



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
CIVIL APPEAL NO. 51 OF 2015

M K.....APPELLANT

VERSUS

HON. C K K..... RESPONDENT

JUDGMENT

PLEADINGS

The Appellant Ms. M K having dissatisfied and aggrieved by the Ruling of the **Magistrate's Court in Children's Case No. 1229 of 2013** of 8th May, 2015 filed an appeal on the following grounds;

- a. The Court took into account irrelevant considerations and evidence in relating the decision
- b. The Court disregarded the evidence that overwhelmingly weighed in favor of the plaintiff
- c. The Court failed to consider the best interest of the child
- d. The Court reversed its own ruling without any charge of facts, circumstances or evidence
- e. The Court overturned a consent order signed by both parties without any justification
- f. The Court issued an order against a party that was not party to the proceedings

HEARING

During oral submissions by learned Counsel for the Applicant; she stated that the order of the Court.

“that the child be immediately moved to [Particulars Withheld] School in Umoja I Estate” was most unfair and did not take into account the best interests of the child. At the time the order was ordered, the appellant had borrowed Ksh. 20,000/= to pay school fees for the child and it was in 2nd term.

Secondly, the Court order was contradictory earlier in the same Court, by a ruling of 5th January, 2015 the Court ordered the child to remain in [Particulars Withheld] School and the defendant was to meet all the educational needs pending the hearing of the application.

Thirdly, earlier on the child was in [Particulars Withheld] School and the fee was not paid and the child could no longer study in the said school. To tell the child to go back to the school is unfair yet the school had refused the child on the basis of nonpayment of school fees.

Fourthly, with regard to the issue of the distance from the [Particulars Withheld] School to his home with the appellant living at Umoja, the child is no longer travelling long distances as the appellant has moved

from Umoja Estate and lives near [Particulars Withheld] School.

Fifthly, apart from the school fees the quality of the education cannot be over emphasized.

Sixthly, the appellant is faced with contempt proceedings for declining to honour the Court order of 8/2/2015 that the child be taken forthwith to [Particulars Withheld] School. This Court gave stay of execution orders.

The Respondent through learned Counsel informed the Court, the Children Court made the order that the child goes to [Particulars Withheld] School and the Respondent booked an appointment and gave a cheque of Kshs. 27,000/=. The party concealed from Court that there were contempt of Court proceedings.

The Applicant in the Magistrate's Court was aggrieved by the review of the Court orders that had been the child stays in [Particulars Withheld] School and now the review was that the child is to be taken to [Particulars Withheld] School.

The Respondent is aggrieved by the child being in [Particulars Withheld] School for two (2) reasons;

1. The distance from Umoja to [Particulars Withheld] School is a very long distance for a child and the child will have fatigue and it is not in the best interest of the child.
2. The Respondent filed the affidavit of means and explained the various responsibilities he has to undertake educating children of the nuclear family and the children of the brother and sister together with the subject's older brother who is in a school in Meru.
3. The Appellant filed her affidavit of means and she states she has means but demands the fees to be paid for the child in [Particulars Withheld] .
4. Then should be fair access to education for both children of the Respondent and Appellant. To keep one child in [Particulars Withheld] and the other in Meru is unfair treatment.

The Appellant, herself addressed the Court and stated that the child was removed from [Particulars Withheld] School and by the order of the Children's Court the child was to stay in [Particulars Withheld] School.

On 8th July, 2015, the Court decided the child should go to [Particulars Withheld] School Umoja. At this time she had moved to near [Particulars Withheld] School borrowed 20,000/= and paid to the School. The child was eventually sent away from school as she could not avail the fees. However, recently the Head Teacher called her to bring the child back to school. She attached the reports from the school on the child's performance.

The Court adjourned the matter to await the child to be assessed by a Children Officer and the parties were to give proposals of schools eligible for the child to attend. On 17th June, 2015, the parties filed the proposals and the Child Welfare Officer was to visit and assess the schools. The Court noted that the order by the Court was not effected and the schools were not assessed. The Court scheduled the ruling on 25th September, 2015.

ISSUES

1. Should the child study in [Particulars Withheld] School as per the Court Order of 8th May, 2015 in the Children's Court?
2. Should the child study in [Particulars Withheld] School as per the Court Order of 5th January, 2015 in the Children's Court?

LAW

The best interests of the child are paramount and the welfare of the child should be upheld in all matters

regarding a child. The Law is settled in **Article 53(2) of the Constitution of Kenya 2010 Section 4 of the Children's Act 2001.**

Parental responsibility is defined in **Section 23 and 24 of the Children's Act 2001 and Article 53(1) (e) of the Constitution of Kenya** and each parent has a duty to provide the child with the necessities of life. The Court under **Section 98 of the Children Act 2001** can make orders on maintenance of the child and in **Section 99** the Court can amend vary the same orders.

ANALYSIS

In the instant case the Court has perused the proceedings in the Children's Court and found as follows;

The child in question H V M (minor) suffers sickle cell anemia and he is a child with special needs. From 2013 when the application for maintenance of the children was filed, the Respondent objected to paternity and demanded DNA testing. On five occasions he failed to turn up for DNA testing. Finally, he conceded paternity hence parental responsibility.

The child attended [Particulars Withheld] Junior School and due to school fees arrears he was sent away from school. By Consent the parties agreed that the child to go to another school.

However, the appellant got [Particulars Withheld] School. The Respondent objected to payment of fees as the school fees is astronomical and a burden compared to his other financial obligations and responsibilities. The child continued in [Particulars Withheld] School to date as per the Children's Court Order of 5th January, 2015. On review of the order the Court of 8th May, 2015 reviewed the earlier order and ordered the child to be taken to [Particulars Withheld] School Umoja I Estate.

The Court's reasoning was based on the fact that the child and mother reside in Umoja Estate and it was cumbersome for the child to traverse across the city to [Particulars Withheld] School each day. It was not the best interest of the child.

Secondly, the Court was not informed of the reason why the child should not attend [Particulars Withheld] School.

Any household that depends on revenue streams from both parents of the children is to be drastically affected and hampered when a parent withdraws financial support for any number of reasons. The resources are limited as the parent sustains a separate living unit. The laws first concern shall be with the child/children of the union to ensure they are adequately catered for even when doing so, the process remains challenging.

On the other hand, parents of the child have a legal duty to provide for the child's basic needs among them education. The parents should supply the psychological and day to day physical needs; initially at an earlier stage of the child's life is feeding, nurturing comforting and caring for the child, and later, it includes educating, guiding protecting and socializing with the child. Clearly both parents contribute to both tangible and intangible needs of the child. Where the parents do not live together, the resident parent shoulders the largest responsibility to the child.

With specific reference to provision of education of the child;

The child went to [Particulars Withheld] Junior School and was sent away due to lack of school fees, the child was refused admission in [Particulars Withheld] School because of school fees arrears and the matter ended up in Court. During the hearing interpartes the partes agreed by consent to get another school. The Appellant got the school.

The school fees per term is Ksh. 93,300/= or so (3 months) which the Respondent claimed is too steep in light of other financial obligations indicated in the affidavit of means.

The Court has considered the Respondent's concerns against the child's best interests. The school provides the right quality of education, the child has settled well as shown by the report forms attached to the Court record.

The Court has considered the reasoning of the ruling of the Children's Court of 8th May, 2015 and the change of school was with regard to the distance to and from the school by the child.

From the information availed to the Court at the time the Court made the right and proper decision. However the Court was thereafter informed;

- a. The mother moved from Umoja Estate and lives near [Particulars Withheld] School
- b. The transport fees will not be payable and will reduce the school fees and expenses paid
- c. She has obtained loans and paid for the school fees for the child in [Particulars Withheld].
- d. The child was sent away from [Particulars Withheld] School and [Particulars Withheld]. School for lack of school fees and it would not be fair for the child to go back to the said schools.

Therefore, the new circumstances change the scenario completely.

The Court finds the parties and Counsel has oscillated from Court to Court to seek favorable orders. In the process it this has impacted negatively on the child whose best interests are paramount. To toss and turn the child from one school to another is to create discomfort, confusion and disorientation in the life of the child while the Appellant and Respondent contest who will win at the end of the day. What is important is for the child to settle down and pursue his education.

It is in the best interests of the child to remain and study in [Particulars Withheld] School. The child will live nearer the school and the distance will no longer be an issue.

- a. On the issue of school fees, the Court finds that whereas the Respondent has other financial obligations, the child is one of his children and his children take precedence over other relatives' children. The fee of 93,300/= is reasonable over a period of three (3) months (a term)
- b. If and when the fortunes change the Respondent is at liberty to apply to the Court for the variation of orders.
- c. The Court record confirms that the Respondent declined to comply with any orders of the Court until notice to show cause and warrant of arrest were issued.
- d. Parental responsibility is shared and not equal based on the financial position of each parent. The mother as the resident parent has nurturing role to the children and the father to provide maintenance and upkeep of the children.

For these reasons the appeal is allowed and the earlier order of the children Court of 5th January, 2015.

FINAL ORDERS

The Court orders as follows;

- 1. The Court order of 8th May, 2015 is vacated as the basis for the order being the distance from the child's home to the school has changed; he lives near the school.**
- 2. The transport charges will reduce the school fees and expenses.**
- 3. The Respondent will pay school fees directly to the school and under the payment schedule provided by the school.**
- 4. The Appellant will pay for school fees expenses; uniform, book stationery in addition to shelter, food and clothing.**
- 5. The Respondent continues to pay maintenance of Ksh. 12,000/= and provide medical care for the children.**
- 6. Each party is at liberty to apply.**
- 7. No orders as to costs.**

READ AND SIGNED IN OPEN COURT AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2015

M. MUIGAI

JUDGE

In the presence of:

Mr. William holding brief Njagi and Nyahuru for the Applicant

Ms Kariuki & Co. Advocates for the Respondent.