



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE 169 OF 2008**

**J M K.....1ST APPLICANT**

**R N K.....2ND APPLICANT**

**VERSUS**

**E K M.....RESPONDENT**

**RULING**

This application is brought by **R N K** against her father **E K M**. The Applicant is aged 25 years, having been born on 31/10/1987 of **M W D** and the Respondent. She brings this application under **Section 28, 91, 7 and 22 of the Children's Act (No. 8 of 2001), Rule 4 of the Children's (Practice and Procedure), Parental Responsibility Regulations, 2002**, seeking the following orders;

- 1. THAT this Honourable Court be pleased to extend parental responsibility against the respondent in respect of R N K.**
- 2. THAT this Honourable Court be pleased to make maintenance order against the Respondent in respect of R N K in such periodical sum or lump sum as may be sufficient to cater for the Applicant's college education.**
- 3. THAT costs of this application and of the application granting leave be provided for and the same be borne by the Respondent.**

The Applicant avers that she is the biological daughter of the Respondent who has in the past assumed parental responsibility for her and her twin brother, **J M K**; that she has just concluded her University education from University of Nairobi, Parklands Law School and is due to graduate in December 2012 (which must have already happened); that the Respondent was paying for part of her education following a consent order recorded in court; she is due to join the Kenya Law School for Diploma training to enable her qualify as an advocate; she avers that the Law School education is an integral part of legal training in Kenya and she is not able to cater for the fees which stands at Kshs.190,000/= and other related expenses; she is due to join the school in January 2013; she is unemployed and that the Respondent is a man of means who is able to pay for the cost of her children. She has made a request to the Respondent but the Respondent has declined to discuss the issue. It is the applicant's view that though legal parental responsibility ends at 18 years, the law makes exceptions and that her case falls within these exceptions. It is the Applicant's view that given the past relationship between her and the Respondent, he will not be willing to pay her fees unless the court intervenes.

In her further affidavit dated 18/12/2012, the Applicant avers that her circumstances are genuine and not instigated by third parties as alleged by the Respondent; that in a similar application in 2007, the court

indicated that she could still move the court for its intervention. She denied that any consent was entered into but it was through fraud of her former advocate and the Respondent.

The Applicant further avers that the Respondent has deliberately refused to support her; that his wife, G M M who is said to be a diabetic is a person of means who is able to meet her own medical needs from a storey building at Section 58 Trading Centre, Nakuru Municipality Block [...], which has rental income of Kshs.100,000/= per month. The appellant attached a demand for rates in respect of the property, addressed to G M M dated 12/10/2012. She also exhibited at paragraph 12 of the supplementary affidavit, rate demands from Municipal Council of Nakuru in respect of the Respondent's properties which she knows (**paragraph 12**). It is also the Applicant's contention that the Applicant is applying double standards in that he has been educating his older Children in the U.S.A. and supports them including a grandchild from one of the children yet he is not willing to support her. She terms his conduct discriminatory.

In addition, **Mr. Akango**, counsel for the Applicant urged that by his conduct, the Respondent has demonstrated that he values education by going out of his way to support his children beyond the age of majority. Counsel denied that the application is *res-judicata* because in such applications for maintenance, circumstances keep on changing and the Children's Act provides for review when the circumstances require it and Section 7 of the C.P.A. only applies to circumstances that can be conclusively determined. As regards the submission that the application is defective, counsel urged the court to invoke the provisions of the Constitution, **Article 159(2)(d)** to do substantive justice to the parties.

In his replying affidavit, the Respondent stated that the application is incompetent, having been filed by a counsel not on record; that it is incompetent because it is brought as an originating summons though it is filed in an existing cause; that the application is instigated by third parties therefore brought in bad faith; that the issue of extension of parental responsibility was the subject in Originating Summons 24 of 2007, **J M K and R N K Vs E K M** but the court declined to order extension and that this application is therefore *res judicata*; that after the application was dismissed, the Respondent willingly assisted the Applicant by paying her University fees; that parental responsibility is a joint venture and it is unfair for him to be condemned to bear it alone; that the Kenya School of Law education is not a mandatory prerequisite to getting gainful employment; that the said education can be postponed till the Applicant is able to raise the fees for the Kenya School of Law; that Kenya School of Law education is not basic education and the Applicant has failed to demonstrate that special circumstances exist to justify the extension of parental responsibility; that he has other obligations which have priority over the applicant's i.e. a mortgage facility of Kshs.20,000,000/= which he repays at Kshs.410,662/= per month (**EKM2**); his wife is diabetic, a condition that requires constant medical attention and a grandson, E K M, for whom he pays fees at rate of Kshs.50,000 per term; that the Applicant who is an adult has not demonstrated what efforts she has made to secure her fees or initiative taken like undertaking a loan from Higher Education Loans Board (HELB), Constituency Development Fund (CDF) or Scholarship; that the **Children's Case No. 126 of 2002** in which the applicant sought maintenance was concluded vide a consent order and that all his children who have finished first degree in University have been pursuing further education through their own initiatives and efforts and the Applicant should be no exception; that the Applicant's mother is an enterprising business lady who is able to afford the Applicant's fees. He urged the court to dismiss the application.

This is not the first time that the Applicant and Respondent have been before the court. In 2002, the Applicant and her twin brother had filed **Nakuru Children's Case No. 126 of 2002**, where the applicant sought maintenance and a consent order was recorded on 20/6/2004 where the Applicant agreed to pay for the arrears of fees and maintenance of the applicant and the brother. The second time that the applicant and her twin brother came to this court on 15/2/2007 in Originating Summons 24 of 2007, seeking extension of parental responsibility against the Respondent. I have already referred to the decision of *Justice Musinga*, in which he dismissed the application. I have also seen that on 29/7/2009, the counsel for the parties recorded a consent whereby the Respondent would pay Kshs.25,000/= per semester while the mother met Kshs.15,000/=.

The application under consideration was brought as an originating summons but the heading of the application shows that it is a chamber summons application. This application is made within a pre-existing case and should not have been brought by way of an originating summons. However, that anomaly is a mere irregularity that does not go to the root of the application. The Applicant has cited the provisions of the law under which the application is brought, that is **Sections 28, 91, 7 and 22 of the Children's Act, Rule 4 of the Children's (Practice & Procedure) Parental Responsibility Regulations 2002**. The prayers that the applicant seeks are clear and this court is enjoined to do substantive justice to the parties by dint of **Article 159(2)(d) of the Constitution**. The court cannot look the other side and deny a party justice just because of a mistake of counsel in bringing a defective application.

The Respondent raised issue with the appearance of Mr. Akango as counsel for the applicant. Mr. Akango is properly on record having filed a notice of appointment on 20/11/2012.

Is this application *res judicata*? In the application before Justice Musinga, the Judge found that the orders sought for extension of parental responsibility were not deserving of a maintenance order because the Applicants would get admission to a public University and would get financial assistance from HELB and the Respondent had undertaken to supplement financial assistance when that time came. The court clearly stated that if the Respondent failed to do so, then the Applicant was at liberty to seek the court's intervention. Secondly, orders sought in the application before Justice Musinga are not similar to the present ones. In the **Originating Summons 26 of 2007**, the applicants sought to have the Respondent compelled to pay for some diploma courses they wanted to undertake as they awaited admission for University and the court found that there was no genuine need by the applicants because they had passed well and would join public Universities where the Respondent would supplement payment of fees. For a matter to be *res judicata*, the matters in issue and parties must be the same and must have been determined conclusively by the court on the merits.

**“Section 7 – No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim , litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”**

Besides, from a reading of Section 28 of the Children's Act, parental responsibility in respect of a child beyond the age of eighteen can be extended if the court is satisfied that special circumstances exist with regard to the welfare of the child. The court is given a very wide discretion in such matters because it can even move on its own motion. The section states;

**“28(1) Parental responsibility in respect of a child may be extended by the court beyond the date of the child's eighteenth birthday if the court is satisfied upon application or of its own motion, that special circumstances exist with regard to the welfare of the child that would necessitate such extension being made.”**

It is obvious that such matters can be subject of review depending on the special circumstances of each case and cannot be said to be *res judicata* unless the circumstances are exactly the same.

The Applicant is said to have been born on 31/10/1987. She is about 25 years, not 27 as deposed to by the Respondent. The age of majority in Kenya is 18 years. Section 2 of the children's Act defines a child as **“means any human being under the age of eighteen years”**. Section 91 of the Children's Act provides for circumstances under which a person can make an application to the court for maintenance of a child. Section 91(b) then provides exceptional circumstances when a person who is not a child can apply to the court for a maintenance order. It states;

**“Section 91. Any parent, guardian or custodian, of the child, may apply to the court to determine any matter relating to the maintenance of the child and to make an order that a specified person make such periodical or lump sum payment for the maintenance of a child,**

**in this Act referred to as a “maintenance order,” as the court may see fit;**

**Provided that -**

**(a) On the making, varying, or discharging of a residence, guardianship or custody order, the court may make a maintenance order for a child even though no application has been made by any person;**

**(b) a person who has attained the age of eighteen years may, with the leave of the court, apply to the court for a maintenance order to be made in his favour in the following circumstances -**

**(i) the person is or will be involved in education and training which will extend beyond the person's eighteenth birthday; or**

**(ii) the person is disabled and requires specialised care which will extend beyond the person's eighteenth birthday; or**

**(iii) the person is suffering from an illness or ailment and will require medical care which will extend beyond the person's eighteenth birthday; or**

**(iv) other special circumstances exist which would warrant the making of the order.**

The ultimate question in this case is therefore whether the Applicant falls within these exceptional circumstances under section 91(i)(b) and (iv).

Although the Respondent claims that this application is instigated by third parties, he did not bother to name the said third parties nor did he state why they would instigate the Applicant. As can be gleaned from previous litigation. The relationship between the applicant and Respondent has not been good. Until the consent order of 20/6/2004 was entered into in Children's Case 24 of 2004, when the Respondent agreed to pay fees and maintenance for the Applicant and her twin brother, it seems that the Applicant had declined or was reluctant to assist in the maintenance of the Applicant till the matter came to court. Again, it seems the Respondent did not continue to pay the applicant's fees till another consent was recorded on 29/7/2009 before Justice Maraga.

The Respondent contends that maintenance of a child is the collective responsibility of the two parents and that it has not been shown what the mother who is, a successful business woman, is able to do or what the applicant can do. Apart from the allegation that the Applicant's mother is a successful businesswoman, there is no evidence as to what kind of business she is engaged in and whether she can be able to contribute to the Applicant's fees. The law is that both parents have the joint responsibility to take care of their children. The Applicant avers that she has lived with her maternal grandmother since 1993 when the parents separated. She also averred that the mother has supported them from the award made to her in an accident claim. Though the Respondent contested that fact, he did not tell the court then where the applicant has lived and who has taken care of her till completion of her education. It is evident from the consent that the applicant's mother has played a role both in bringing the applicant up and taking care of her needs while in school and college because she supplemented to the applicant's needs.

The applicant states that the Respondent is a man of means who is able to pay her fees and is also doing so for his other adult children. At paragraph 12 of the further affidavit, the Applicant listed the following properties;

**(a) NAKURU MUNICIPALITY BLOCK [...]**

**(b) NAKURU MUNICIPALITY BLOCK [...]**

**(c) NAKURU MUNICIPALITY BLOCK [...]**

**(d) NAKURU MUNICIPALITY BLOCK [...]**

**(e) NAKURU MUNICIPALITY BLOCK [...]**

She exhibited **(RMK 1)**, demand notices from Municipal Council of Nakuru addressed to the Respondent. There is no doubt that the Respondent is a propertied man. Apart from the above listed properties, he admits that he is able to pay a mortgage of Kshs.20 million. The Respondent also admits to maintaining a grandchild, a child to one of his adult children. The question is whether preference should be given to educating his children or grandchildren? As regards the allegation that the Respondent's wife is sick and requires constant medication, the Applicant has been able to demonstrate that the Respondent's wife is not a person of straw but also owns property that earns her income.

The Applicant has ably completed her University education. To qualify to be a practising Advocate, one has to go through the Kenya School of Law and obtain a Diploma. The Applicant's case is that she has no means of doing so and the Respondent who has been paying her University education, though capable, has declined to do so. The law on extension of parental responsibility to an adult is clear. There have to exist special circumstances in accordance with the Act. As Judge Musinga observed in the earlier application brought by the Applicant, the court has to consider whether the Applicant has a genuine need that cannot be met in any other way except through the order sought. The Respondent suggests that the applicant should have sought a loan from (HELB), but this court has no idea whether that loan facility extends to the Kenya School of Law. As for Constituency Development Fund or Scholarships, I believe there are considerations made as to whether the Applicant's parents are paupers and unable to pay fees and whether the applicant qualifies. These are unlikely options for the applicant because the Respondent is a very able man. The applicant is a bright student. She excelled in her KCSE and was admitted to a public University where the Respondent paid fees after a consent order was recorded in court.

In my view, the Kenya School of Law education is not further education after the Law degree but is an integral part of legal education in Kenya. Why would the Respondent pay the Applicant's University fees and decline to pay for the Kenya School of Law when she is about to complete and instead relegate her to a mere legal clerk for failure to obtain a diploma from the School of Law? To qualify as an advocate of the High Court of Kenya, one must go through the Kenya School of Law. I find the Respondent's arguments that the applicant should seek other options in order to pay fees for herself, to be absurd. The applicant's conditions in Kenya cannot be compared to the Respondent's other children studying in U.S.A., because, in U.S.A., there are opportunities for one to work and pay fees for themselves. The School of Law programme runs for one year. The fees required is Kshs.190,000= plus other subsistence costs. The Applicant being such a bright student is likely to complete the programme within the specified period. All relevant considerations put on the balance, I am satisfied that the Applicant has established that special circumstances do exist that require extension of parental responsibility. The Respondent is a man of means and I find that the maintenance order is deserved. I direct the Respondent should continue to pay the applicant's fees at the School of Law and her subsistence requirements related to the school till completion of the School of Law programme. I note from the earlier consent that the applicant's mother contributed and I will apportion the responsibility at 75% as against the Respondent. The applicant's mother will bear the balance.

Each party will bear its own costs, this being a family dispute.

**DATED and DELIVERED this 9<sup>th</sup> day of January, 2013.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Mr. Njoga holding brief for Mr. Akang'o for the Applicant.

Mr. Kisila for the Respondent.

Kennedy – Court Clerk.