



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.69 OF 2012

JOTHAM SIMIYU WASIKE.....1ST APPELLANT
LEAH NGAIRA MPAPALE 2ND APPELLANT

VRS

**JACKSON ONGERI 1ST
RESPONDENT/APPLICANT**

**JOSEPH ANANGWE2ND
RESPONDENT/APPLICANT**

**BRAMWEL MALANGA.....3RD
RESPONDENT/APPLICANT**

**GRACE ONGERI 4TH
RESPONDENT/APPLICANT**

**JOSEPH KUI 5TH
RESPONDENT/APPLICANT**

(Appeal from the Judgment and decree of Hon. P. Areri, Senior Resident Magistrate

In

Bungoma Civil Case No.684 of 2011)

RULING

1. In or about September, 2011, Jackson Ongeri, Joseph Anangwe, Bramwel Malanga, Grace Ongeri and Joseph Kui (hereinafter referred to as “*the Respondents*”) lodged a suit in the Chief Magistrates Court, Bungoma against Jotham Simiyu Wasike, Leah Ngaira Mpapale and Suffolk Janice Elizabeth (hereinafter “*the Appellants.*”), seeking inter alia vacant possession of the premises upon LR No.E.Bukusu/S.Kanduyi/2210. In the said suit, the Respondents described themselves as the officials of a society known as Robin Nest Orphanage which is registered under the Societies Act, Cap 108 Laws of Kenya (hereinafter “*the Society*”).

2. The Plaintiff pleaded that through church mobilization and sensitization on the needs of children that are at risk, an orphanage was established and the church handed over the said orphanage to the society through which the church was to aid the children. Subsequently, the society acquired a property known as E. Bukusu/S.Kanduyi/2210 whereupon Robin Nest Children's Home for the children was

established. That home was thereafter to become a home for disadvantaged and or orphaned children who as at 25/03/14 numbered 21.

3. After hearing the parties, the trial Court decreed , *inter alia*; that:-

“That the District Children's Officer be and is hereby ordered also to investigate whether Robin Nest Orphanage had been registered and approved by the National Council of Children Services under Section 30 of the Children's Act as a charitable children's institution as defined under Section 58 of the said Act and if it is established that the orphanage is not registered and approved by the National Council for Children Services as a charitable children's home, the District Children's Officer will then remove any children found at the orphanage to an institution which is properly registered and approved until such time that Robin Nest Orphanage could have complied with the law.”

4. Aggrieved by the decree of the trial Court, the Appellants lodged a Memorandum of Appeal in this Court on 05/11/12 and applied for stay of execution and/or injunction. When the matter came up for hearing before Gikonyo, J, he observed and ordered as follows:-

“ 20. Bad times come. I children in Robin Nest Orphanage have found themselves entangled in these proceedings. That really is what concerns the court at the moment. Matters of children and child rights are of pivotal significance in every nation, and have gained great momentum in the world. That rights of a child should be protected at all costs anywhere they have become an issue.

**21.....22.
.....23. None of the parties have enlightened the court on the true status of the orphanage and compliance with the above court orders. Parties are just preoccupied with issues that concern them without really acting in the best interest of the children in the Orphanage. The Appellants are merely using the plight of the children as a basis for their application for stay and or temporary injunction without addressing the particular vulnerabilities of the children in light of the orders of the trial Court which I have pointed out above.”**

5. In his ruling of the 6th February, 2013, Gikonyo, J then ordered that:-

“25. On that basis, I order that the Children's Officer, Bungoma South District, to file within 21 days a status report of Robin Nest Orphanage particularly on:

a) The number of children in the orphanage

b) Any children who have been moved from the orphanage, if at all. After the order of the trial court, and the current destination of children so moved.

c) The legal status of the orphanage

d) Any other useful information in the protection of rights of a child in the circumstances of the case.

26.

27. **Upon receipt of the said report, the court shall make further appropriate orders.”**

6. Pursuant to the said orders, Alice Wanyonyi, the District Children's Officer, Bungoma South filed a Report in court on 17/3/13 where she observed that; the Board of Management applied for the registration of the home as a Charitable Children's Institution on 18/8/10, but because of differences over the ownership of land and management of the home's resources, the home had not been registered by the Ministry; the hindrance to registration had been the frequent change of administrators who have not been responsive and had failed to establish a New Board of Management to manage the affairs of the home. That there had been no new admission of children since 2010 to indicate continuity and that the home

was operating illegally. The number of children was 21 against a workforce of 16 employees including two administrators from Newzealand, she opined that **Regulations 31 and 33 of the Children (Charitable Children Institutions) Regulations, 2005** were being breached by those running the institution. She further observed that the facility could accommodate up to 60 children if only those involved in the dispute over the ownership and management of the institution put their house in order.

7. The said officer was cross-examined on her report on 18th and 19th April, 2013. She maintained that the management wrangles was adversely affecting the welfare of the children at the home. The Court gave further orders for that officer to confirm generally about the management of that home and a report dated 07/05/13 was filed.

8. On 20th March, 2014, I directed that the same Officer do attend Court and brief the Court on the status of the orphanage. On the 25th March, 2014, she attended Court and gave a report to the effect that; currently, the home has 21 children who are at different levels of education within Bungoma County; there are 16 members of staff at the orphanage; that there is no stable management that can stand answerable as a new administrator is sent to the home after every three (3) months which is a very short period to undertake any meaningful work; that the administrators come from different countries and lack the grasp of the issues affecting the institution and that the registration of the home cannot be pursued because of lack of a stable manager.

9. The report also indicated that the institution lack beds and most children spread the mattresses on the floor at night; that two (2) pit latrines are already filled up and need replacement. The Officer opined that due to lack of proper management structure to address the challenges the institution was facing, it was proper if the institution could be closed down temporarily to allow the replacement of the beds and construction of new pit latrines and for there to be a settlement between the sponsor and local church in themanagement of the institution.She confirmed that she has enough space in other children's homes where the children who are currently in the orphanage can be placed.

10. The parties proposed to address the Court on the report of the Children's Officer; Mr. Wanyama, learned Counsel for the Appellants submitted that the report of the officer was correct only as to the number of children and staff. That however, the report fell short of the provisions of Order 28 Rule 8 of the Civil Procedure Rules. He explained the relationship between the sponsors and the Orphanage and how the dispute in the management of the institution arose. That the report had not included who the interviewee's were or the source of the informationsubmitted to Court.That the reason for the non-registration of the institution was not lack of a true manager but because of the competing interests between the sponsor and the Respondents.

11. Mr. Wanyama indicated that there were only three (3) beds that were lacking at the institution. That the pit latrines that were full were those used by the 16 members of staff and women trainees who come to the home for tailoring classes. Otherwise there were two (2) toilets within the building which are used by the children. Counsel proposed that the Court do visit the home or an independent report be prepared in respect of the institution. He concluded that, if the institution was closed the children whose fees amounting to Kshs.280,000/= is paid by the home will lose that assistance and that the children's stay at the orphanage should not be disrupted.

12. On his part, Mr. Ocharo for the Respondents supported the position taken by the Children's Officer's report.Counsel gave the history of how the idea of the institution was conceived and how the management wrangles between his clients and the sponsor arose. According to him, there was a management problem at the institution brought about by what he called a "lead donor" and the management of the institution. That this is what had led to the suit in the lower Court. To him, the management issue touch on the welfare of the children. He proposed that the Respondents be allowed to manage the home under the watch of the Court.

13. I have carefully considered the report of the Children's Officer and the submissions of counsel in the matter. It is clear that both the lower Court and Gikonyo, J digressed from the principal dispute between the combatants herein (the Appellants and the Respondents) to address the plight of the children

who are housed in the orphanage. Indeed, the order by the lower Court as to the status of the Children's home was over and above what the Court had been called upon by the parties to adjudicate upon. That digression, is but a clear indication that Courts in this country consider the best interest and welfare of children to be paramount. Children are a vulnerable group in our society. They cannot protect themselves from any exploitation by either the society or the vulgaries of nature. It is for that reason that Courts will move with dispatch to protect children's interests when it is suspected that their well being has been exposed to breach. It is for this reason that in 2001, our legislature enacted the Children's Act, Chapter 141 of the Laws of Kenya.

14. In this regard, in Section 4 of that Act, it is provided that:-

“ 1)

2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to-

a) safeguard and promote the rights and welfare of the child;

b) conserve and promote the welfare of the child;

c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

4).....”

It is for this reason that the earlier courts which dealt with this matter were concerned with the **“interests of the children in Robin Nest Children's Home as being of first and paramount considerations”**, that they decided to address their issues and the dispute between the Appellants and Respondents took a back seat. I will likewise do so.

15. I am aware that one of the orders against which the Appellants have appealed against and had sought a stay of execution on one of their earlier applications was the order by the lower Court that if the Robin Nest Children's home had not been registered by the National Council for Children's Service as a charitable children's home, the same be closed. That order was made on 1/11/2012. It is now 17 months later and the same has not been acted on. I am aware that by making a decision on the report of the Children's Officer, I will be affecting a portion of the

intended appeal. Indeed, it is covered by ground 9 of the Memorandum of Appeal. If in doing so, would be in the best interests of the children, so be it.

16. I hold the view that in doing so, I will be acting correctly and in accordance with the dictates of the law and Constitution, i.e delivering substantive justice in that I will be inquiring into the best interests of the children whose welfare seem to have taken a back seat in the management wrangles or dispute between the Appellants and the Respondents. Both the lower Court and Gikonyo J found that these parties were less concerned with what effect their duels was having on these poor vulnerable mortals. I am of the same opinion, I would rather deal with their interests and welfare now, than wait for another two or three years or when the appeal may settle the dispute between the parties to this appeal. When their lives may have been shattered. Shying away from deciding on this matter that touches on the welfare of the Children in my view would be in breach of Article 159 (2) (c) of the Constitution and Section 4 (2) and (3) of the Children's Act.

17. The lower Court had directed that if the children's home had not been registered in accordance with the law (i.e had not been approved by the National Council for Children's Services) the same be closed. In her first report dated 25/02/13, the Children's Officer confirmed to the Court that the institution had not been registered with the Ministry, that it was operating illegally and should have been closed down for failure to meet the minimum requirements for the registration of the institution and that the institution was operating in utter contravention of Regulations 31 and 33 of the Children's (Charitable Children Institutions) Regulations, 2005. In particular, the report observed that the management wrangles between the founders and co-founders was affecting the institution.

18. As at 25/3/2014, when Alice Wanyonyi, the Children's Officer, Bungoma south gave her final report, the situation remained the same. The institution had not been registered under the relevant law. What was registered was Robin Nest Orphanage under the Societies Act Cap 108 Laws of Kenya in 2003 and not the home under Section 30 and approved under Section 58 of the Children's Act. The home cannot therefore be called a home in terms of the law, ie the Children's Act. The home has only remained a cash cow for the combatants in this dispute for 11 years now. It is on record by the Children's Officer that it is the management wrangles that has made it difficult to have the institution registered. It is also on record that the dispute between the parties is about whether resources should be channeled through the Respondents as the founders of the home or directly to the Appellants as the managers of the home. It is all about control and use of resources and not about the well being of the inhabitants thereof, the children.

19. The Report of the Children' Officer of 25/03/14 observed that because of management wrangles, some children were spreading their mattresses and sleeping on the floor at night for lack of beds. That two (2) latrines in the institution were full and that the system of foreign administrators who come from various countries for three (3) months, hampered proper administration of the home as that did not give them time to have the proper grasp of the issues facing the home.

20. The response of the Appellants was that the report of Alice Wanyonyi fell short of the provisions of Order 28 Rule 8 of the Civil Procedure Rules, that the report did not indicate who her interviewees were, and that there were only 3 beds missing and were to be replaced. That the two (2) latrines that were full were for use by the members of staff and women from outside who were attending some tailoring lessons at the institution and not for the children. Finally, it was submitted that the foster parents were the ones in charge of the children and not the foreign administrators.

21. As regards the legality of the report, I am not in agreement with Mr. Wanyama that the same did not conform with the law. In my view, Order 28 Rule 8 of the Civil Procedure Rules is not applicable to that report. That provision of the law applies to a report of a commission, where a court issues a commission for examination of a person who although resides within, the jurisdiction is exempted from appearing in court. In the case before me, the Children's Officer was not giving a report of a commission but her observations about the legal status and working of the subject children's home.

22. The issue of 3 or less beds missing and pit latrines being full is but an indictment on the management. That some children would be spreading mattresses and sleep on the floor at night is clear evidence of lack of concern or accountability by the managers of the institution. There is admission that the 2 pit latrines meant for the members of staff and trainees from outside the home are full. That there are only two (2) other lavatories in the premises which are meant for the children. If we have the institution running and the staff are working the whole day and probably others at night, which lavatories will they use if not the ones meant for the children? Is it not logical that those attending training at the institution and the members of staff would naturally answer calls of nature? If so, where will they do so if not at the only remaining usable lavatories belonging to the children? Is it in the best interest of those children that such an eventuality happens? I do not think so. The Court was not told when the extra beds will be procured, or when the 3 beds broke. The Court was also not told when the alternative latrines will be constructed for the staff and the visiting trainees. This may be because no one is in-charge at the home and if there be any, he or they care less.

23. From the foregoing, I am satisfied that by not being registered and approved in accordance with the law, (Sections 30 and 58 of the Children's Act), Robin Nest Orphanage has been operating and

continue to operate illegally as a children's home. The welfare of the children who are in that home cannot be said to be well taken care of. The continued management wrangles by the opposing sides may have a negative impact on the welfare of the 21 children who are currently housed at the home. The arrangement of having the so called administrators from foreign countries to come in for 3 months and leave is a terrible mistake. We cannot have foreigners who have not been properly investigated and/or screened as to their suitability to work in our children's home to come and be with our children as the administrators of a home at such short period and leave. Nobody knows their qualifications, their intentions and suitability to work in children's homes. May be they are only visitors or tourists, that is why they remain for only three (3) months, the period a tourist visa lasts and do not bother to apply for work permits

24. My view is that, the continued management wrangles between the combatants in this appeal is completely at odds with the best interest and/or welfare of the children at the home. The combatants are only using the children as pawn. Their intentions are to control and manage the resources channeled to the home by the so called sponsors.

25. There was the issue that if the children are removed from the orphanage, it is not clear who will foot the fees of the children amounting to Kshs.280,000/=. To my mind, if the interests of those concerned, is the welfare of the children, they will continue paying for the school fees of the children at the institutions they are currently schooling notwithstanding that they are away from the home. The children are not schooling at the home but at various institutions to whom the school fees can be paid by those concerned. The home only offers shelter and home environment for the children. Their being moved from the home need not affect the good heart or intention of the sponsors, if their intentions are positive.

26. Accordingly, I have come to the conclusion that for the foregoing reasons, sad as it may be to remove the children from their environment, their best interests and welfare will be well served by the immediate closure of Robin Nest Children's Home and the removal of the said children therefrom and placement in various compliant children's homes within Bungoma South. This should be effected immediately after the schools are closed on 11th April, 2014 as proposed by the report of the Children's Officer.

27. This now will enable the parties to fight it out properly and squarely for the control of the orphanage and the attendant property without injuring the welfare of the children.

It is so ordered.

DATED and **Delivered** at Bungoma this 7th day of April, 2014.

A. MABEYA

JUDGE