



CIVIL APPEAL NO: 49 OF 2011

A. D. M. T.....APPLICANT
VERUS
A. W. K.....RESPONDENT

JUDGEMENT

1. This judgement is deli A. D. M. T v A. W. K vered in Nairobi High Civil Court Appeal No. 49 of 2011 wherein the appellant prays that the judgement delivered by the Children’s Court in Thika (Hon. B.A. Owino SRM) on 15th July 2011, dismissing the appellant’s suit against the respondent be overturned on the grounds that:-

- (i) *The Children’s Court did not give an opportunity for appeal, and did not mention or explain the right of appeal when it delivered its ruling at the interlocutory stage, directing only that hearing dates to be taken.*
- (ii) *The Children’s Court did not consider that the some of the household items taken away from plaintiff’s house by respondent were for exclusively use by the child, while other items (also taken away) were jointly for use by the child and the plaintiff.*
- (iii) *The Children’s Court did not consider that the respondent has an income and has all along avoided providing support for child’s welfare and maintenance.*
- (iv) *The Children’s Court did not consider the financial position of the plaintiff (who is also a student) and the financial resources needed for the maintenance of child with cerebral palsy.*
- (v) *The Children’s Court did not consider that the respondent having been allowed visitation and access to the child’s legal home there was need for her being restrained from taking away any more household items from the plaintiff house during her visits.*
- (vi) *The Children’s Court did not consider that the child is disabled and totally dependent on the respondent and caregivers, and this child’s condition is life-long and goes beyond the age of majority and thus contribution of material maintenance by respondent was necessary.*
- (vii) *The Children Court did not consider and grant the plaintiff’s request that the matter be heard in camera or in the Magistrate’s chamber, as the matter in question concerned a minor and a disabled child. The matter was held and heard in an open court with members of public present.*
- (viii) *The Children’s Court did not consider that the respondent and plaintiff had long divorced and that the respondent accessed the plaintiff’s house (in his absence) and took away the household items which plaintiff had been using with the child after divorce.*
- (ix) *The Children’s Court ruled that the child was not staying with the plaintiff against the testimony of both the respondent and the plaintiff.*

2. The reliefs sought in the suit before the children’s court as set out in the judgement were follows:-

(a) That the respondent do return the household items she took away so that the welfare of the child is not affected when school closes.

(b) That the respondent do provide maintenance for the child.

(c) That the honorable court, do restrain the respondent from taking away any household items from the house where the child stays during school holidays.

(d) That part of the respondent's income be attached and be made available for the maintenance of the minor.

3. The appellant, who is unrepresented, argued his appeal outside what was recorded in the proceedings and the judgement of the learned trial magistrate. The proceedings were quite brief, with the plaintiff's evidence taking only about a page, with no cross examination or re-examination. The respondent's evidence was equally short, with the evidence in chief taking ½ a page and the cross-examination by the plaintiff also taking a page. The judgment is just over a page.

4. I have examined the entire record and proceedings of the lower court as well as the judgement delivered therein. The trial court relied on the evidence available to arrive at its judgement. The learned trial magistrate dismissed the suit on finding that the appellant did not prove his case on the balance of probabilities.

5. There is no requirement under the Civil Procedure Act and Rules for a magistrate to explain the right of appeal to the parties. Ground 1 of this appeal can't stand and it is disallowed. The matters said in grounds (ii), (iii), (iv), (v) and (vii) not to have been considered by the trial magistrate were addressed in the judgement and were found to have been settled in the interlocutory proceedings which culminated in a ruling dated 11th April 2011.

6. The trial magistrate ruled that the appellant had failed to prove that the items taken by the respondent were for the exclusive use in the care of the issue of marriage, the evidence tendered having disclosed only that what was taken consisted of electronics and utensils which were not proved to have been bought by the appellant in any event. The portion at Page 5 of the typed record referred to by the appellant contains an omission of part of the hand-written notes as to the court's finding in this respect.

7. On the issue of maintenance (ground vi) the trial court did consider the evidence that the minor was a child with special needs but found that the parties had failed to provide the court with affidavits of means for it to make an appropriate assessment of such maintenance. This, I note, was despite the learned trial magistrate having warned, in her interlocutory ruling, that the parties would be required to produce such affidavits of means at the full trial. I have seen no such affidavits in the entire record.

8. When arguing the appeal, the appellant submitted that he produced documents in this regard when he testified in chief on 30th June 2011 but that the magistrate ignored them in her judgement. There is no record of any documents being produced on 30th June 2011. During the appeal however, the appellant intimated that the assortment of papers in the lower court's file were produced on that date. I find it difficult to believe such an assertion particularly since they were not filed as part of an affidavit of means as directed by the court.

9. There is no record of the appellant requesting the court that the proceedings be conducted on camera as stated in ground (vii). Moreover, the appellant has not demonstrated how the proceedings, as conducted, resulted in a miscarriage of justice or the nature and extent of prejudice caused. The matter did not involve the child per se and he was not in court.

10. As regards ground (ix) the record shows that the testimony of both the appellant and the respondent was that the child had been moved to a home but as at the time of the hearing he was said to

have been attending a boarding school. It is not clear to me what the appellant's complaint as regards the finding of whether the child was at a home or not is intended to achieve.

11. In exercising my appellate jurisdiction, my mandate is to satisfy myself that the subordinate court misdirected itself, either in the way it evaluated the evidence before it, or in some other way, leading to a wrong decision; or that the trial magistrate misdirected herself in the exercise of her discretion as a result of which there has been a miscarriage of justice. Unless I am so satisfied, I cannot interfere with the lower court's judgement and reverse it.

12. In my considered view, the issue of custody and maintenance is *res judicata* in view of the determination of the divorce case wherein the appellant was granted full custody of the issue of the marriage. **Section 7 of the Civil Procedure Act** is quite clear on this. Nonetheless the learned trial magistrate did consider the issue of maintenance and found that the evidence adduced was not sufficient to enable her make a finding on the same.

13. I know of no provision in our civil law jurisprudence for the enforcement of parental responsibility, which in any case, the respondent in this appeal admitted before the trial magistrate, saying that the appellant had made it difficult for her to take up her part in discharging that responsibility. She wished she could have the child.

14. I see no error in the proceedings or judgement of the lower court in Children's Case No: 21 of 2011. I find therefore, that the appeal fails and it is hereby dismissed.

15. As the respondent did not participate despite service I make no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd DAY OF August, 2012.

M.G. MUGO

JUDGE

In the presence of :

the applicant in person.

for the respondent.