



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CAUSE NO. 30 OF 2003

IN THE MATTER OF THE CHILDRENS ACT NO.8 OF 2001

AND

IN THE MATTER OF

D N W.....APPLICANT

AND

DR. P M W.....RESPONDENT

RULING

D N W was born on 1st February 1982 to Dr. P M W and R M W. She has filed this Originating Summons under Section 91,23 of the Childrens Act 2001 and what I would call the Omnibus clause known as all the enabling and guiding provisions of the law. What was argued before me was first of all, the applicant be granted leave which will enable her to file an application for an order of maintenance against her father who is the respondent in this matter. The applicant is 22 years of age, she is seeking for an order compelling her father to pay part of, the whole university fees, or any sum that the court may consider fair and just.

The applicant is engaged as a student at the University of Nairobi undertaking a medical degree under the parallel programme since 2001. The applicant's parents separated in 1995, and custody of the children of the marriage including the applicant was given to the mother. The respondent was ordered to pay school fees for the children. He paid school fees for the applicant upto Form IV level at Precious Blood Secondary School. The applicant qualified to go to the university but she had already attained the age of majority and so the maintenance order lapsed. The applicant wanted to pursue a degree in medicine and opted to apply under the parallel programme. The respondent is a lecturer at the University of Nairobi, he is entitled to a staff education support (SESF) fund for his children which would cover up to 50% of the university fees. According to the SESF forms attached to the application a member of staff of University of Nairobi is entitled to this facility for upto two children. Children must not be more than 30 years at the time of registration for the degree course and there should be evidence that the child/children are entirely dependent on the parent.

An enrolled SESF beneficiary child of a staff member, who cease to be permanent and confirmed employee of University of Nairobi through death or normal retirement continues to benefit until he/she completes the programme enrolled on.

According to the applicant she approached her father to sign for her the form that would entitle her to this benefit but the respondent refused. She sought the intervention of the Vice Chancellor to prevail upon the respondent but this did not yield any results. Hence the applicant sought the intervention of the court under the provisions of the Children Act 2001. The matter was first filed before the Children's Court but the court advised (according to both counsel) that for reasons to do with monetary jurisdiction the matter would better be filed in the High court. That is when the matter at the Children's Court was withdrawn and the present application was filed. The applicants counsel argued that the High Court has jurisdiction to determine this matter which touches on the payment of education as provided for under Section 7(1) of the Children Act. This right to education can be extended to a child of over 18 years as the court has power under the provisions of Section 28 of the Act the court can extend the parental responsibility in respect of a child beyond the date of the child's 18th birthday if the court is satisfied upon application or on its own motion, That special circumstances exist with regard to the welfare of the child. Those special circumstances would necessitate an extension of time and such application may be made by the child, parent or relative, any person who has parental responsibility for the child.

Counsel for the applicant urged the court to take judicial Notice of the Kenyan System of Education where a child starts school at the age of 6 years and until they attain a vocational training, the child remains reliant upon its parents for school fess, university or college fees beyond the age of 18 years. The applicant were referred to the provisions of Section 60 of the constitution that gives this court unlimited original jurisdiction in Civil and Criminal matters and although the jurisdiction of this court is limited to matters covered under part II and XII of the Children Act, the nature of this application that involves the education of a child beyond 18 years involves parental responsibility that is dealt with under part III of the Act as well. This application was strenuously opposed by the respondent. First of all the respondent argued that this court has no jurisdiction to deal with the application for leave. The applicant is not qualified as the applicant's rights under Sections 14 to 19 of the Childrens Act have not been contravened.

The definition of a child "means any human being under the age of eighteen years" in this regard therefore counsel argued that the responsibility of extending parental responsibility lies with the children's courts as duly ordained under Section 73 of the Act.

According to the respondent, there are no special circumstances that would apply to the applicant who has attained the age of 22 years. The respondent duly discharged his parental responsibility and the only time special circumstances would have arisen is for instance if the applicant attained the age of majority before completing secondary school or if the applicant was suffering from any form of disability. The applicant is a normal child who was admitted at the same university to pursue a BA degree course in this regard the applicant is a normal child who can apply for a bursary or a loan under the Higher Education Board like other children who have no support from their fathers. The respondent also took issue with the applicant for applying for the SESF directly. The applicant made the application without consulting the respondent and now expects the father to be compelled to make a sacrifice. The respondent felt strong by that he is under no legal obligation to make a sacrifice to fulfill moral and social responsibility. In this respect counsel referred to an English authority Norman vs Norman Allec LR 1950 page 1083 whereby the order of maintenance for a child who had attained 16 years could not be continued because it had already ceased to exist. Counsel for the respondent also referred to the Halsbury's Laws of England Vol.17 paragraph 516 which deals with the duty of parents to provide every child with education. According to this text the education should be at the level of compulsory school age hence university education is not a basic right that a parent should be compelled to provide.

The above is the summary of the facts and arguments presented in this matter. I have given the submissions due consideration and also the provisions of the law. The first issue for me to address is whether this court has jurisdiction to deal with this matter. As pointed out earlier, the applicant filed this matter before the Children's Court. The Act is quite clear what matters fall under the Children's Court as provided for under Section 73. All matters under parts III, V, VII, VIII, IX, X XI and XII should be heard by the Children's Courts. There is no set ceiling based on monetary jurisdiction of the magistrate.

The Constitution of Kenya Section also gives this court unlimited original jurisdiction in Civil and

Criminal matters. Counsel for the applicant also submitted that there is a breach of the provisions of Section 7 of the Childrens Act which breach can be handled by the High Court. The desperation by the applicant to pursue Higher Education has brought her to the High Court and to the Childrens Court. The responsibility of the court is to decide all cases according to substantial justice without undue regard to technicalities of procedure and without undue delay. In this regard I am satisfied that the court has jurisdiction to deal with the application as Transferring the matter to the Children's Court would occasion delay, and inconvenience to the applicant. Secondly there is the issue that was raised regarding Section 7 of the Act whose jurisdiction is vested in the High Court. The next issue to tackle is whether there are special circumstances that would entitle the extension of parental responsibility. The applicant is pursuing a degree course in medicine. She has no ability to pay school fees for herself. The respondent is a professor at the same university and he is entitled to Staff Education Support Fund (SESF) to the tune of 50% of the fees. The applicant is only requesting the respondent to be compelled to sign the SESF forms for 50%. Her mother has been struggling to raise the other 50%. The respondent is not at all required to pay any money from his pockets.

I have carefully considered the reasons given by the respondent for his refusal to sign the form. These reasons are quite clearly articulated in a letter written by the respondent and addressed to the Deputy Vice Chancellor dated 30th September 2003. The respondent blames the mother of the respondent and makes accusations against her for taking him to court whereby he was ordered to pay school fee for the children. He complains of not having been consulted when this applicant made a choice of pursuing a degree in medicine. He says it is very painful for him and I can understand why he declined to sign the forms. According to him the request and pursuit by the applicant is instigated by her mother. The respondent has no relationship with his daughter he has not drawn a distinction between his differences with his wife/mother of the applicant. The applicant has also not nurtured a cordial relationship with her father, but who among the applicant and respondent should nurture and promote an atmosphere of happiness, understanding and companionships. I think both should attempt to build this relationship as they are the biggest prime movers in this respect. Due to this stalemate, the applicant has sought the intervention of this court. It was submitted quite eloquently by counsel for the respondent that this court cannot implement a moral obligation. Legal obligation by the respondent ceased when the applicant turned 18 years and in any case parental responsibility cannot be extended to include Higher Education. This has led me to unravel the mystery of what is basic education. According to the Children Act 2001, "Education" means the giving of intellectual, moral, spiritual instruction or other training to a child". A child means "any human being under the age of 18 years". Parliament in its own wisdom provided for a situation whereby parental responsibility can be extended.

The preamble of the Childrens Act 2001 has acknowledged the application of the principles of the United Nations Convention on the Rights of Child and the African Charter on the Rights and Welfare of the Child. The Act has also largely incorporated these principles but I was particularly drawn to the articles dealing with education especially Article 28 (c) of the United Nations convention on the rights of the child; whereby state parties are enjoined to (c) "make higher education accessible to all on the basis of capacity by every appropriate means. (e) Take measures to encourage regular attendance at schools and reduction of drop out rates "

In view of the above, and in my humble opinion, basic education is more than just learning how to read, write and calculate. It encompasses the broadest possible sense of learning at any stage of life and it is not confined to childhood and formative years. The definition of education varies depending on the Social Class, personal Circumstances, National Standards and other reasons. Hence to some people basic education would include higher education or tertiary which is seen as a foundation for working life and further education. Yet to some other people, education is the first stage of formal schooling and yet to others it extends to full secondary school. The applicant is a daughter of a medical doctor, a professor at the university.

The mother's profession is not disclosed but it is said she is an international Civil Servant working with a United Nations Organization. To my mind these parents belong to an educated elite. They have set very high standards for their children and education in this respect can be construed to include higher education in their circumstances. I would therefore not fault the applicant for striving to attain what she

considered to be the best for her, that is medical degree under the parallel programme.

The parents having set high standards for their children have a responsibility to promote their social progress and better standards of life for their children especially children who are willing and who are self driven. The University of Nairobi, a public body has set up a scheme for the education of the children of their staff members. I find the refusal by the respondent to extend this facility to the applicant unreasonable especially when the applicant is not asking the respondent to go beyond what is offered by the scheme.

The sum total of the above analysis leads me to a conclusion that the circumstances of the applicant, looked together with the circumstance of the respondent, I am satisfied that the applicant should be granted leave to file an application for an order of maintenance against the respondent. I would however wish to add that the said maintenance should not go beyond what is provided under the SESF and as long as the respondent remains an employee of Nairobi University.

Since this is a family matter there will be no orders to costs. Ruling read and signed on 21st May, 2004.

MARTHA KOOME

JUDGE