



**JKM v COO (Divorce Cause 52 of 2013)
[2014] KEHC 7487 (KLR) (Family) (21 March 2014) (Ruling)**

J.K.M v C.O.O [2014] eKLR

Neutral citation: [2014] KEHC 7487 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

DIVORCE CAUSE 52 OF 2013

LK KIMARU, J

MARCH 21, 2014

BETWEEN

JKM PETITIONER

AND

COO RESPONDENT

The Children Court as opposed to the High Court had jurisdiction in the first instance to consider all questions relating to the custody and maintenance of children

The instant application resulted from a petition for divorce that sought orders of custody and maintenance of the children along with the divorce decree. The respondent raised a preliminary objection on grounds that the Children's Court and not the High Court had jurisdiction to determine custody applications and that the High Court of Nairobi lacked the territorial/administrative jurisdiction to determine a divorce petition of a couple that resided in Isinya, Kajiado. The respondent contended that the High Court at Machakos had jurisdiction. The court held that the Children's Court had jurisdiction in the first instance to consider all questions relating to the custody and maintenance of children. On territorial jurisdiction the court held that, given that the respondent worked for gain in Nairobi, then the matter was subject to the territorial jurisdiction of the High Court at Nairobi.

Reported by John Ribia

Jurisdiction - jurisdiction of the High Court - territorial jurisdiction of the High Court - whether the High Court had territorial jurisdiction to hear and determine matters falling outside its "administrative" jurisdiction - Constitution, article 165(3)(a).

Children Law - custody and maintenance - children's court - court of first instance for child custody and maintenance - whether the High Court had jurisdiction to adjudicate on matters of child custody and maintenance in the first instance - Children Act, Act No 8 of 2001, sections 73 and 118.



Statutes - precedence of statutes - place of latter Act of Parliament vis-à-vis an earlier one - whether the Matrimonial Causes Act took precedence over the Children Act - Matrimonial Causes Act (repealed), section 30(1).

Brief facts

The petitioner and respondent were a couple married under the Marriage Act. The petitioner filed a petition for divorce as well as an application that sought custody and maintenance for her three children and an order seeking the respondent to vacate their matrimonial home.

The respondent raised a preliminary objection to the effect that issues of custody and maintenance were to be adjudicated by the Children's Court and not the High Court. In addition, the respondent raised the issue of territorial jurisdiction citing the lack of jurisdiction by the High Court of Nairobi to handle the matter since the couple resided in Isinya, Kajiado District and as such the matter was better suited to be heard in the High Court at Machakos.

Issues

- i. Whether the High Court had territorial jurisdiction to hear and determine matters that fell outside its administrative jurisdiction.
- ii. Whether the High Court had jurisdiction to adjudicate on matters of child custody and maintenance in the first instance.

Held

1. Article 165(3)(a) of the Constitution granted the High Court original unlimited jurisdiction to determine all cases of criminal and civil nature save for the type specifically limited by the Constitution. Given that the respondent worked for gain in Nairobi, then the matter was subject to the territorial jurisdiction of the court.
2. The Children's Court had jurisdiction in the first instance to consider all questions relating to the custody and maintenance of children as per section 73 and 118 of the Children Act. The fact that section 30(1) of the Matrimonial Causes Act (repealed) granted the High Court jurisdiction to issue orders regarding child custody and maintenance was immaterial since the Children Act was enacted after the Matrimonial Causes Act (repealed).
3. A latter Act of Parliament took precedence over an earlier one. The divorce proceedings were to proceed in the High Court while the petitioner was to present the case concerning custody and maintenance before the Children's Court in Nairobi. It was the Children's Court that had jurisdiction in the first instance to consider any issue regarding custody and maintenance of children.

Petition partially succeeded.

Orders

No order as to costs.

Citations

East Africa

None referred to

Statutes

East Africa

1. Matrimonial Causes Act (cap 152) section 27, 30(1)- (Interpreted)
2. Constitution of Kenya, 2010 article 165(3)(a) - (Interpreted)
3. Children Act, 2001 sections (Act No 8 of 2001) sections 73,118 - (Interpreted)
4. Marriage Act (cap 150) In general (cited)



RULING

1. The petitioner and the respondent are husband and wife. They were married on October 1, 1999 at the District Commissioner's Office in Mwingi District. The petitioner has filed a petition seeking to be divorced from the respondent. Apart from the divorce, the petitioner has sought to be granted custody of the three (3) children of the marriage, to be provided maintenance and upkeep for the said children, and for the Respondent to be ordered to vacate a property known as LR No [particulars withheld]. Contemporaneous with filing the petition, the petitioner filed an application seeking to be granted interim orders in relation to the custody and maintenance of the children of the marriage pending the hearing and determination of the suit.
2. When the respondent was served with the petition and the application, he duly entered appearance and filed a notice of preliminary application. He objected to the entire suit on the several grounds. The first ground is that the prayers sought regarding the custody and maintenance of the children should in the first place be adjudicated by the Children's Court as provided under the *Children Act*. The second ground of objection is that this court had no territorial jurisdiction to hear the petition for divorce because the petitioner and the respondent have their matrimonial home in Isinya District which is within the County of Kajiado and therefore territorially under the jurisdiction of the High court sitting at Machakos. He took issue with the fact that the Petitioner had bundled her claim for divorce with that of distribution of matrimonial property. In his view, this was a flawed process which rendered the entire suit incompetent and therefore liable to be struck out.
3. At the hearing of the application, Mr Agina for the respondent reiterated the above grounds. He further submitted that if this court were to admit the case to hearing, it will not be able to access the services of other actors in children matters such as the children officers based at Kajiado. He submitted that it was only the High Court sitting at Machakos and the Children's Court at Kajiado, respectively, which had the requisite jurisdiction to deal with the matters in dispute. Miss Oduor for the petitioner opposed the notice of preliminary objection. She submitted that this court had jurisdiction to deal with the matter because the marriage was celebrated under the Marriage Act. While conceding that the Children's Court had jurisdiction to deal with children matters, she explained that that fact did not oust the jurisdiction of this court which was unlimited territorially. She submitted that section 27 of the Matrimonial Causes Act granted this court jurisdiction to divide the matrimonial property. She further submitted that the children of the marriage were born in Nairobi and further that the Respondent worked for gain in Nairobi. In the premises therefore, she was of the view that the preliminary objection did not have any merit and should be disallowed.
5. This court has carefully considered the rival submission made by the parties to this application. The petitioner has filed a petition seeking to be divorced from the Respondent. She has also sought to be granted orders by the court in respect of custody and maintenance of the children of the marriage. The respondent has opposed the application and the entire suit on the grounds that this court did not have jurisdiction to hear and determine the dispute. It is the respondent's case that the petitioner ought to have filed the petition either before the High Court at Machakos or before the Children's Court at Kajiado. This is because the parties reside in Kajiado County. In response, the petitioner stated that the respondent works for gain in Nairobi. She further stated that the children of the marriage were born in Nairobi. She therefore urged the court to dismiss the preliminary objection and direct the case to be heard on its merit.



6. The preliminary objection raised by respondent is in regard to whether, firstly, this court has territorial jurisdiction to hear the divorce cause and secondly, whether this court has jurisdiction to hear, in the first instance, a dispute in respect of custody and maintenance of children. It was common ground that the petitioner and the respondent reside in Isinya in Kajiado County. The respondent works for gain in Nairobi. Article 165(3)(a) of the Constitution grants the High Court original unlimited jurisdiction to determine all cases of criminal and civil nature save the type of cases limited by the Constitution. This court was not persuaded by the argument put forward by the respondent that this court did not have territorial jurisdiction to hear the present divorce cause. The respondent works for gain in Nairobi. He is therefore resident within the territorial jurisdiction of this court. As regard the question where this court has jurisdiction to hear a dispute regarding custody and maintenance of children in the first instance, sections 73 and 118 of the Children Act is clear. It is the Children's Court which has jurisdiction in the first instance to consider all questions relating to the custody and maintenance of children. The Petitioner argued that section 30(1) of the Matrimonial Causes Act grants this court jurisdiction to issue orders regarding the custody and maintenance of children. That may be the case.

But this court takes judicial notice of the fact that the Children Act was enacted after the Matrimonial Causes Act. Being a latter Act of Parliament, the Children Act takes precedence. The respondent was therefore correct when he argued that the petitioner ought to have first litigated the issue of custody and maintenance of the children before the Children's Court.

7. In the premises therefore, the preliminary objection raised by the respondent partially succeeds. The divorce proceedings shall continue before this court. The Petitioner is ordered to present her case regarding the custody and maintenance of the children before the Children's Court Nairobi. It is that court that has jurisdiction in the first instance to consider any issue regarding the custody and maintenance of children. If either party shall be aggrieved by the decision of that court, they shall be at liberty to appeal to this court. There shall be no orders as to costs. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF MARCH 2014

L.KIMARU

JUDGE

