



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CIVIL APPEAL NO. 40 OF 2013

(From original ruling in Civil Case No. 23 OF 2012 of the Chief Magistrate's Court at Malindi before Hon. N. Shiundu - PM)

P BAPPELLANT

VERSUS

J NRESPONDENT

JUDGMENT

1. This is an interlocutory appeal filed by the appellant (defendant in the Lower Court) with regard to the interlocutory order made by the learned Principal Magistrate on 12th September, 2013 in Malindi Civil Suit No. 23 of 2012 J N v P B. The order was in consequence of the Ruling delivered on 5th September, 2013.
2. The said ruling was in respect of the respondent's (Plaintiff's mother and next friend in the Lower Court) application dated 28th August, 2013 seeking inter alia:

“1. THAT, this honourable court does compel the defendant/respondent (appellant herein) to pay forthwith the school fees for the minor – Plaintiff at [Particulars withheld] School totaling Kenya Shillings six Hundred and Fifty Thousand (Kshs. 650,000.00) being boarding and tuition fees forthwith (sic).

2. **THAT the honourable court does compel the defendant/respondent to pay a further sum of Kenya shillings Three Hundred and Fifty Thousand (Ksh. 350,000.00) being the costs of caution money, transport cost and purchase of boarding house requirements for the minor school to attend the afforested [Particulars withheld] School pending the hearing and determination of the application and suit (sic)”**

3. At the conclusion of the ruling the learned Principal Magistrate issued orders as follows:

“1. The child herein be taken to a school offering a similar system of education and good standards beside [Particulars withheld] by the respondent.

2. **The respondent will meet the school fees and substance of the child and any other educational requirements**

3. **The school in question should be a boarding school as that the minor can be able to concentrate and not to be exposed to the differences between the parents.**
4. **The district Children's Officer, Malindi is hereby directed to liaise with both parents and the minor in ascertaining the school and placement and to form and a report to the court on the issue.**
5. **If the parents cannot agree on the school the District Education Officer to make a choice on placement”**

4. When the Children's Officer's report was produced before the court, the court received the respondent's comments and noted that the parents had been unable to agree on the choice of a school. The court proceeded to make the following order:

“...I order that the respondent enrolls the minor either at Aga Khan Academy, Mombasa or Brookhouse School without any further delay.”

5. It is this latter order that triggered the present appeal. The appellant successfully obtained an order to stay execution pending the determination of this appeal. The memorandum of appeal raises 17 grounds of appeal.
6. The background to this appeal was stated in my ruling delivered on 23rd October, 2013 regarding the application for stay of execution pending appeal. The parties have filed their respective submissions with regard to the appeal. I have studied these carefully alongside the record of appeal. In my considered view the appellate court has to be cautious in dealing with an interlocutory appeal of this nature, so that it does not arrive at findings or make orders which amount to a determination of the suit pending in the Lower Court.
7. Looking at the submissions filed, the respective parties are arguing on the merits of the orders given by the Lower Court on 5th and 12th September, 2013. Significantly, the orders sought in the application giving rise to the said orders are also primarily the substance, with minor alterations, of the prayers contained in paragraph 17(h) and (j) of the amended plaint filed by the respondent herein on 29th January, 2013. And in some respects the orders sought in an earlier application dated 21st February, 2013.
8. While it is true that paragraph 17 of the plaint contains 10 substantive prayers, it is evident that eight of these are in respect of maintenance and provision for the minor. The other two are the sole original prayer (a) that was seeking the release of the minor's passport by the appellant to the respondent, while prayer (b) introduced in the amended plaint seeks that the respondent be given “actual control, care and custody of the minor plaintiff.”
9. The appellant filed an amended defence and counterclaimed for the custody of the minor. The record of the Lower Court shows that the application dated 21st February, 2013 was substantially outstanding at the time the Notice of Motion of 28th August, 2013 was heard, under a certificate of urgency. For the principal reason that the minor had been removed by the respondent from [Particulars withheld] School Malindi which she was previously attending and caused to undertake an interview at [Particulars withheld] School which offered her a place, in August, 2013.
10. Clearly these precipitate actions were unilaterally carried out by the respondent without consulting the appellant. There was and still exists serious contention as to whether [Particulars withheld] School is too expensive for the appellant (as the respondent pleads indigence) or, more importantly, whether the order to enroll her into the said school is in their minor's best interest.
11. Under the Constitution and the Children Act, every child has a right to education which, is the responsibility of Government and the parents. The Children Act sets out general principles applicable to proceedings before the Children Court. (See Section 76(1) to (6)). With regard to

maintenance of children whose parents are not married, but where the father has acquired parental responsibility as in this case, the two parents are presumed to bear joint responsibility for the child, unless the court directs otherwise.

12. Hence the unilateral action by the respondent to withdraw the minor from [Particulars withheld] School and subsequent placement at [Particulars withheld] School appears to fly in the face of this principle. Absent any agreement between the parents regarding the school to which she should transfer, the Lower Court could not leave the child out of school or order her back to [Particulars withheld] School. That would not have been in her best interest notwithstanding her mother's action.

13. I think the Lower Court was entitled in the interim to seek the aid of the Children's Officer or other professional to provide a quick and suitable solution so that the minor's right to education was not compromised. That however did not dictate that the minor had to attend the school or schools chosen by the mother alone. As I see it, the problem arose because the Lower Court acted on the limited choice of schools presented before it by the Children's Officer. It would appear to me that unwittingly in acting upon the Children's Officer's report the said court allowed itself to be corralled within the prayers of the Notice of Motion, and, the predetermined choice of [Particulars withheld] School by the respondent.

14. This is because the [particulars withheld] School according to the report of the children's officer, had no vacancy for the minor. Yet in its earlier ruling of 5th September, 2013 the court had very prudently declined to order the enrollment of the minor into the specific school cited in the prayers of the Notice of Motion dated 28th August, 2013. By its order of 12th September, 2013 the court also effectively determined a key prayer in the amended plaint without hearing evidence as to the means of the parties thereby permanently shutting out the appellant from making an important decision concerning the school to which his daughter ought to study. He was also to pay all fees and costs of education in the said school. No doubt the impugned order if effected would have an impact on the rest of the prayers concerning maintenance of the minor both in the plaint and the notice of motion of 21st February, 2013.

15. While the Lower Court may be commended for acting with dispatch, I think the learned magistrate fell into error when he failed to recognize that the prayers in the notice of motion of 28th August, 2013 and the orders made thereon effectively determined a substantial portion of the dispute without hearing the parties and that the result was that the appellant's role/responsibility as a parent was negatively impacted.

16. Another arising consequence is this:-

What recourse would the court have had if it was subsequently to find, upon hearing the matter fully, that in fact the said prayer should not have been granted at all or should have been given with modifications in the first place? Supposing there was need to move the minor to a cheaper school after she had settled at [Particulars withheld]? That would clearly not augur well for her welfare.

17. Considering all the relevant factors and circumstances of this case, I am of the view that the complaints contained in grounds 1, 2, 4 and 9 of the Memorandum of appeal are not without merit.

18. The minor was not schooling at [Particulars withheld] School when the suit was filed. She was attending [Particulars Withheld] School where the appellant paid the fees singlehandedly. The Respondent subsequently moved her from her previous school without adequate or any consultation with the appellant and sought to place her in [Particulars withheld] School which is a fairly expensive school. It is not enough for the respondent to assert that the minor herself insisted on moving to the new school. The respondent continues to claim that she is indigent. The lower court should have considered all these matters. By acting without consulting the respondent and moving the minor from [Particulars withheld] School to [Particulars withheld] School, the respondent effectively presented a *fait accompli* to the court and the respondent. That represents

an unfortunate forcing of the court's hand.

19. It seems to me that in the interest of justice and the best welfare of the minor, the Lower Court's orders of 12th September, 2013 in particular cannot be allowed to stand. The same are hereby set aside. In my considered view, unilateral as it was, the removal of the minor from [Particulars withheld] School is now water under the bridge. For the sake of the minor's education, the parties have to confront the present task of getting her into an appropriate school in the new year. As I have indicated, the trial court fell into error firstly by entertaining the application of 28th August, 2013 in its presented form. And even though the modified orders given in the ruling appeared reasonable, given the circumstances herein, the final orders of 12th September, 2013 changed all that.

20. These orders served to grant the original prayers in the notice of Motion of 28th September, 2013, creating a relatively heavy financial obligation on one parent alone. Thus while setting aside the orders of 12th September, 2013, this court has grappled with what orders to make regarding the application of 28th August, 2013. The appellant has prayed that the same be ordered dismissed. I do not consider such an order prudent at this stage when the minor is already out of her former school. She needs to be back into an appropriate school, even though decision to remove her from the previous school was unilaterally made. Thus it is not necessary or even prudent to order the notice of Motion of 28th August, 2013 dismissed and thereby setting aside the culminating orders of 5th September, 2013. The orders should continue being in force.

21. In addition it is my view that, enough time has been taken up with interlocutory applications, and any further delay can only prejudice the minor's welfare. A piecemeal approach to any suit offends Section 1A and 1B of the Civil Procedure Rules and is to be deprecated. One of the binding principles in the Children Act is that issues involving children should be determined with utmost expedition.

22. In light of all the foregoing I will direct that:

1. The suit in the Lower court be heard on priority on a day-to-day basis until it is concluded and determined early in the new year.
2. For this purpose the suit will be mentioned before Mrs. Gicheha Senior Principal Magistrate on 18th December, 2013 to take appropriate directions in that regard.
3. Meanwhile, the appellant and the respondent are directed to personally take steps to identify three suitable potential schools, each with a ready vacancy for the minor to continue her education in the new school year.

a) The six proposed schools may be in Nairobi, Coast or the Rift Valley Provinces and should range in fees and standard between [Particulars withheld] and [Particulars withheld] School.

b) The particulars of these schools and appropriate letters from respective heads should be presented to the Lower Court on a date to be fixed by the said court, before the new school year commences, so that a decision on the placement of the minor can be made in good time.

4. Each party will bear its own costs in the appeal and in the Lower Court.

Delivered and signed at Malindi this 16th day of December, 2013

in the presence of

Mr. Ole Kina for the appellant;

Mr. Gicharu for the respondent.

Court clerk - Mwebi

C. W. Meoli

JUDGE