



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CIVIL APPEAL NO. 82 OF 2010

A.O.....APPLICANT

VERSUS

J.M.O.....RESPONDENT

JUDGMENT

The Respondent to this appeal was the first one to approach the seat of justice by filing Kisumu Children's case Number 27 of 2009. The salient features of the same in a summary form are as follows:-

- The appellants are husband and wife by reason of them having contracted a marriage under Kisii Customary law.
- They have two issues between them who appeared to have crossed the maturity line as at now. These are:-

- (i) E.O.O. born on 25th December 1987
- (ii) V.O.O. born on 25th December 1992

- The reason moving for to the seat of justice to seek intervention is because the appellant /defendant had neglected to maintain the said children and pay their school fees. The amount of support required was stated in paragraph 10 thereof in consequence thereof, the respondent / plaintiff sought the following reliefs:-

- (a) *That the legal and actual custody of the 2nd child be awarded to the plaintiff.*

(b) An order do issue compelling the defendant to provide maintenance for the minor as pleaded in paragraph 10 above.

(c) That the costs of the suit be borne by the defendant

(d) That this Honourable court be pleased to make such further or other orders as it may deem fit in the circumstances to grant.

The plaint is accompanied by a verifying affidavit verifying the correctness of the plaint.

Summons were taken out and the appellant / defendant was served. He entered appearance and filed a statement of defence dated the 22nd day of June 2009, and filed on the 27th day of June 2009. The salient features of the same are as follows:-

- **Vide paragraph 2 that the defendant gave intention to raise objection with regard to the territorial jurisdiction of the court on the one hand, and on the other hand, that the plaint filed was defective and that it should be struck out**

- **Vide paragraph 3 thereof, denied marrying the plaintiff / respondent under Gusii Customary law or any other law.**

- **Denied having lived as man and wife with the Respondent / plaintiff as from 1999.**

- **Denied that the two issues are as a result of the union of the defendant and the plaintiff was put to strict proof.**

- **Denied allegations of negligence attributed to him, separation from the plaintiff in 2008, denied allegations of failure to perform parental responsibility duties, towards maintenance of the children, denied obligation to maintain the children of the marriage as alleged in paragraph 10 and put the plaintiff to strict proof.**

- **Vide paragraph 7, that he only gave solace to the plaintiff / respondent between 2003 – 2007 as a relative after she had separated from her husband.**

- **Vide paragraphs 10 denied ever seeking custody of the said minor child.**

- **Admitted paragraph 12 and 13 of the plaint but denied accusation of failure to meet his obligations, thereby inviting the justification for the taking out of the suit against him.**

There was reply to defence not dated but filed on the 30th day of June 2009, whose summary is that the Respondent / plaintiff had averred that the defence was ashamed, specifically denied paragraph 2 and put the defendant to strict proof, reiterated the content of the plaint in opposition to the averments in the plaint, maintained they married in 1999, but solemnized the ceremony in 2007, and demanded strict proof, The defendant's denial of the existence of a customary law marriage.

The court has been informed that the proceedings were *ex parte*, The respondent / plaintiff was the sole witness. Her testimony was from pages 19 – 21 of the record. A perusal of the same reveals that it is a reiteration of the content of the plaint but for purposes of the record the following has been stressed:-

- **The two married in 1999, and stayed peacefully in the rural home till 2008, when she was moved to the shopping centre of Suneka alleging that the appellant would start a business for her but was chased away with her two sons without food.**

- **She came to live in Kisumu, start a business and that is how she ended up filing the proceedings leading to this appeal.**

- **As at the time of initiating the proceedings one son was seventeen (17) years, and another fifteen (15) years.**

- **The seventeen (17) years old had done K. C. S. E. but had not collected his result slips because of an outstanding fee of Kshs. 6,500/= owed to the school which she wanted the court to order the Respondent to pay so that the academic testimony as is.**

- **That fee for the small boy was also still outstanding.**

- **That there was a letter from the area chief confirming that the appellant / defendant paid dowry for her.**

- **She did not have birth certificates but was in the process of acquiring duplicates as the originals had been misplaced or not**

On the basis of the evidence on the record, the learned trial magistrate gave a judgment dated 14th day of April 2010 After reviewing the evidence adduced by the plaintiff, the learned trial magistrate made the following findings on the same:-

- (a) Since the defendant's defence filed in court had not been proved by evidence the plaintiff is deemed to have proved her case against the defendant on a balance of probability.**

- (b) Custody of the minor V.O.O. is given to the plaintiff**

- (c) As the other child is over 18 years there will be no order for custody**

- (d) The defendant was ordered to pay Kshs. 10,000/= to the plaintiff as upkeep for the minor V.O.O. to be paid until the child reaches the age of maturity**

(e) The court ordered the defendant to pay fees of Kshs. 13,800/= as per the fee structure.

(f) Since the fees for E.O.O.Education at Butoro University was incurred when the child was a minor, the defendant was ordered to pay the said sum of Kshs. 7,000/= to facilitate the release of the child's academic certificates

(g) Since the plaintiff had testified that she was just a vegetable vendor with very little income the court did not order. The plaintiff to be responsible for anything specific needs some that she has to chip in from time to time depending on when the income allows considering that she was the one who had been taking care of the children since January 2008, through hardships.

The appellant herein became aggrieved by those orders and has filed the appeal subject of this judgment. Five grounds of appeal are filed. These are:-

(1) The learned trial magistrate erred in law in hearing and determining the matter when the court did not have territorial jurisdiction

(2) The learned trial magistrate erred in law in granting some relief that were not sought in the plaint

(3) The learned trial magistrate heard the case exparte without affording the appellant a reasonable opportunity and . or chance to ventilate his case

(4) The learned trial magistrate erred in law on deciding to proceed with the hearing of the case without making a ruling on issues raised, objecting to the case proceeding to hearing

(5) The learned trial magistrate decided the case with a biased mind hence occasioned a miscarriage of justice.

In consequence thereof the appellant's counsel urged the court to set aside the orders of the lower court, dismiss the claims and condemn the respondent to pay costs of this appeal.

At the trial, the learned counsel for the appellant abandoned ground 5, and then argued ground 1 and 4 together and 2nd and 3rd separately. The learned counsel reiterated the grounds of appeal and then stressed the following:-

- **Since the cause of action arose at Kisii and the defendant was also residing at Kisii, the proper venue for trial should have been the children's court in Kisii. For these reasons, the trial was a nullity as the court had no jurisdiction and for this reason the appeal should be allowed.**

- **That the general rule is that a party is bound by its pleadings. The ordering payment of Kenya Shillings 7,000/= as a fee balance for the child who was over age should not have been made**

age as this had not been prayed for.

- **The court was aware of a pending application for transfer to Kisii and for this reason it should not have allowed the respondent / plaintiff to proceed with the trial in the absence of the defendant.** In response the respondent who appears in person had this to say:-

- **The orders granted by the lower court should not be upset because of the following reasons:-**

(a) **She was residing in Kisumu with the children and that is why she found it convenient to file the proceedings in Kisumu as opposed to Kisii as she had no transport to Kisii as she has been depending on well wishers**

(b) **The learned trial magistrate was right in ordering the trial to proceed because the appellants delayed the disposal of their application for transfer of the matter to Kisii and further that it was becoming difficult to serve the appellants.**

(c) **It is her stand that her sons have not yet collected their academic certificates from the schools attended because she is unable to pay the said fee balances**

(d) **She still reiterates that she has no funds of her own and she and her sons are suffering and for this reason the court should dismiss the appeal and allow executor process to proceed.**

This court is seized of this matter in its appellate capacity and this being the case, its mandate is as donated by Section 78 of the Civil Procedure Act with a major one being to revisit the evidence before the lower court and then determine whether the conclusion reached by the lower court are to stand or not.

This court has done so and it proceeds to make the following findings on the same:-

(i) **This court has judicial notice of the fact that Section 18 of the Civil Procedure Act donates supervisory power to the high court to exercise supervisory power over sub-ordinate courts with power to transfer civil cases from one subordinate court to another, from itself to a subordinate court ,and from a subordinate court to itself.**

This court also has judicial notice of the fact that one of the considerations for such transfer is the location of the business and residence of the defendant with the requirement being that such suits, should be instituted in courts within the local limits of where the defendant resides or carries on business. Infact this is the major complaint, the appellant has put forward on the issue of lack of jurisdiction. It is not disputed that indeed the defendant resides in Kisii and owns residential rental premises in Kisii as well as a home (land) in the same area. Under civil law this was an ideal situation for rerouting the case to Kisii. However it has to be noted that in as much as the issue under consideration fell into the domain of civil litigation, the special nature of this civil litigation cannot be ignored. The special nature arises because the proceedings relate to children.

This being the case, the court has to be guided by cardinal principles applicable to this litigation, one of them being that indeed cases where children are involved the court has to treat the best interests and welfare of the child as being of paramount consideration. This being the case, issue will arise as to whether it will be in the best interest of the children subject of the proceedings to fault jurisdiction solely on the ground of the alleged convenience of their father.

In this court's opinion, this will not be because other than saying that the law should have been followed, issue of inconvenience or hardship on his part, attending hearings in Kisumu as contrasted with the hardship of the struggling mother attending trial in Kisii has not been demonstrated to exist. When considered against the fact that the child resides also in Kisumu and could easily be assessed if required by the court, the best interest and welfare of the children outweighed the convenience or the inconvenience of the father having to travel to Kisumu for the trial. Further Sections 73 and 76 of the Children's Act governing the jurisdiction of the children's courts, does not prioritize interests and convenience of the defendant father over the welfare and best interests of the children.

(2) There was a complaint on the denial of the right to be heard. A revisit to the court record reveals that there were no stay of proceedings orders pending hearing of an application for transfer to Kisii. This being the case, and after establishing that the defendants had due notice of the hearing date the court was entitled to proceed *ex parte* as it did and properly so.

The *ex parte* proceedings were not in themselves a total denial of the right of being heard. There is a cure to there. The cure being an application for setting aside of the *ex parte* proceedings this court has perused the entire proceedings on the record and found that there was no attempt on the part of the appellant to have the *ex parte* proceedings set aside for him to be heard. Even when seeking stay of execution pending appeal, there was no plea for reopening of the matter for them to be heard on their merits.

There have also been no mention about the outcome of the pending application for transfer to Kisii whether it was ever prosecuted or not.

(3) Issue was also raised about granting a relief on account of a child who was not subject of the proceedings. This court is satisfied that although there was a plea to the court to granting other relief that the court may deem fit and just the learned trial magistrate could only grant auxiliary reliefs which could have been prayed for along side the main relief sought. This relief had to be confined to the subject of the proceedings namely a child under 18 years. Indeed the beneficiary of the school fees order was over 18 years and for this reason no orders could be made in this file for his benefit. If the mother needed support for him then, either she on his behalf, and or jointly with him could take out civil litigation to enforce that claims on account of a move to extend the father's parental responsibility over the child beyond 18 years.

Lastly, to be considered is the effect of the final orders is that which is that the appellant has asked for a dismissal of the suit in the lower court. This cannot arise considering that the evidence that was before the lower court was only that of the complainant. This being the case, the merits of that evidence can only be overturned by the merits of the defence evidence which the learned trial magistrate found wanting as all that the court had before it was an unproven defence. This being the case, it means that there is nothing on the basis of which the court can consider the merits of the plaintiffs case and dismiss the same save for merit of jurisdiction which the court has disallowed what the applicant should have done should have been to ask for the matter to be reopened for them to be heard on their defence. As argued by them that a party is bound by its pleadings, they two are bound by the prayers in their appeal. They cannot be granted what they did not ask for. This means that if the plea for dismissal is refused that will be the end of their litigation.

It also has to be noted that the subject child has crossed the maturity line and in the absence of an application to extend the parental responsibility beyond the 18th birth day, there is no way these proceedings can continue in their present form. The decision of the appeal is coming after the crossing of the line and for this reason the court's hands are tied.

For the reason given in the assessment, the court proceeds to make the following orders:-

(1) The appellants appeal is allowed in part in that the order of payment of fees of Kshs. 7,000.00 in favour of E.O.O. which was not pleaded but which rose from the plaintiffs testimony stands faulted and the same is set aside as per the reasoning given in the assessment.

(2) Plea of lack of jurisdiction on the part of the children court Kisumu being seized of the matter whose defendant resides in Kisii stands ousted having been overridden by the provisions of Section 4 and 76 of the Children's Act , which require that the best interests and welfare of the child be of paramount consideration. The best interest and welfare of the subject child demanded that the Kisumu Children's Court do proceed and determine the issue on their merits, it did for the benefit of the child in the manner it did. The inconvenience and or hardship suffered by the appellant are of no consequence

(3) The appropriate relief to have been sought by the appellant should have been a plea for setting aside of the expense proceedings and not a dismissal order. This is so because there is no merit evidence on their part to be compared with the merit evidence of the plaintiff in order to result into a dismissal of the plaintiffs claims.

(4) For the reasons given in number 1 -3 above only item (d) of the decree is disallowed

(i) Item (a) is confirmed

(ii) Item (b) is confirmed but limited to the period running from the date of judgment on 14th April 2010 upto the 18th Birth day.

(iv) Item (c) is confirmed.

(v) Item (e) is confirmed.

(5) Each party will bear own costs of the appeal and the lower court proceedings.

(6) With the exception of what has been specified in number 4 above, the balance of the appellants appeal stands dismissed.

Dated, signed and delivered at Kisumu this 8th day of July 2011.

R. N. NAMBUYE

JUDGE

RNN/ao