. However, I must observe that the decision that the court purported to vary related to the custody of the child, and not to the financial maintenance of the child covered by section 98 and 99. More importantly, however, and what is at the core of the dispute, is the question whether the court could properly place parental responsibility for the child on the child's

grandmother when the mother and father are both alive, especially when the grandmother is elderly and sickly.

28. Article 53 is clear with regard to where parental responsibility lies. There can be no basis for imposing parental responsibility on a person except in the limited circumstances provided under the Children Act, where guardians are appointed and take on parental responsibility for a child. Even in those circumstances, such parental responsibility cannot be imposed on a party who is not willing to take them on. In the present case, neither the appellant nor the child's grandmother has a legal obligation to assume parental responsibility for the child.

29. In any event, is the current situation that resulted from the orders of the court appealed from in the best interests of the child? The child is a girl, 14 years of age, just into her vulnerable, uncertain, teenage years. She has been removed from the environment she has known for 14 years, and placed with alleged relatives who clearly do not want her. She is living in a wooden house, by herself. The other persons in the compound are the elderly, sickly grandmother, who does not want her, and an unmarried uncle, who also clearly does not want her. There is of course the alleged Lillian, but it is not the responsibility of a house girl to take care of the teenage daughter of the respondent. Whichever way one looks at it, the order of the court, and the actions of the respondent in seeking the said order, are not in the best interests of the child.

30. The court does not claim to be an expert on teenage behaviour or reactions to situations. However, it is my view that to leave the child in this case in her current situation is likely to have significant negative psychological consequences on her, will likely leave her feeling unwanted and unloved, even by her own mother, and likely to have serious long term impact on her self- esteem and psychological well- being.

31. In the course of hearing the parties on the 17th of October 2017, the court got the distinct impression that the respondent was facing a financial problem with taking care of the child. She stated that the child is "*not my burden alone.*" She wanted the father of the child forced to find a house for the child in Kericho, and she would then live with her. She has problems meeting the school fees for the child, and according to the report of the children officer, is in fees arrears of Kshs 30,000.

32. It appears that what the respondent is really after is support from the father of the child in the care and maintenance of the child. However, she has gone about it in the wrong way. The child cannot be foisted on an 87 year old grandmother and her house girl and son. The appellant has no legal responsibility to take care of the child. He may have a moral responsibility, if the father is deceased or unable or unwilling to take care of the child. And if this was a succession claim, the child, if it is indeed a child of the appellant's brother, would have a claim to any property that the appellant's brother, if deceased, was entitled to. This, however, is not what was before the court.

33. The respondent must take up her parental responsibility for her child. Should she want her to continue in the school that she is currently attending, she must find a place where she can reside with the child within easy reach of the school. Should she wish to get support with the care and maintenance of the child from the child's biological father, which she is entitled to, she needs to pursue her claim for such support against J K, not the appellant. She may elect to pursue her claim in **Kericho CM Children's Case No.28 of 2017-in the matter of A K C K**, the substantive hearing of which is still pending before the Children's Court, but only against the father of the child. In the alternative, she could file a case for maintenance of the child in the Children's Court in Nairobi, where the father of the child, so the court has been informed, resides.

34. Accordingly, I direct that once school closes on 25th October 2017, the respondent shall resume custody of the child as directed by Hon. Ngetich. Should she decide to remain within Kericho, then she must find suitable housing where she can reside with the child.

35. However, in the event that she decides to return to Nairobi, then she is under a duty to take the child with her and enroll her back in the school she previously attended, or any other suitable institution. Her argument that she does not want the child to change schools at this stage does not hold up to scrutiny: she

changed the child, as she alleges, from [particulars withheld] School in the middle of this year and took her to a new school in a new town. It would be, in my view, less disruptive for the child if she goes back to the environment in which she has lived and gone to school for the last fourteen years of her life.

36. In the event that the respondent elects to stay in Kericho, then the Children Officer, Kericho, shall monitor and file a report on the welfare of the child for the next three months. Should she, however, elect to return to Nairobi, the Children Officer, Nairobi, shall monitor the care of the child and file a report should there be any basis for concern.

Dated, Delivered and Signed at Kericho this 24th day of October 2017.

MUMBI NGUGI

JUDGE